O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

WISCONSIN'S NEW "RIGHT TO REPAIR" LAW

Wisconsin's new "Right to Repair" law was enacted on March 27, 2006, and became effective on October 1, 2006. The new law affects the relationship between owners and builders or remodeling contractors, and between such contractors and the suppliers of windows and doors.

The "Right to Repair" law is a misnomer. The new law does not give the contractor an absolute right to repair a claimed defect. Instead, the new law is lmerely an ADR (Alternative Dispute Resolution) law that applies to construction defect claims on residential construction and remodeling projects. It is intended to reduce owner lawsuits by fostering settlement through mandatory pre-suit procedures aimed at opening a dialogue for a negotiated resolution of such claims.

At the time that the contract is made, the contractor is required to provide the owner with a specific statutory notice and a brochure prepared by the Department of Commerce advising the owner about the new law. Before an owner may commence a lawsuit or an arbitration against the contractor for breach of warranty or for construction defects, the owner must first give the contractor a written notice of the nature and description of the alleged defects, and the owner must also provide the contractor with an opportunity to offer to repair the defect or to make a monetary settlement offer. An action or arbitration filed by the owner without first giving the contractor such notice would be subject to dismissal without prejudice or to stay by the court or arbitrator pending the owner's compliance with the statutory requirements.

In response to the owner's notice of claim, the contractor has five options:

- Make a written offer to repair the defect at no cost to the owner
- Make a written monetary settlement offer
- Make a written offer including a combination of repairs and monetary payment
- Make a written statement rejecting the claim
- Make a proposal for inspection of the dwelling

Under the option to make a proposal for inspection of the dwelling, the contractor has the right to inspect the dwelling and to conduct destructive testing before responding to the claim on the merits. Contractors also have a right to seek contribution from suppliers of windows and doors, and may require their participation in this process. In cases where the

contractor does not flatly reject the owner's claim, the "Right to Repair" law includes specific procedures and deadlines requiring the parties to make a series of offers and counteroffers until the parties either reach an agreement or reach an impasse. The obvious intent is to cause the parties to engage in active negotiation. However, the law does not require the parties to reach an agreement.

The law will not apply to all owner-contractor disputes. For example, it may not apply to claims involving purely design defects, as opposed to construction defects. Nor would it apply to accounting or delay claims, or to claims arising under Wisconsin's Home Improvement Practices regulations. Furthermore, it allows owners to make immediate repairs "to protect the health and safety of its occupants" without first giving notice to the contractor. It is the author's opinion that owners would also be permitted to make emergency repairs where a failure to take immediate action could result in serious additional damage to the home, such as the emergency repair of a plumbing leak.

The "Right to Repair" law leaves many questions unanswered. For example, it does not specifically state what happens if the owner first repairs the alleged defect before giving notice to the contractor of a claim where the repair was not an emergency. Under such circumstances, the contractor's right to inspect the defect and to offer to repair has been compromised, but not necessarily its right to make a monetary offer of settlement. Such questions are left to the Courts to decide.

Without question, there will be a learning curve both for contractors and for attorneys and judges in dealing with the new "Right to Repair" law.

For more information, please contact Steven J. Slawinski.