

'Reading the Riot Act'—Why Notice and Opportunity to Cure Matter

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Those of us of a certain age recall the phrase 'reading the Riot Act' as a stern warning or dressing down.

Someone chewed out by a parent or a boss at work would be said to have been "read the Riot Act." The history and meaning of that phrase inform the importance of providing the other party to a contract, especially a construction contract, with notice and an opportunity to cure prior to

invoking harsh remedies under the contract.

Why is 'Reading the Riot Act' a Stern Warning?

The British Parliament adopted an act against riotous assemblies in 1714 ("the Riot Act"). Similar acts were subsequently adopted in other Anglo-Saxon jurisdictions, including the United States (the Posse Comitatus Act). A key provision of the Riot Act was the requirement that a warning is read first to the rioters before the standing army ("the Redcoats") could be used to disperse the riot at gun or bayonet point. This requirement was meant to act as a brake on the King's ability to use the Redcoats against his own people. The text of the warning required to be read was:

Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King.

This wording was within the Riot Act itself. Thus, in order to use the violent sanction of the Redcoats against the rioters, a King's magistrate had to first "read the Riot Act" to the rioters and give them an opportunity to disperse. The point was to first give the rioters notice that their behavior was wrong and then provide them with an opportunity to disperse on their own accord, otherwise, they would be dispersed at the point of the bayonet.

Why Notice to Cure is Important

In a typical construction contract, there are many hard remedies one party can impose on the other party if the other party is in breach of the contract, especially if the first party is higher up the contracting chain than the breaching party (use of "breaching party" herein implies the use of "allegedly" as a prefix). These include, without limitation:

- Terminating the other party's performance under the contract.
- Performing some or all of the other party's work under the contract and then backcharging them for the cost of doing so.
- Supplementing the other party's forces and backcharging them for the cost of doing so.
- Withholding money from payment to the other party, including potentially money otherwise owed on other, unrelated projects.
- Seizing materials, tools, and equipment of the other party.

Like the Riot Act, providing notice and an opportunity to cure is, at its most basic, both a mechanism intended to deescalate the intensity of the conflict between the parties and to provide the breaching party with an opportunity to correct their misbehavior and thereby avoid a harsh penalty—the harsh penalty being at the same time the outcome to be avoided and the threat to incentivize the breaching party to conform.

The benefits of providing the breaching party with notice and an opportunity to cure are, without limitation:

Contractually required. Many contracts require that before a harsh remedy be taken, that notice and an opportunity to cure be first provided. The reasoning for such contractual requirements is rooted in the benefits described in the subsequent bullet points.

Thus, as the nonbreaching party, you should provide the breaching party with notice and an opportunity to cure because the contract requires it. In that case, the nonbreaching party is in the position of the King: The contract, like the Riot Act, requires that notice and opportunity to cure be provided to the offenders before bayonet point remedies may be leveled.

If those hard remedies are leveled against the breaching party without first satisfying the contractual condition precedent of notice and an opportunity to cure, then the use of those remedies may ultimately be found to be wrongfully exercised.

Clearing up confusion. The breaching party may not believe they are in breach or that their performance is deficient. Providing the breaching party with notice allows them to respond and raise new facts that may address the noticing party's concerns or at least refine the issues that need to be addressed.

Avoiding the harsh remedies or expensive litigation. The breaching party may choose to address the demanded cure actions, even if they believe they are not required to do so. This is so since not providing the demanded cure may incur a greater cost even if it is later determined that the demand was improper.

Similarly, the breaching party may be able to address or resolve the concern with minimal effort. In either event, harsher, bayonet point-type outcomes are avoided.

Aids in litigation. If one party is alleged to have breached and the other party levels harsh remedies in response, then the parties are likely headed into litigation. If the nonbreaching party provided notice and an opportunity to cure prior to calling out the Redcoats then the litigation will be conducted in a much more straightforward and efficient manner, for both parties, as it will be easier to narrow the issues in dispute to those raised in the notice to cure (and any response from the breaching party).

Damage mitigation. The breaching party is in the best position to efficiently and cost-effectively address the issue that gives rise to the breach. The parties' joint interest in minimizing waste supports giving every opportunity to fix the problem to the party with responsibility for performing the work in question.

Commercial reasonableness. It is commercially reasonable to provide a breaching party with notice of the acts or omissions that constitute the breach and an opportunity to cure the breach—at least so long as the time allowed to do so does not create a greater problem.

For the King, it was a matter of acting as a constitutional monarch responsible for protecting, not inflicting harm, on his subjects. For the nonbreaching party, it is a matter of acting in a manner that reasonably respects the rights and interests of the breaching party. This also allows the nonbreaching party to don the "white hat" in any subsequent litigation.

Respecting the rights of the breaching party. Every party is entitled to benefit of the bargain they struck in their contract so long as they are fulfilling their obligations under the contract. Courts jealously guard this entitlement. The remedy of terminating the other party's right to perform and the remedy of performing work and backcharging are harsh insofar as they deprive the breaching party of the benefit of the bargain of the contract. Before finding that the imposition of this drastic sanction was justified, the court will want to see that the party leveling the sanction made every effort to provide the nonbreaching party an opportunity to first rectify its behavior. In other words, the court will want to see that the nonbreaching party first read them the Riot Act prior to calling out the Redcoats.

Best Practices for Providing Notice and Opportunity to Cure

In providing notice and opportunity to cure, be sure to follow the applicable contract provision. Even absent a contract provision requiring notice and an opportunity to cure, such notice and opportunity should be provided if at all possible.

The notice should include, at a minimum, the acts of breach that the notice is based on, a clear statement that the notice is providing a cure opportunity, a detailed description of the acts required by the breaching party to cure the breach within the cure period, and some indication of what actions will be taken by the nonbreaching party in the event the breaching party fails to properly cure within the cure period.

The required cure actions have to be reasonably achievable; otherwise, the breaching party is not being provided a reasonable or genuine opportunity to cure.

The length of a reasonable cure period and the reasonableness of the demanded cure actions are dependent on the circumstances and a balancing of the relative interests of the parties. The nonbreaching party should not be prejudiced by providing the breaching party an extended period to cure.

Similarly, if the action demanded to occur during the cure period is to commence reasonable cure activities or to prepare a plan for implementing the cure, then the period in which the breaching party is required to perform these actions may be shorter.

However, if the actions required to occur during the cure period are substantial, substantive activities, not just a plan, then the cure period has to be of sufficient length to allow the breaching party to reasonably perform the activities.

Drafting Notice to Cure Provision in Contract

Contract provisions that govern notice and opportunity to cure should clearly describe those situations that require a notice to cure as a condition precedent to action by the nonbreaching party, the minimum requirements for such a notice, the minimum cured period allowed for the breaching party, and the manner of in which the nonbreaching party may exercise its remedies in the event the breaching party fails to cure its breach.

A common error is to describe the notice of cure period as well as the period after which the nonbreaching party may impose its remedies without making clear whether those periods are the same or are two separate, consecutive periods. The better practice is to simply state the length of the cure period and that if the breaching party fails to take the proper cure action within that period then the condition precedent is satisfied.

Conclusion

The better course in employing harsh contract remedies is to first provide a notice and a genuine opportunity to cure to the other party. Doing so may avoid greater loss for both parties and will certainly allow the noticing party to don the "white hat" of commercial reasonableness.

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