



## An Introduction to the CDARA Notice of Claim Process

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In the past, a general contractor or developer who was served a property owner's construction defect lawsuit would immediately name any and all subcontractors who participated in the construction as third-party defendants.<sup>1</sup> The Construction Defect Action Reform Act ("CDARA") Notice of Claim process was instituted in 2003 as a way to promote settlement and prevent this shotgun-style litigation.<sup>2</sup> CDARA's intent was to provide time for all parties to determine which construction professionals may be responsible for the alleged defects and keep other contractors out of the fray.<sup>3</sup>

CDARA's Notice of Claim process requires a residential claimant to provide written notice to the construction professional at least 75 days prior to filing suit.<sup>4</sup> The Notice of Claim should include a general description of the location and type of defects and damage.<sup>5</sup> The Notice of Claim should be sent by certified mail or personal service,<sup>6</sup> but actual receipt is deemed sufficient delivery.<sup>7</sup> The construction professional has 30 days from receipt of claimant's Notice of Claim to request and complete an inspection of claimant's property.<sup>8</sup> The construction professional then has another 30 days to make an offer of settlement.<sup>9</sup> If the offer of settlement from the construction professional is an offer to repair, the offer is required to include a report of the scope of the inspection, the findings and results of the inspection, a description of the work necessary to remedy the defect and damage, and a timetable for completion of the repair work.<sup>10</sup> The claimant then has 15 days to either accept the offer, or if the claimant does not respond, the offer is deemed rejected.<sup>11</sup> If the offer of repair is not accepted, the claimant may bring a construction defect action against the construction professional, unless there is a contractual obligation for pre-suit mediation, which must be satisfied before a claimant brings the action.<sup>12</sup> If new defects are discovered after a Notice of Claim is sent, the claimant must send additional Notices of Claims and otherwise comply with the process for the additional defects.<sup>13</sup>

In a perfect world, a homeowner would provide a Notice of Claim to a construction professional, the construction professional would repair or pay to repair the defects and damage, and the parties move forward with their lives. In reality, the Notice of Claim process rarely succeeds in stimulating settlement, as builders and their insurers often ignore Notices of Claims. In response to receiving Notices of Claims for their construction professional clients, one Denver law firm immediately sends a form letter purporting to terminate the Notice of Claim process before an inspection even occurs. On the other side of the coin, unscrupulous contractors exist that have purloined homeowners' money or belongings, while also performing defective work that caused damage. Homeowners are often reluctant to allow those same deceitful contractors back into their home to repair the defective work. Moreover, it is often not possible or probably to immediately determine the source of defects that are causing damage, because often defects are hidden within walls and time-consuming testing and analysis is necessary to uncover the root cause of damage. Overall the CDARA Notice of Claim process was born from great intentions and enjoys some limited success, but is imperfect because thousands of construction defect matters cannot be resolved by a "one-size-fits-all" solution.

If the Notice of Claim process does not resolve the dispute, a suit may need to be filed very quickly in order to preserve a claimant's rights under the construction defect statutes of limitations and repose. Fortunately, the CDARA Notice of Claim process allows for tolling of the statutes of limitations and repose during the entire Notice of Claim process and 60 days after completion of the Notice of Claim process.<sup>14</sup> However, CDARA's tolling will not extend to claims against construction professionals who were not sent a Notice of Claim.<sup>15</sup>

It is important for practitioners to understand that the Notice of Claim process may be completed earlier than the statutorily prescribed timeframes, or as described above, a construction professional or their counsel may altogether reject the Notice of Claim process, effectively cutting it short of 75 days. In those situations, builder advocates are likely to argue a shorter tolling period applies based on a shortened Notice of Claim process, in an attempt to get their clients off the hook on the statute of repose or limitations. The CDARA Notice of Claim statute permits alterations or lengthening of the Notice of Claim process by written mutual agreement.<sup>16</sup> Absent strict compliance with the Notice of Claim process or an express written agreement to alter or clarify the length of the Notice of Claim process, practitioners may want to use caution in waiting to file suit for the full 135 days before filing.

In cases where a potential client comes to an attorney with a claim that is possibly time-barred, it is imperative the practitioner request all correspondence between the potential client and builder—including texts, emails, and even phone logs—to determine if the Notice of Claim process was potentially instituted before attorney involvement. These communications may contain facts that allow you to demonstrate to a judge or arbiter that the Notice of Claim process has been going on for years, thereby defeating motions arguing the claims are untimely.<sup>17</sup> At least one district court has agreed with this argument and held the Notice of Claim process in that case lasted seven years.<sup>18</sup> Furthermore, if there is a pre-suit mediation clause in the parties' contract, and mediation has not occurred, it can be argued that the Notice of Claim process, and therefore tolling, is ongoing until the mediation occurs.<sup>19</sup>

While many practitioners have received motions to dismiss for an alleged failure to comply with the Notice of Claim process, CDARA's remedy is a stay of the action until the Notice of Claim requirements are met—not dismissal.<sup>20</sup> The penalty for contractors who fail to comply with the Notice of Claim process is zero, unless the claimant has also proven a Colorado Consumer Protection Act claim at trial or the arbitration hearing.<sup>21</sup>

Even though the legislature intended the Notice of Claim process to streamline construction defect litigation and provide an out-of-court settlement process, practically speaking the Notice of Claim process rarely leads to acceptable settlement offers or resolution of a claimant's damages. Some fault may be on construction professionals that ignore a claimant's notice, and the lack of any real consequences for that conduct, but the practicality and technical aspects of construction defect cases are a significant factor. The greatest benefit of the CDARA Notice of Claim process may be the tolling provision, which allows claimants and their counsel at least a few months to assess their case before filing suit, and is a vital tool to argue that claims are not time-barred under Colorado's short statutes of limitations and repose. ▲▲▲

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#### Endnotes:

- <sup>1</sup> *Shaw Const., LLC v. United Builder Servs., Inc.*, 296 P.3d 145, 151, 2012 COA 24, ¶ 24 (Colo. App. 2012), *overruled on other grounds by Goodman v. Heritage Builders, Inc.*, 390 P.3d 398 (Colo. 2017).
- <sup>2</sup> *Id.*
- <sup>3</sup> *Id.*
- <sup>4</sup> C.R.S. § 13-20-803.5(1). CDARA's timelines are different residential and commercial properties.
- <sup>5</sup> C.R.S. § 13-20-802.5(5).
- <sup>6</sup> C.R.S. § 13-20-803.5(1).
- <sup>7</sup> C.R.S. § 13-20-803.5(11).
- <sup>8</sup> C.R.S. § 13-20-803.5(2).
- <sup>9</sup> C.R.S. § 13-20-803.5(3).
- <sup>10</sup> C.R.S. § 13-20-803.5(3).
- <sup>11</sup> C.R.S. § 13-20-803.5(4).
- <sup>12</sup> C.R.S. § 13-20-803.5(6).
- <sup>13</sup> C.R.S. § 13-20-803.5(10).
- <sup>14</sup> C.R.S. § 13-20-805.
- <sup>15</sup> *Shaw Const., LLC v. United Builder Servs., Inc.*, 296 P.3d 145, 152, 2012 COA 24, ¶ 27 (Colo. App. 2012).
- <sup>16</sup> C.R.S. § 13-20-803.5(8).
- <sup>17</sup> C.R.S. § 13-20-803.5(11).
- <sup>18</sup> *Ajax Lofts Condo. Ass'n v. Ajax Lofts, LLC*, No. 11cv7763, at \*3-4 (Denver County Dist. Ct. Nov. 16, 2012).
- <sup>19</sup> C.R.S. § 13-20-803.5(6).
- <sup>20</sup> C.R.S. § 13-20-803.5(9); *Shaw Const., LLC*, 296 P.3d at 151-152, 2012 COA 24 at ¶ 25; *Coates et al. v. Vision Dev. Group, Inc. et al.*, No. 14CA0678, at \*10 (Colo. App. June 25, 2015) (NSFOP).
- <sup>21</sup> C.R.S. § 13-20-806(2).