



# Notice of Defect: Now What?

If you sell your window or door products in one of the growing number of states with a “Notice and Opportunity to Cure” or “Right of Repair” statute, you need a plan in the event you receive a defect notice relating to your product. These statutes require that homeowners and builders—as well as subcontractors and suppliers—have the opportunity to resolve any construction deficiencies before diving headfirst into a lawsuit. If the notice requirement is not met, then the claimant is not entitled to pursue his or her claim. Demanding strict compliance with these statutes is your first opportunity to establish your company’s position should you receive a defect notice.

### DOCUMENTATION

First, immediately document the date you receive the defect notice, and make note of the deadline for required responses. Keep copies of the documents you receive, and note how and when the notice was delivered. Some notice statutes specify that the notice be sent via certified mail. Did the sender comply? You might also want to make a copy of the envelope in which the notice arrived. The date of receipt is typically the controlling date when it comes to any required response or action. Did you receive the notice in a timely manner? If the notice was sent outside of the designated statutory timeframe, this may be an additional defense down the road if a lawsuit arises.

Next, perform a search relating to the address that is the subject of the notice. Can you locate any previously sent notice of issues, either formal or informal? This might include requests for field service or warranty repairs. Also notify the department at your company that handles intake

of service requests and ask them to alert you to any incoming or pending requests relating to the home(s) for which the defect notice was provided. If any such requests are pending or later made, consider whether they should be addressed through the formalized statutory process as opposed to the normal approach your company takes. Make sure that the normal warranty channels are alerted to receipt of the statutory notice.

Be sure to provide prompt notice

shipping documents relating to the home(s). This may help identify the specific product series installed in the property. It is also helpful for notifying your insurance carrier under the applicable policy based on the dates of manufacture, sale and/or construction. Additionally, locating these documents will assist in identifying data relating to the products themselves, including test reports, product specifications, installation instructions and marketing literature, which may be

➤ **The only thing worse than getting sued by a builder or consumer without any notice is messing up the opportunity to address the issue, when you do receive a defect notice.**

to your insurers, in order to avoid issues with the insurer for failure to notify. If you participate in the process and respond to the statutory notice without providing such notice, you may jeopardize coverage. Some statutes contain a provision that expressly requires an insurer to handle notice of defect as if it were a formal lawsuit, which is beneficial to your company if your insurer attempts to refuse coverage. For these reasons, you should tender your claim to the insurer as soon as you obtain sufficient information, unless you have a self-insured retention policy. As you may know, insurers can be notoriously slow to respond, so you should still be in a position to provide a response to the statutory notice regardless of when the insurer responds to the claim and retains an attorney.

Locate any sales documents, such as purchase orders, invoices and

useful in the pre-litigation process, as well as in the event of a lawsuit.

### KNOWLEDGE IS YOUR FRIEND

Locate project documents or contracts; reach out to your employees, sales force or distribution partners to inquire whether anyone recalls anything notable about the project or the transaction. Be aware that a distributor may seek defense and indemnity from you if they also received notice, especially if there is a contract with a provision requiring you to do so. Also consider whether the products are covered by a warranty. Does the warranty address the claimant’s identified defects? Is the property still within warranty coverage? If so, you need a strategy and may choose to point this out in your written response to the notice.

Typically, these statutes provide for the opportunity to inspect the proper-

ty. Be sure to request this opportunity in your written response to the party who sent you the notice. Confirm when the site inspections are scheduled, as there may be a tight timeline from the date the notice was originally sent. Depending on the scale of the project, consider working with an expert at the inspection. Provide that person the necessary product information, and clarify your expectations and goals for the inspection.

It is important to prepare an effective and timely written response to the notice within the statute's express timeframe. As noted, don't be afraid to point out problems with the notice. Address any insufficiency in the notice you received, paying close attention to the language of the statute in developing your response. Make sure you fully comply with the requirements of the statute and consider consultation

with legal counsel to best determine how to proceed, as the response will set the tone for your defense position. If you confirm there is an issue with your product, don't be afraid to make a fair proposal for repair, and properly document that proposal. If you make an offer to repair or a monetary offer, remember the claimant is generally not required to accept the offer. If the product is under warranty, consider that as a viable channel as well.

### **LAWSUITS**

This notice process is often just the precursor to litigation, as it is common that the pre-litigation notice process will not result in full resolution of the claims. Therefore, you should anticipate that the next step will be a lawsuit. Be aware that some, but not all, statutes will allow claimants to recover attorney fees should they prevail

at trial. Be sure to check the relevant statute, or consult with your legal counsel to determine whether your state is one of these. If you have taken the proactive steps outlined above to prepare yourself for this possibility, then you should be in a better position to defend your products.

For information about individual state statutes, the American Institute of Architects website, [www.aia.org](http://www.aia.org), is a great resource, providing access to a Construction Defect Reform Statute Matrix identifying states with a statutory process in place, as well as information about the statutes themselves. ☐

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