

A quarterly publication of Wiles, Boyle, Burkholder & Bringardner, Attorneys at Law.



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Homeowners Must Notify Builders of Defects Before Taking Legal Action

For years builders expressed their concerns about not being able to “cure” defects prior to a homeowner filing a lawsuit against the builder. Were you aware that Ohio law establishes an affirmative obligation on behalf of the homeowner to notify the builder of any defects before the homeowner can initiate a proceeding (arbitration or lawsuit) against the builder? Ohio Revised Code Section 1312, et seq. establishes a so-called “right to cure” on behalf of builders (and for that matter remodelers). It follows a series of similar laws passed in over 23 states during the last five years.

The law itself sets forth certain timeframes relative to the owner’s obligation to notify the builder of alleged defects and the builder’s obligation to respond. When the builder enters into a contract it must provide the homeowner with a notice of the builder’s right to offer to resolve any alleged construction defects before the homeowner may commence a legal action against the builder (for a more detailed description of the notice, please contact our office). Provided the builder has delivered the notice to the homeowner, the homeowner may not commence a legal action against the builder without first providing a “notice of relevant construction defects” to the builder. The law bars homeowner from filing a lawsuit, “unless, at least sixty days before commencing the proceedings or filing the action, the owner provides the contractor with written notice of the construction defect that would be the basis of the arbitration proceedings or the dwelling action.”

The builder has twenty-one (21) days to respond to the notice served by the homeowner. The builder’s response must fall into one of the following categories: (i) a request to inspect the

home; (ii) a proposed compromise or settlement of the claim without an inspection; or (iii) a dispute or disagreement as to the validity of the claim.

If the builder fails to respond within twenty-one (21) days or disputes the claim, the homeowner is deemed to have complied with the law and may commence a legal action or arbitration proceeding. If the builder requests to inspect the home or proposes a compromise, the homeowner has fourteen (14) days to respond. If the homeowner accepts the compromise, the matter is resolved. If the homeowner accepts the builder’s request to inspect the property, the builder is required to inspect the home within fourteen (14) days. After the inspection, the builder must respond by stating what issues the builder will agree and/or refuse to repair.

Where the law breaks down, is in providing the homeowner the option to simply reject the request of the builder to inspect the property. As long as the homeowner provides a “reason” for rejecting the inspection request the homeowner is deemed to have complied with his/her obligations under the law and

may thereafter proceed with its action at law or through arbitration.

Still the inclusion of the notice language within the contract (or the delivery of the same at contract execution) at least facilitates communication and dialogue between the parties that can lead to a successful resolution.

If you have any further questions regarding a builder or homeowner’s rights and obligations under the law or general construction law matters, please contact Bruce Burkholder or Kerry Boyle.



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Featured Attorneys



Samuel M. Pipino

Sam is an insurance coverage and defense litigation specialist with considerable experience in personal injury, commercial contracts and construction disputes.

He is an Oberlin College graduate and earned his law degree from The Ohio State University. In addition to membership in the Columbus, Ohio State and American Bar Associations, he is also a member of the Ohio Association of Civil Trial Attorneys, International Association of Defense Counsel, and the Defense Research Institute.

Sam is a frequent lecturer on a variety of civil litigation topics for insurers, builders, and risk managers.



Christopher G. Phillips

Cris specializes in creditor's rights, bankruptcy, title insurance and real estate law.

He is a graduate of the University of Toledo and earned his law degree from Thomas Jefferson School of Law in 2001. He is a member of the Columbus and Ohio State Bar Associations, as well as the Mortgage Banker's Association.

Cris is also a licensed title agent.

The Price of Doing Business

Allocation of Marketing Risks Through Standard Liability Insurance

As any astute insurance broker can tell you, the risks associated with a company's employment practices, the discretion wielded by its directors & officers, and even administration of its fringe benefit plans can be ascertained and absorbed through a multitude of commercial liability insurance products. Frequently, this additional coverage is available through policy endorsements tailored specifically to insure against claims arising from these discrete operations. At the other end of the spectrum, of course, are those ubiquitous "costs of doing business" (think of bad debt incurred from a product supplier) that are typically charged against bottom line profits, and which cannot be allocated or recovered. In between these extremes is standard Commercial General Liability (CGL) Insurance that businesses large and small carry to protect against exposure to catastrophic bodily injury or property damage claims suffered by the general public. However, as demonstrated by an emerging trend in insurance coverage cases, the risks and costs of marketing to customers may also be subject to coverage under traditional CGL Policies.

In addition to Bodily Injury and Property Damage, most CGL Policies also insure

against "Personal and Advertising Injury." Courts in Ohio as well as other state and federal jurisdictions have held that this coverage may extend to product branding. One recent Ohio Appellate Court found that Federal Lanham Act Claims for Trade Dress Infringement arising from the unlicensed use of another company's marketing research, was covered Advertising Injury. Other Federal Courts have split on the issue of whether "Fax Spamming" Claims brought under the Telephone Consumer Protection Act, should also be insurable under these standard policies. U.S. District Courts in Georgia, North Carolina, Virginia and the 8th Circuit Court of Appeals have found fax spamming claims to be covered, while Courts in the U.S. Fourth and Seventh Circuits have decided against coverage for these unsolicited advertisements. Beyond advertising, courts have also held that a company's inappropriate use of customer information may also constitute an insurable risk. For example, courts in the U.S. Fifth Circuit Court of Appeals have held that customer claims resulting from various business activities by insured companies should be covered. In one case, the Court held that wrongful disclosure of

an employee or customer's social security number or other personal identification materials constituted an invasion of privacy within the scope of the CGL carrier's Coverage B "Personal Injury" claim limits. A similar decision from the Court held that repeated phone calls from a debt collection company, in addition to being a violation of the Federal Fair Debt Collection & Practices Act, constituted a privacy invasion protected by the collection company's liability coverage.

As the competitive energies of a global economy continue to expand, there has been a commensurate increase in the number and costs of claims for companies doing business in the Internet age. And when consumers and competitors cry foul from such practices, the influx of privacy invasion, fax spamming and other marketing offenses will continue to confront and challenge both the business and risk management communities. Fortunately, consultation with our Coverage Practice Group is available to help you resolve confusing questions about whether such costs of doing business are covered. If you have questions about your coverage, please give our office a call.

Effective Date of Referendums Certified by Secretary of State

The Ohio Supreme Court recently released its opinion in *Thornton v. Salak*, 112 Ohio St.3d 254 (2006). WBBB attorney, Michael Close, argued the case for the prevailing party, Canal Winchester. The Supreme Court reached a decision regarding an unsettled constitutional issue involving referendums that contain an insufficient

number of signatures needed to have the matter submitted to voters. The Court agreed with Mr. Close that the trial court should have applied an injunction standard, rather than an appeals standard, for a 227-acre annexation petition that was filed in 2002. The Court held that referendums shall take effect on the date that the Secretary of State

certifies that the petition contains a sufficient or insufficient number of valid signatures. The Court held that to rule otherwise would create uncertainty about whether Ohioan's should follow new or old laws when referendum petitions are in dispute.

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