Overview of “Right to Repair Act”
OVERVIEW

Georgia’s “Right to Repair Act” ("Act")\(^1\) is intended to promote the resolution of residential construction disputes through a form of alternative dispute resolution ("ADR"), thereby avoiding legal proceedings. This Chapter summarizes the Act and discusses questions raised by it. Unless otherwise noted, the comments will be about the Act as currently amended, rather than the original version of the Act, which continues to apply to causes of action arising prior to April 28, 2006. For claims arising prior to that date, a thorough review of the original Act is important.

In short, the Act applies to construction defect claims by “claimants” against “contractors” relating to “construction defects” in “dwellings” and “common areas.” This Chapter discusses each of these defined terms.

§ 22.1 DEFINITIONS

§ 22.1.1 The Act Applies To Construction Defect Claims Against “Contractors”

The Act applies to construction defect claims against “contractors.”\(^2\) That term means:

(a) Any individual or business entity that is in the business of designing, developing, constructing, altering, repairing, adding to or selling dwellings or common areas and is required by Georgia’s recently enacted residential or general contractor licensing law ("Contractor Licensing Law") to have a license;\(^3\)

(b) Owners, officers, directors, shareholders, partners or employees of a contractor;

(c) Subcontractors and suppliers of labor and materials used by a contractor in a dwelling or common area; and

(d) Risk retention groups registered under applicable law, if any, that insures all or any part of a contractor's liability for the cost to repair a construction defect.\(^4\)

The original Act included essentially the same definition of contractor, except it was not limited to those required to be licensed as a residential or general contractor. Thus, it arguably applied not only to builders, contractors and construction managers, but also, for example, to real estate agents, architects and developers in general.

§ 22.1.2 The Act Applies To Construction Defect Claims By “Claimants”

Under the Act, the term “claimant” means anyone “who asserts a claim concerning a construction defect.”\(^5\) That term covers homeowners and home buyers,\(^6\) as well as condominium

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2. O.C.G.A. § 8-2-36(5).
3. O.C.G.A. § 8-2-36(5).
4. Id.
5. O.C.G.A. § 8-2-36(d).
6. It appears to cover second and subsequent owners of a dwelling who assert a construction defect claim against

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and neighborhood associations.\(^7\)

\section*{§ 22.1.3 The Act Applies To Construction Defect Claims In “Dwellings” And “Common Areas”}

The Act covers only “dwellings,”\(^8\) not commercial or industrial buildings. The term “dwelling” is very broadly defined, and includes single-family houses, duplexes, condominium units, townhouses, and all their systems and components. Significantly, it also covers “common areas,” which are the areas, improvements and facilities owned or maintained by an incorporated condominium or neighborhood association.\(^9\)

\section*{§ 22.1.4 The Act Applies To “Construction Defect” Claims}

The Act applies only to “construction defect” claims.\(^10\) That term has a principal and a default definition.

\subsection*{§ 22.1.4.1 Principal definition}

The principal definition of “construction defect” is its definition in any “express written warranty”\(^11\) that is either provided by the contractor (example: builder limited warranty) or required by a statute (example: Contractor Licensing Law’s minimum warranty requirements). Significantly, the definition used in the express written warranty can be the default definition discussed below.

A number of questions arise about the “express written warranty” alternative definition.

(a) Must the exact term “construction defect” be used in the warranty in order for that definition to apply under the Act? Probably not as long as a comparable term is employed or perhaps even if, although no term is used, the warranty adequately sets forth the items or categories of items for which the contractor is responsible under the warranty.

(b) Does the term “express written warranty” cover only separate warranty documents (example: a separate builder limited warranty) or does it also cover sale and/or construction contracts that contain a definition of or terms suggesting the meaning of “construction defect”?\(^12\) The answer is not clear and probably depends on particular circumstances.

(c) In order to trigger the ADR procedures of the Act, can a contractor use a definition of “construction defect” that is broader than the defects covered by the express written warranty?

\(^7\) O.C.G.A. § 8-2-36(2) and O.C.G.A. § 8-2-42(e).
\(^8\) O.C.G.A. § 8-2-36(6).
\(^9\) O.C.G.A. § 8-2-36(6). An example is a community pool.
\(^10\) O.C.G.A. § 8-2-36(4).
\(^11\) Thus, common law definitions from implied warranties, if any, are not triggered.
\(^12\) Georgia case law clearly recognizes that warranties can be in purchase agreements and construction agreements.
The answer is probably, yes, although courts may balk at applying the Act to claims significantly outside the common meaning of the term “construction defect.”

(d) If an express written warranty does contain language that is deemed sufficient to create a definition of a “construction defect,” does the Act only apply to warranty claims as opposed to claims for negligence, fraud, breach of contract, etc.? The answer will likely depend on the exact wording of the express written warranty.

(e) If the definition of “construction defect” in a builder’s limited warranty fails to comply with the performance standards in the Contractor Licensing Law’s minimum warranty requirements, will the definition be modified by a court or arbitrator so that it does comply? Probably.

(f) Which “statutory” warranties exist other than the Contractor Licensing Law’s minimum warranty requirements? HUD, VA and FHA may require minimum warranty terms.

§ 22.1.4.2 Default definition

The default definition of “construction defect” applies in two circumstances. One is when neither the contractor’s express written warranty nor a statute provides that definition. The second is when the default definition is used in an express written warranty. The default definition is:

…. a matter concerning the design, construction, or repair of a dwelling, or an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling on which a person has a complaint against a contractor.13

This default definition is very broad and includes all conceivable construction-related claims against a contractor relating to a dwelling, including claims for breach of warranty, breach of contract, negligence and fraud.

Since this default definition is likely to be broader than the term “construction defect” in an express written warranty and since, in almost all cases, contractors will prefer the Act to apply, it is generally advisable for contractors to trigger the default definition at the contract and warranty stage. A specific statement in any express written warranty and in the sale or construction contract that, for ADR purposes, the term “construction defect” shall have the default meaning should accomplish that goal. It should be clarified, however, that the use of that definition is not intended to expand the contractor’s warranty or contractual construction obligations beyond those set forth in those documents. A home buyer who wants to limit the application of the Act should consider using a more narrow definition of “construction defect” for purposes of the Act.

§ 22.1.4.3 What is included in “construction defect”

The Act states that the definition of construction defect may also include any physical damage to the dwelling or real property on which it is located that is caused by a construction

13 O.C.G.A. § 8-2-36(4).
defect.\textsuperscript{14} It is unclear whether the term “may” applies to the default definition as well as the first definition of “construction defect” in the Act. As a practical matter, this confusion can be addressed by incorporating this permissive expansion of the term into the contractor’s warranty and/or contract.

\textit{§ 22.1.4.4 The Act applies to all construction defects}

Significantly, the Act generally applies to any alleged construction defect, even if it is only one of several claims by a claimant against a contractor.\textsuperscript{15} It may also apply to claims where an alleged construction defect is only tangentially or collaterally involved. For example, a claim for rescission of a contract based on the existence of a construction defect would appear to be covered by the Act.\textsuperscript{16} A claim for the return of earnest money or an adjustment in the contract price due to an alleged construction defect or a delay in construction might also be covered by the Act.\textsuperscript{17}

\textit{§ 22.1.4.5 The importance of timing of dispute relative to closing}

While some of the Act’s provisions assume that a dwelling is already owned by the claimant, most of them, including the definition of “construction defect,”\textsuperscript{18} appear to also apply to construction defect disputes arising before a closing.\textsuperscript{19} Application of the Act’s ADR procedures to pre-closing disputes will often cause significant closing delays or even contract termination. For example, while a claimant can send a contract termination notice without first complying with the Act, if the contractor refuses to accept the termination, compliance with the Act may be necessary before a claimant can pursue an action based on that termination, such as action for the return of earnest money.

\textbf{§ 22.2 ADR Procedures}

The heart of the Act is its ADR procedures.\textsuperscript{20}

\textbf{§ 22.2.1 A Notice Of Claim Must Be Sent By Claimant To Contractor}

The Act’s ADR procedures are initiated by a “notice of claim” (“NOC”).\textsuperscript{21} At least 90 days in advance of a lawsuit or arbitration asserting a construction defect claim against a contractor, the claimant must “serve” a written NOC on the contractor.\textsuperscript{22} The term “serve” means sending

\begin{itemize}
\item \textsuperscript{14} O.C.G.A. § 8-2-36(4).
\item \textsuperscript{15} O.C.G.A. § 8-2-36(1).
\item \textsuperscript{16} O.C.G.A. § 8-2-36(1).
\item \textsuperscript{17} O.C.G.A. § 8-2-36(1) and O.C.G.A. § 8-2-36(4).
\item \textsuperscript{18} O.C.G.A. § 8-2-36(4).
\item \textsuperscript{19} It is even possible that the Act could be applied to a home that was never actually purchased by a claimant or to one that the claimant sold before or after the ADR or action was commenced.
\item \textsuperscript{20} The ADR procedures include a number of deadlines. Standing alone, the statutory language required by O.C.G.A. § 8-2-41, which includes that “there are strict deadlines and procedures” under the Act, suggests that these deadlines should be strictly enforced.
\item \textsuperscript{21} O.C.G.A. § 8-2-38(a).
\item \textsuperscript{22} O.C.G.A. § 8-2-38(a). Although the Act refers to 90 days, it is not clear that a claimant must actually wait 90 days if the ADR process has clearly run its course prior to that time.
\end{itemize}
by certified mail, return receipt requested, or by statutory overnight mail, such as UPS or Fed-X, to the last known address of the addressee.23 The use of the term "delivery" in the definition of "serve" may, in most cases, mean that a time established by the Act is not triggered until actual receipt as opposed to the time of mailing.24 For a registered business entity, service should be on its registered agent or other person authorized by law to receive lawsuits.25 Since the term "serve" is used many times in the ADR procedures, its meaning should be kept in mind.

The NOC must contain the following specific information:26

(a) It must state that the claimant is asserting a construction defect claim and is providing an NOC under the Act.27 This statement is intended to distinguish the NOC from other correspondence from a claimant, such as traditional warranty correspondence. Because the Act imposes obligations on the contractor upon receipt of an NOC, it is critical that the contractor be able to recognize when it has received an NOC. The Act itself does not prevent a claimant from sending a warranty notice along with an NOC or from separately sending a warranty notice.

(b) The NOC must describe the claims "in detail sufficient to explain the nature of the alleged construction defects and the results of the defects."28 An explanation of the "results of the defect" not only alerts the contractor to those results, it provides information significant to the general liability insurer of the contractor in deciding whether coverage exists. A general liability policy may cover the results of a defect, but not the defect itself.

(c) Importantly, the NOC must also include "any evidence" that depicts the nature and cause of the construction defects, including expert reports, photographs, and videotapes, if that evidence would be "discoverable under evidentiary rules."29 Thus, evidence that might previously have been withheld by a claimant for strategic reasons must now be provided.30 Presumably, this provision only covers evidence in existence at the time of the NOC. Thus, for strategic reasons, a claimant may wish to delay creating some of this evidence (photos, videos, etc.) until after the completion of the ADR process.

The Act does not specifically require the NOC to include a demand for relief or settlement

23 O.C.G.A. § 8-2-36(7).
24 O.C.G.A. § 8-2-36(7).
26 O.C.G.A. § 8-2-38(a).
27 O.C.G.A. § 8-2-38(a).
28 O.C.G.A. § 8-2-38(a).
29 O.C.G.A. § 8-2-38(a). The term "discoverable under evidentiary rules" is a bit confusing since "evidentiary rules" or privileges do not establish the primary rules relating to discovery. Those primary rules are established by discovery procedures, such as those contained in the Georgia and Federal Civil Procedure Acts. It seems rather clear that the phrase "discoverable under evidentiary rules" is intended to protect attorney-client, work product, and other privileged communications. The use of that phrase, however, is almost certainly not intended to allow unlimited discovery of documents other than covered by those privileges. A more reasonable interpretation of "discoverable under evidentiary rules" may be that documents must be produced if discoverable under rules of the forum where an action may eventually be filed. That interpretation may be problematic in an arbitration context, however, since discovery is often limited or non-existent in arbitration.
30 It is noteworthy that, with minor possible exceptions (see O.C.G.A. § 8-2-38(1)), the Act does not impose any obligation on the contractor to provide comparable information relating to the construction defect.
proposal. Instead, as discussed below, that responsibility is the contractor's.31

If the claimant wishes to pursue a legal proceeding against more than one contractor, an NOC must be sent to each contractor.32 That can be accomplished with one NOC or separate NOCs.

Contractors should bear in mind that actual construction defects are still best addressed promptly and without need for the Act’s ADR process. The Act does not prevent a contractor from simply addressing a problem even if the claimant has not yet complied with the ADR procedures.

§ 22.2.2 A Response To An NOC Must Be Sent By Contractor To Claimant

Within 30 days after service of the NOC, the contractor must serve a written response to it on the claimant and any other contractor that has received the NOC.33 The contractor should consider coordinating its response with others to whom the NOC was sent and also with others, like subcontractors or suppliers, who, while not receiving the NOC, may be called upon by the contractor to assist in resolving a claim. Before responding, the contractor should also notify its general liability carrier of any potentially covered claim and insist that the carrier be involved in the response. Otherwise, the carrier may contend that it did not receive timely notice and therefore coverage has been waived.

The Act allows several types of responses by a contractor. It also recognizes that a contractor may not respond at all. Each of these scenarios is explored below.

§ 22.2.2.1 Settlement Offer Without Inspection

One permissible contractor response is to offer to settle by monetary payment, repairs or a combination of them.34 The offer should state a timetable for performance35 and any other terms that are important to the contractor. If it is accepted, it is presumably enforceable.36 If the claimant accepts the offer and it is performed, the ADR process has been completed.

If the claimant rejects the offer, he must provide37 a written rejection notice on the contractor and its attorney, if any.38 The claimant’s rejection notice must include all known reasons for the rejection.39 If the claimant believes the offer omits reference to a portion of the claim, the notice must note that portion.40 If the claimant believes the offer is unreasonable “in any manner,” the notice must “set forth in detail all known reasons” for that belief.41 Although not expressly provided for in the Act, the claimant’s notice may also contain a counteroffer.

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31 O.C.G.A. § 8-2-38(b).
32 O.C.G.A. § 8-2-38(a); see also O.C.G.A. § 8-2-38(b) for the obligation of response by each contractor.
33 O.C.G.A. § 8-2-38(b).
34 O.C.G.A. § 8-2-38(b)(1).
35 O.C.G.A. § 8-2-38(n).
36 Although not directly applicable to an offer without an inspection, see O.C.G.A. § 8-2-38(g).
37 The term "provide" rather than "serve" is used. O.C.G.A. § 8-2-38(d).
38 O.C.G.A. § 8-2-38(d) and (i).
39 O.C.G.A. § 8-2-38(d) and (i).
40 O.C.G.A. § 8-2-38(d).
41 O.C.G.A. § 8-2-38(d).

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If the claimant rejects the offer, he can file a suit or demand for arbitration, unless, as discussed below, a supplemental offer is made by the contractor within 15 days after rejection.\(^{42}\)

The ability of the claimant to ultimately pursue a legal action is a significant limitation on the Act. The Act does not guarantee or force a settlement; it simply provides ADR procedures intended to promote settlement prior to suit or arbitration and creates potential negative consequences for failing to accept a “reasonable offer.” The consequences of the claimant rejecting a “reasonable offer” are discussed below.

Within 15 days after receiving a rejection notice, the contractor may, but is not required to, make a supplemental settlement offer, which may include a monetary offer, a repair offer or a combination of them.\(^{43}\) Although the Act does not specifically require the supplemental offer to be in writing, it should be in writing.\(^{44}\) The Act does not expressly state that the claimant must delay filing a legal action during this 15-day period, however, a court or arbitrator will, upon request, probably stay the action if one is pursued during that period and a supplemental offer has, in fact, been made.\(^{45}\) Significantly, the supplemental offer as contemplated by the Act does not allow a request for an inspection to determine the details regarding the alleged construction defect.\(^{46}\) Thus, if the contractor wants to insist upon an inspection, it must request one in its original response to the NOC. This does not mean that the contractor cannot ask permission to inspect, just that it is not entitled to such an inspection in the context of a supplemental offer.\(^{47}\)

If a supplemental offer is rejected by the claimant, the claimant must serve a supplemental rejection notice on the contractor, which must set forth “all known reasons” for rejection.\(^{48}\) Upon rejection of a supplemental offer, the claimant can file a suit or demand for arbitration.\(^{49}\) The consequences of the claimant rejecting a reasonable supplemental offer are discussed below.

Under the Act, an offer, whether original or supplemental, can be accepted in an affirmative manner. Acceptance also automatically occurs if the claimant fails to reject an offer to “remedy a construction defect” within 30 days after receipt of the offer.\(^{50}\) While the phrase “remedy a construction defect” plainly covers an offer of repair, it is not clear whether it applies to a monetary offer or a combination of money and repairs.\(^{51}\)

If the claimant accepts an offer that, in whole or in part, involves repairs, the claimant must

\(^{42}\) O.C.G.A. § 8-2-38(l).
\(^{43}\) O.C.G.A. § 8-2-38(j).
\(^{44}\) O.C.G.A. § 8-2-38(j).
\(^{45}\) O.C.G.A. § 8-2-37.
\(^{46}\) O.C.G.A. § 8-2-38(j).
\(^{47}\) A contractor may be able to insist on a contractual right of access, in a sale, construction or warranty document. The Act does not expressly allow a contractor to respond with an offer that contains the alternative of an inspection in the event the offer is not accepted, but a contractor could propose such an alternative. If that alternative is accepted by the claimant, that acceptance should be documented in accordance with O.C.G.A. § 8-2-38(p).
\(^{48}\) O.C.G.A. § 8-2-38(k).
\(^{49}\) O.C.G.A. § 8-2-38(l).
\(^{50}\) O.C.G.A. § 8-2-38(m).
\(^{51}\) O.C.G.A. § 8-2-38(m). Arguably it does cover the latter since no other provision of the Act addresses a time frame for acceptance by the claimant. Moreover, there appears to be no reason for creating a different time frame for a monetary or combination offer. Confusion arises, however, because the phrase "remedy a construction defect" is rather plainly used on other part of the Act to refer only to repairs.
provide the contractor and its subcontractors, agents, experts and consultants “unfettered access” to the dwelling for completion of the repairs.\textsuperscript{52}

If the claimant accepts an offer, whether original or supplemental, and it is performed, the claimant will thereafter be barred from bringing an action “for the claim described in the” NOC.\textsuperscript{53} After acceptance, the Act only bars a claimant from bringing a legal action for claims described in the NOC. If the contractor intends its settlement offer to fully resolve all potential claims by the claimant, it should condition that offer on a standard general release of all claims.\textsuperscript{54}

\textbf{§ 22.2.2.2 Request for Inspection Prior to Settlement Offer}

Another response that a contractor may make to an NOC is to propose an inspection.\textsuperscript{55} This request must be served on the claimant within 30 days after receipt of the NOC.\textsuperscript{56} If this request is timely made, the claimant must, within 30 days after receiving the contractor’s response, provide the contractor and its subcontractors, agents, experts and consultants reasonable access to the dwelling or common area.\textsuperscript{57} Reasonable access probably includes access during typical work hours.

In the inspection, the contractor is entitled to examine, document and test anything required to “fully and completely evaluate the nature, extent and cause of the claimed defects and the nature and extent of any repairs or replacements that may be necessary to remedy the alleged defects.”\textsuperscript{58} The inspection may include destructive testing, although the contractor must give the claimant advance notice of such testing, perhaps after the initial inspection, and the dwelling or common area must be returned to its pre-testing condition, presumably at the sole expense of the contractor.\textsuperscript{59} If the inspection reveals a condition that requires additional testing in order to fully evaluate a defect, the contractor must provide notice (written notice is not required, but preferable) to the claimant, after which the claimant must provide prompt and reasonable access.\textsuperscript{60}

Within 14 days after completion of the inspection and testing, the contractor must serve on the claimant either a written settlement offer or a statement that the contractor will not remedy the alleged defects.\textsuperscript{61} The settlement offer can consist of a monetary payment, repairs at no cost to the claimant or a combination.\textsuperscript{62} If the written offer includes repairs, the offer must include a description of the repair work and the anticipated repair timetable.\textsuperscript{63} Contractors should be realistic about timetables since claimants may only be required to provide access during that
If an offer is made, the claimant may accept the contractor’s offer. If the claimant accepts it and it is performed, the ADR process will be complete. If the claimant accepts the contractor’s offer following the inspection process and the contractor fails to make the monetary payment and/or repair the construction defect within the timetable, the claimant may bring an action against the contractor without further notice except as may be provided by other law. The claimant may also file the offer and acceptance in that action, which will create a rebuttable presumption that a binding and valid settlement occurred and should be enforced by the court or arbitrator.

If the claimant rejects the offer made by the contractor, the claimant must serve a written rejection on the contractor. Presumably, the rejection notice must be served within 30 days after receipt of the settlement offer. The notice must state all known reasons for rejection of the offer. If the claimant rejects the offer, the claimant can file a suit or demand for arbitration, unless a supplemental offer is made by the contractor within 15 days thereafter.

Within 15 days after receiving a rejection notice, the contractor may, but is not required to, make a supplemental settlement offer, which may include a monetary offer, a repair offer or a combination. Although the Act does not specifically require the supplemental offer to be in writing, a written offer is advisable. Any legal action by the claimant will probably be stayed if it is commenced during this 15-day period and a supplemental offer has been made. If the supplemental offer is rejected by the claimant, the claimant must serve a supplemental rejection notice on the contractor, which must set forth “all known reasons” for rejection.

An offer, whether original or supplemental, can be accepted in an affirmative manner. Acceptance also automatically occurs if the claimant fails to reject an offer to “remedy a construction defect” within 30 days after receipt of the offer. While the phrase “remedy a construction defect” plainly covers an offer of repair, it is not clear whether it applies to a

64 O.C.G.A. § 8-2-38(g) and (n).
65 O.C.G.A. § 8-2-38(f)(4) and (h).
66 O.C.G.A. § 8-2-38(h).
67 O.C.G.A. § 8-2-38(h).
68 O.C.G.A. § 8-2-38(g).
69 O.C.G.A. § 8-2-38(g).
70 O.C.G.A. § 8-2-38(i).
71 O.C.G.A. § 8-2-38(i).
72 O.C.G.A. § 8-2-38(i).
73 O.C.G.A. § 8-2-38(j).
74 O.C.G.A. § 8-2-38(j).
75 O.C.G.A. § 8-2-38(k).
76 O.C.G.A. § 8-2-38(m).
monetary offer or a combination of money and repairs.\textsuperscript{77}

If a claimant accepts an offer that, in whole or in part, involves repairs by the contractor, the claimant must provide the contractor and its subcontractors, agents, experts and consultants “unfettered access” to the dwelling for completion of construction.\textsuperscript{78} If, after acceptance of an offer of repairs, the claimant does not permit the contractor to make the repairs, the damages recoverable by the claimant in a subsequent action will be limited as discussed below.\textsuperscript{79}

If the claimant accepts an offer, whether original or supplemental, and it is performed, the claimant will thereafter be barred from bringing an action “for the claim described in the” NOC.\textsuperscript{80} After acceptance, the Act only bars the claimant from bringing a legal action for the claims described in the NOC. If the contractor intends the settlement offer to fully resolve all potential claims by the claimant, it should condition its settlement offer on a standard general release of all claims.

Upon rejection of an initial offer that is not followed within 15 days by a supplemental offer by the contractor, the claimant can file a suit or demand for arbitration.\textsuperscript{81}

\textbf{§ 22.2.2.3 Rejection of NOC by Contractor}

The Act also contemplates that the contractor may wholly reject the claimant’s NOC.\textsuperscript{82} It appears that such a rejection should include all known reasons for the rejection.\textsuperscript{83} Any rejection notice should be carefully considered and drafted since it may eventually be evidence at trial or arbitration. It should include all legal and factual reasons for rejecting the offer. Upon receipt of a written rejection, the claimant may bring an action against the contractor without further notice except as may otherwise be required by law.\textsuperscript{84}

\textbf{§ 22.2.2.4 Lack of Response by Contractor to NOC}

While the Act does not authorize a contractor to simply fail to respond to an NOC;\textsuperscript{85} it recognizes that possibility. If the contractor does not respond at all within 30 days after service of the NOC, the claimant may bring an action against the contractor without further notice except as may otherwise be required by law.\textsuperscript{86}

\textsuperscript{77} O.C.G.A. § 8-2-38(m). Arguably it does since no other provision of the Act addresses a time frame for acceptance by the claimant. Moreover, there appears to be no reason for creating a different time frame for a monetary or combination offer. Confusion arises, however, because the phrase “remedy a construction defect” is rather plainly used in other parts of the Act to refer only to repairs.

\textsuperscript{78} O.C.G.A. § 8-2-38(n).

\textsuperscript{79} O.C.G.A. § 8-2-38(l).

\textsuperscript{80} O.C.G.A. § 8-2-40(a)(1).

\textsuperscript{81} O.C.G.A. § 8-2-38(l).

\textsuperscript{82} O.C.G.A. § 8-2-38(c).

\textsuperscript{83} O.C.G.A. § 8-2-38(h).

\textsuperscript{84} O.C.G.A. § 8-2-38(h); see also O.C.G.A. § 8-2-38(c).

\textsuperscript{85} O.C.G.A. § 8-2-38(c).

\textsuperscript{86} O.C.G.A. § 8-2-38(c).
After the NOC is served, the Act allows a claimant and contractor to alter the ADR procedures of the Act by written agreement. No guidance, restrictions or time limitations are provided for such procedures. Alternative procedures can be elaborate or as simple as extensions or limitations on the time for actions. The permission to alter the ADR procedures only after the NOC is presumably intended to prevent contractors from sidestepping the terms of the Act by including ADR procedures in contract or warranty documents. The possibility of modifying the Act’s ADR provisions should be considered by a contractor in formulating a response to an NOC. If the contractor wishes to propose alternative procedures, it is preferable to do so well in advance of the 30-day period for response to the NOC or to include that proposal as an alternative in its response to an NOC. The contractor should also consider involving any other contractors in the written agreement for alternative procedures. The Act also allows a claimant to propose alternative ADR procedures. Both parties must agree to them in writing before they will be effective. As discussed in § 22.7, the current version of the Act, but not the original, appears to also allow the parties to include ADR procedures in their contract documents rather than waiting until an NOC is served.

§ 22.3 COMMUNICATIONS UNDER THE ACT SHOULD BE IN WRITING

In most cases, the Act requires communications under it to be in writing. While contractors often deviate from contractual requirements of written communication, they should strictly avoid such deviations when communicating under the Act. Otherwise, a judge or arbitrator may find that the written communication requirement has been mutually waived by the parties. That could lead to confusing and contradictory testimony regarding oral communications between the parties.

§ 22.4 ANOTHER NOC MUST BE PROVIDED BEFORE SUBSEQUENTLY DISCOVERED ALLEGED CONSTRUCTION DEFECTS CAN BE PURSUED

In general, if, after serving an NOC, other construction defects are “discovered,” the claimant cannot pursue a suit or arbitration against a contractor for those defects without first following the same ADR procedures outlined above for the original NOC. However, if construction defects are discovered during a legal action that complied with the Act, the new claims can be added to the action, but the case should be stayed, absent contrary agreement of the parties, and

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87 O.C.G.A. § 8-2-38(p).
88 Whether it is permissible for a contractor to include terms in a contract intended to flesh out or supplement the statutory procedures, without altering the structure provided in the statute, is unclear.
89 Although the Act requires alternative ADR procedures to be in writing, if the parties in fact agree to alternative ADR procedures, a court or arbitrator may determine that the requirement of a written agreement has been waived.
90 O.C.G.A. § 8-2-39. If a construction defect was already known when the original NOC was served, this provision might suggest that it can no longer be pursued. In the absence of a release of all claims or the final judgment or award, that is probably not the result of the Act, however, since under the Act a settlement of claims only precludes a claimant from pursuing an action for defects set forth in the NOT. O.C.G.A. § 8-2-40(a)(1). Subject to the Georgia Civil Practice Act, a subsequently discovered defect claim can generally be added as a matter of right to a civil action by amendment after the Act’s ADR procedures have been satisfied. Amending claims in an arbitration context may require the permission of the arbitrator.
the claimant must still serve a new NOC.

§ 22.5 IF CLAIMANT REJECTS A “REASONABLE OFFER, THE DAMAGES RECOVERABLE WILL BE LIMITED

If a claimant rejects a “reasonable offer,” including any reasonable supplemental offer, the claimant is not precluded from pursuing an action. However, the claimant cannot recover an amount in excess of: (1) the fair market value of the settlement offer or the actual cost of the repairs made;\(^91\) or (2) the amount of a monetary settlement offer.\(^92\) This might exclude, for example, reduction in fair market value, loss of use, inconvenience, punitive and many other damages. The Act also precludes the claimant from recovering any attorney’s fees or costs otherwise recoverable that are incurred after the rejection of a reasonable offer.\(^93\) If the only real damages at issue are repair costs, the claimant may not suffer significant losses, other than the claimant’s own attorneys’ fees, legal expenses, costs and lost time, from rejecting a reasonable offer.

The trier of fact (judge, jury or arbitrator) determines the reasonableness of the settlement offer.\(^94\) The trier of fact will presumably consider not only the offer, but the reasons provided by the claimant in its rejection notice(s).\(^95\) The Act does not expressly state that, in a subsequent legal proceeding, the claimant will be limited to those reasons in defending its rejection, but that may be the legal or practical consequence. The admissibility of settlement offers and other communications relating to settlement is a major departure from the normal rule that settlement discussions are inadmissible in evidence. This change suggests that parties exercise care to ensure that offers and other communications are, in fact, reasonable and are readily understood as such by a trier of fact.

The same damages limitations for rejections of reasonable offers apply when a claimant does not permit a contractor to make repairs per an accepted settlement offer.\(^96\) The Act does not expressly authorize enforcement of an agreement to repair,\(^97\) but a contractor may be able to enforce it under general contract and legal principles outside the Act.

Presumably, the contractor must assert that a claimant failed to accept a reasonable offer in order for that to be an issue in a suit or arbitration. If the contractor does not raise that issue, because it is concerned that its offer was not or may not be perceived by a trier of fact as reasonable or for any other reason, it is doubtful that the claimant will be able to raise the issue solely for the purpose of demonstrating that the settlement offer by the contractor was

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91 Since it may well have cost the contractor less to complete the repairs itself, by using its own subcontractors, etc., than the fair market value or cost of repairs, the contractor can still end up paying more than it would have cost the contractor to accomplish the repairs. What if repairs have not been "made," but claimant just has repair estimates?
92 O.C.G.A. § 8-2-38(l).
93 O.C.G.A. § 8-2-38(l).
94 O.C.G.A. § 8-2-38(l).
95 O.C.G.A. § 8-2-38(d), (i) and (k).
96 O.C.G.A. § 8-2-38(l).
97 This is notably different from O.C.G.A. § 8-2-38(g), which expressly allows a claimant to enforce a settlement agreement under the Act.
unreasonable. The parties can probably also mutually agree that reasonableness is not an issue for resolution at trial or arbitration.

To the extent that reasonableness is an issue at trial, it, technically, only applies to the resolution of “construction defect” claims as defined in the Act. Evidence regarding settlement efforts relating to other claims in the case, including some that relate to construction issues but fall outside the definition of “construction defects,” are not expressly admissible under the Act. It is not clear whether courts or arbitrators will, in fact, exclude other settlement discussions from evidence or allow their introduction on the basis that the reasonableness of an offer relating to construction defects cannot be determined in isolation from other claims at issue. Where other claims exist, as well as construction defect claims, contractors may wish to carefully segregate offers relating to the construction defects from offers relating to the other claims.

§ 22.6 IF A CLAIMANT FILES AN ACTION WITHOUT FIRST COMPLYING WITH THE ADR PROCEDURES, THE ACTION SHOULD BE STAYED

If a claimant files a legal action (suit or arbitration) “without first complying with the requirements” of the Act, the court or arbitrator is required, if requested by the contractor or other party, to stay the action until the claimant has complied. This is a way for contractors to enforce compliance by claimants.

A failure by a claimant to comply with the “requirements of” the Act could mean almost any failure, including failing to: serve an NOC; include all information and documentation required in the NOC; serve a notice of rejection; include all reasons for rejection in the

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98 Non-attorney arbitrators may not fully appreciate their obligation to stay an action. If an arbitrator declines to stay an action under circumstances requiring a stay, the contractor will need to consider whether to file a motion to stay with a court. The Act does not expressly contemplate such a motion to a court in an arbitration context. However, since the only alternative is to file a motion to vacate or modify the eventual arbitration award if a stay should have been granted, there is a chance that a court will consider reviewing the denial of a motion to stay in an arbitration context if the failure by the claimant to follow the requirements of the Act is clear.

99 O.C.G.A. § 8-2-37. Although the occasions for injunctive relief in cases covered by the Act may be limited, the possibility remains that injunctive relief may be required in some cases. For example, a claimant may want to seek specific performance of a sale contract while also asserting claims of construction defects. In that action, the claimant might seek injunctive relief preventing the sale of the dwelling during the pendency of the case. Whether the claimant can file an action for purposes of asserting injunctive relief without first completing the Act’s dispute resolution process is not clear. Moreover, whether a claimant can file an action in order to support the filing of a lis pendens without first having complied with the requirements of the Act is also unclear.

100 Note that the Georgia Arbitration Act itself provides in O.C.G.A. § 9-9-6(d) as follows: "(d). After service of the demand, or any amendment thereof, the party served must make application within 30 days to the court for a stay of arbitration or he will thereafter be precluded from denying the validity of the agreement or compliance therewith or from asserting limitation of time as a bar in court. Notice of this application shall be served on the other parties. The right to apply for a stay of arbitration may not be waived, except as provided in this Code section." (Emphasis added.) This section almost certainly does not apply to a motion for stay for failure to comply with the pre-action requirements of the Act. However, someone might argue otherwise. That is another reason to promptly file the motion for stay with a court when the action has been commenced in a court. Out of an abundance of caution, a contractor named in a demand for arbitration could file a motion in court under this code section as well as with the arbitrator under O.C.G.A. § 8-2-37. Again, it does not appear that this section applies to a motion for stay under that code section.

101 O.C.G.A. § 8-2-38(a).

102 O.C.G.A. § 8-2-38(a).
notice of rejection;\textsuperscript{104} or allow an inspection upon proper request by a contractor.\textsuperscript{105} A claimant’s failure to allow access for repairs after accepting an offer involving repairs, even though required by the Act,\textsuperscript{106} does not appear to be grounds for a stay since the Act allows a claimant to pursue a legal action despite breaching that agreement.\textsuperscript{107}

A suit or arbitration is not required to be stayed. In fact, it may not be appropriate for it to be stayed, unless a stay is requested by a contractor or other party to the action.\textsuperscript{108} Thus, if the contractor believes that a claimant has failed to comply with any requirement of the Act and if the contractor wants to enforce compliance and stay the action, the contractor must move to stay the action.

The actions that are subject to a stay under the Act are broader than one might initially assume. The term “action” is defined very broadly to mean “any civil lawsuit, judicial action, or arbitration proceeding asserting a claim in whole or in part for damages or other relief in connection with a dwelling caused by an alleged construction defect.” Thus, in order for a stay to apply, it is not necessary that all or even most of the claims in the case involve construction defects. It may be sufficient if a construction defect claim is only tangentially or collaterally involved.

If a claimant has sent an NOC to more than one contractor, that claimant may have completed the Acts’ prerequisites to a suit or arbitration as to some contractors, but not others. Thus, the claimant may be able to pursue a suit or arbitration against some contractors, but not others.\textsuperscript{109}

If a lawsuit or arbitration, as initially filed, does not assert a construction defect claim, but one is asserted by way of amendment, the action should be stayed upon request of any party unless the claimant has complied with the pre-action requirements for that claim. Whether a counterclaim by a claimant asserting a construction defect claim is covered by the Act is not clear.\textsuperscript{110} Since the overall intent of the Act is to promote the resolution of construction defect claims, counterclaims are probably covered.

Although the Act does not provide a time within which a motion to stay must be filed, contractors should assume that it must be promptly filed. If not, the claimant may successfully argue that the contractor waived its right to a stay. When grounds for a stay do not reasonably become apparent to a contractor until the discovery process or later,\textsuperscript{111} a contractor may be able to stay the action at that time.

If an action is filed without compliance by the claimant and the contractor is required to file a

\textsuperscript{103} O.C.G.A. § 8-2-38(d), (i) and (j).
\textsuperscript{104} O.C.G.A. § 8-2-38(d), (i) and (j).
\textsuperscript{105} O.C.G.A. § 8-2-38(e).
\textsuperscript{106} O.C.G.A. § 8-2-38(n).
\textsuperscript{107} O.C.G.A. § 8-2-38(l).
\textsuperscript{108} O.C.G.A. § 8-2-37.
\textsuperscript{109} The others can generally be added to a civil action at a later time. See generally O.C.G.A. § 9-11-15, O.C.G.A. § 9-11-20 and O.C.G.A. § 9-11-21.
\textsuperscript{110} O.C.G.A. § 8-2-36(l); O.C.G.A. § 8-2-37.
\textsuperscript{111} For example, if the contractor learns in the discovery process that documents that were required to be produced along with the NOC were not produced, it may be appropriate to file an application for a stay at that time.
motion for stay, the contractor should consider asking for its attorney’s fees and expenses incurred in obtaining the stay. Whether attorney’s fees may be pursued in this context in arbitration, as opposed to a lawsuit, is less clear under Georgia law. Including a provision in the sale or construction contract allowing the recovery of those fees and expenses should be enforceable.

The Act expressly authorizes an action to be filed before the ADR process is pursued or completed if a statute of limitation will expire during that process. However, the action should then be immediately stayed. The stay does not apply to a cause of action for damages due to personal injury or death, although it does apply to construction defects claims asserted in the same action.

§ 22.7 CONTRACT TERMS PREVAIL OVER THE ACT’S TERMS

The Act provides that in the event of any conflict or inconsistency between its provisions and those of any contract between a claimant and a contractor, the provisions of the contract shall govern and control. This language, which was not in the original Act, allows the parties to modify the Act’s procedures in their contract documents and, perhaps, eliminate its application entirely.

§ 22.8 SPECIFIC STATUTORY NOTICE MUST BE PROVIDED BY CONTRACTORS AT THE TIME OF CONTRACT

Under the Act, a contractor is required to provide written notice to the buyer or owner of the dwelling of the contractor’s right to resolve alleged construction defects before the buyer or owner may commence an action against the contractor. That notice must be provided at the time the initial contract for sale, construction or improvement is signed by the contractor and the buyer or owner. The Act expressly states that the notice may be included as a part of the contract. As a matter of practice, that is probably the best way to provide it. The notice is included in the GAR New Construction Contract.

In whatever manner the notice is provided, it must be conspicuous and must be in “substantially” the form set forth in the Act. The safest course is simply to include that exact language, which is as follows:

GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT

112 O.C.G.A. § 9-15-14 may provide a basis for a claim for attorney’s fees. But see O.C.G.A. § 8-2-43(a), which states that the Act is not intended to create any cause of action.
113 O.C.G.A. § 8-2-38(o).
114 O.C.G.A. § 8-2-38(o).
115 O.C.G.A. § 8-2-37. If a personal injury claim is actually resolved in a court or in arbitration, collateral estoppel issues will arise.
117 O.C.G.A. § 8-2-41(a).
118 O.C.G.A. § 8-2-41(a).
119 GAR Form F23.
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.

One of the questions unanswered by the Act is the consequence to a contractor of failing to provide this notice. The Act does not expressly state that a contractor’s failure to provide the notice excuses the claimant from providing the NOC and otherwise complying with the Act. Eventually, a Georgia appellate court will address that question. In the meantime, trial courts and arbitrators will have to struggle with it. Contractors are likely to argue that the notice requirement is independent of the rest of the Act and therefore that its absence should not excuse a claimant from following the other terms of the Act. Some claimants will argue that they are excused from the Act if the notice is not provided. That argument may well be accepted by courts and arbitrators.120 Some claimants may go further and argue that the failure to provide the notice constitutes grounds for rescinding a contract.

Presumably, the requirement of providing this statutory notice only applies to contractors who have a direct contractual relationship with the owner or buyer. Other persons and entities covered by the term “contractor,” such as subcontractors, suppliers, contractor-retained engineers or architects, that do not have a contract with the owner or buyer should be excused from that obligation.121

§ 22.9 THE ACT CONTAINS SPECIFIC ADDITIONAL PROVISIONS RELATING TO CONDOMINIUM AND NEIGHBORHOOD ASSOCIATIONS

In addition to complying with the ADR procedures discussed above, associations must comply with a special set of other preconditions to legal actions against contractors.

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120 Second or subsequent owners of a dwelling may also argue that they are excused from complying with the Act's ADR procedures because they did not receive statutory notice. Since the original builder cannot be expected to provide a notice to subsequent owners, that argument seems unlikely to prevail.

121 Presumably, contractors who lack contract privity with claimants will nevertheless be protected by the Act even if the general contractor fails to provide the statutory notice. It is conceivable, however, that a court or arbitrator might determine that a general contractor's failure to provide the notice means that the claimant is entirely excused from obligations under the Act. If that is the result, do other contractors have a claim against the general contractor for damages they incur as a result of the general contractor's failure to provide the notice? Probably not.
§ 22.9.1 The Term “Association” Covers Neighborhood And Condominium Associations

The term “association” is defined in the Act as “a corporation formed for the purpose of exercising the powers of the members of any community interest community.”122 This definition covers both incorporated neighborhood and condominium associations. It does not cover unincorporated neighborhood associations, which, in some cases, can assert claims against developers.123 Claims by individual unit owners, individually or collectively, are also not covered by this definition.

§ 22.9.2 Associations May Bring Actions Against Contractors For Construction Defects In Common Or Limited Common Elements, Subject To Certain Conditions

The Act states that Associations may bring a legal action for damages against a contractor for construction defects, but only for those in the common or limited common elements.124 Despite this statement, contractors may still be able to argue in the condominium context that only unit owners can pursue these claims since they are the actual owners of the common and limited common elements.

An association has to comply with a number of preconditions to a construction defect action for damages against a contractor.125 According to its wording, this subsection only applies to legal actions for “damages.”126 Thus, legal actions for injunctive or declaratory relief are not covered by this subsection. The preconditions to a construction defect action for damages by an association against a contractor are set forth below. The conditions under the original Act were substantially greater.

§ 22.9.2.1 Written Approval of certain unit owners

Every unit owner whose interest in the common or limited common elements will be affected by the action127 must give the association his or her written approval to pursue the matter against the contractor. In other words, if a suit seeks damages for construction defects in balconies that are limited common elements assigned only to certain units, all owners of those specific units must consent in writing.128 If a suit seeks damages for construction defects in a recreation area

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122 O.C.G.A. § 8-3-36(2).
123 O.C.G.A. § 9-2-24. Condominium associations are required by law to be corporations (O.C.G.A. § 44-3-100), so an unincorporated condominium association cannot legally exist.
124 O.C.G.A. § 8-2-42(e).
125 O.C.G.A. § 9-2-42-(e).
126 O.C.G.A. § 8-2-42(e). While the definition of "action" is broad enough to cover suits or demands for arbitration covering claims other than for damages, O.C.G.A. § 8-2-42(e) covers only actions for damages for construction defects. Thus, an enforcement action by an association against a contractor for violation of architectural control standards will not be covered by the Act even though such a violation might fall within the Act's definition of "construction defect." If, however, that enforcement action seeks damages as allowed by the covenants or otherwise, the action may be covered by O.C.G.A. § 8-2-42(e).
127 O.C.G.A. § 8-2-42(e)(1).
128 This conclusion is uncertain in a condominium context since, while only the unit owners to which a limited common element is assigned have the right to use it, all unit owners have an undivided ownership interest in those limited common elements.
available to all unit owners, then all unit owners must consent to the action.

§ 22.9.2.2 Pre-Vote Information

At least three business days in advance of a vote to proceed with legal action against a contractor, the attorney representing the association\(^{129}\) must provide each owner with a written statement including reasonable detail regarding the defects and damages at issue; causes of the defects if known; the nature and extent of the damages; the location of each defect in the common or limited common elements; a reasonable estimate of the cost of the action (including attorney's fees, costs, expert fees, etc.); and all disclosures that a unit owner is required to make upon the sale of his or her unit.\(^{130}\)

§ 22.9.2.3 Majority Vote in Favor of the Action

There must be a vote in favor of the action by the unit owners holding a majority of the votes of the members of the association.\(^{131}\) Such a vote must be taken in compliance with the requirements of the documents governing the association,\(^{132}\) unless they are in conflict with the Act.

§ 22.9.2.4 The Association Board Must Have Offered to Meet with Contractor

The board of directors of the association and the contractor must have met in person and conferred in a good faith attempt to resolve the association’s claim, or the contractor must have definitively declined or ignored the requests\(^{133}\) to meet with the board.\(^{134}\)

§ 22.9.2.5 Compliance with standard pre-action requirements of the Act

The above list is not exhaustive. The association must still satisfy all of the other pre-action requirements for a claimant to commence an action. At a minimum, this means that all of the preconditions to an action established by the Act that are applicable to non-association claimants are also applicable to association claimants.

§ 22.9.3 Restrictions On Destructive Testing For Associations

The Act forbids an association or its attorney from employing a person to perform destructive testing “to determine damage or injury” to a dwelling or common area caused by a construction defect unless the following conditions are met:\(^{135}\)

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\(^{129}\) This statutory creation of a legal duty from the association's attorney to unit owners raises many issues and could be subject to challenge.

\(^{130}\) O.C.G.A. § 8-2-42(f).

\(^{131}\) O.C.G.A. § 8-2-42(e)(2).

\(^{132}\) That is, the bylaws and declaration of condominium.

\(^{133}\) The plural term "requests" suggests that more than one request is required.

\(^{134}\) O.C.G.A. § 8-2-42(e)(3).

\(^{135}\) O.C.G.A. § 8-2-42(g).
(a) The person is licensed as a contractor pursuant to law;\textsuperscript{136}

(b) The association has obtained the prior written approval of each owner whose dwelling will be directly affected by such testing;

(c) The person performing the tests has provided a written schedule for repairs;

(d) The person performing the tests is required to repair all damage resulting from such tests in accordance with state laws and local ordinances;

(e) The association or the person employed obtains all permits required to conduct such tests and to repair any damage resulting from such tests; and

(f) Reasonable prior notice and opportunity to observe the tests is given to the contractor against whom an action may be brought as a result of the tests.

The board may, without giving notice to the owners, employ a contractor and such other persons as are necessary to make such immediate repairs to a common area as are required to protect the health, safety, and welfare of the owners.

Some of these requirements (a through e above) appear to be intended for the protection of unit owners. One of them (f) appears to be for the protection of contractors against which claims may be asserted. These restrictions on an association’s right to perform destructive testing are, with the exception of the last one, not expressly limited by the Act to circumstances in which a claim against a contractor is contemplated. The consequence to an association of violating these provisions is unclear. The failure of an association to follow requirement 4 may preclude a claim against a contractor, at least in the absence of a subsequent inspection in compliance with those requirements.

If the destructive testing is not conducted to determine damage or injury, but is conducted to determine whether a construction defect exists and, if so, the cause of the defect, the destructive testing may not be covered by this part of the Act. Moreover, if a contractor is hired simply to fix a defect, not for destructive testing, the requirements relating to destructive testing presumably do not apply.

\textsuperscript{136} See O.C.G.A. § 43-41-2.