



2020 Construction Conference
September 29 – October 1

**Navigating the Right to Repair Laws:
Opportunities for Failures and Strategies for Success**

**I. Practical Issues of Pre-Litigation Repairs - Scope of Project, Coordination,
Design Issues and Product Manufacturers**

A. Use of Right to Repair Approach as Effective Tool for Claim Resolution

Are pre-litigation repairs the solution or the problem as a resolution option in our tool- box of resources to handle construction claims? Our industry has been encouraged for years to engage in early, “practical resolutions” of construction issues in various contexts that provide effective and productive means to handle these types of claims.

Most states across the country have enacted right to repair legislation and have various risk transfer statutes aimed at encouraging these resolution efforts. All but 16 states currently have pre-litigation repair statutes.

**B. Enforcement of Right To Repair Pre-Litigation Resolution For
Construction Claims**

Many REQUIRE the use of the right to repair in advance of initiating litigation and right to repair requirements are now incorporated in numerous construction contracts. Our state by state chart below provides key information on each jurisdiction’s approach on right to repair including the applicable code sections. Right to repair legislation is also favored for code compliance and health/ safety including claims under licensing board statutes. Indemnity statutes that allow for risk transfer exist in nearly all states to shift responsibility for workmanship issues to the indemnitor when allocating legal costs and expenses for handling these claims. Carriers do favor these types of approaches and have different positions in their policies for property damage that now include policy language on warranty and pre-litigation repair coverages. However, there are often unidentified risks that accompany the process which cause frustration and rejection of the process. The statues often preclude a release for the work performed, they may not be covered under the applicable insurance programs, they are often

evolving and can end up costing more than projected at the time of resolution and can impact or extend the statutes of limitation. We have attached a state by state summary of the applicable Right to Repair statutes, Indemnity statutes and limited summary of Statutes of Limitations for construction claims for reference to provide the key statutory information to consider in this analysis for consideration of the right to repair.

C. Concerns to Address with Parties in Pursuing the Right to Repair Process

The answer to whether a pre-litigation repair is the best course of action for a specific construction claim invariably depends on who is asked the question and is usually different depending upon the experience of the individual in trying to navigate the tricky aspects of the process. The claimant lawyers are often opposed to the approach and the insurance carrier may not want to participate in a pre-litigation repair resolution plan. Each claim should be considered on a case -by -case basis examining the numerous ramifications from a business, legal and insurance perspective. One of the most significant threshold questions to answer is determining which parties or companies should participate in the process that requires an assessment of the role in repairs for the developer, design professionals, general contractor, subcontractor and product manufacturers. Also, for each claim the parties need to understand how extensive are the repairs will be, the risk transfer options in the process, the role of the insurance carrier involved and whether there is a final resolution in the process. In many cases the right to repair presents an expensive temporary patch to a bigger problem which leads to further litigation in the future and potential extensions of the deadlines to file claims and unending liability exposure to legal.

Here are some interesting facts on the national legislative approach to pre-litigation repairs across the country.

II. Legal Issues Impacting Pre-Litigation Repairs: Risk Transfer, Funding Sources, Release of Claims, Coverage Obstacles

All but 16 states currently have pre-litigation repair statutes. Many states REQUIRE the use of the right to repair procedures in advance of initiating litigation and this requirement is mirrored in numerous contracts. Right to repair legislation is also favored for code compliance and health/ safety including claims under licensing board statutes. Anti-indemnity statutes are prevalent but many allow for risk transfer exist in nearly to shift responsibility for poor workmanship to the indemnitor when allocating legal costs and expenses for these claims. Many insurance carriers do favor pre-litigation resolution approaches and have different positions based on the specific provisions of the policy language pertaining to pre-litigation repair coverages in the applicable insurance policy.

A. Coverage For Pre-Litigation Matters

- Mandatory Pre-Litigation Procedures for Construction Defect Litigation Often Trigger Coverage Under Comprehensive General Liability Policies. For example, under the mandatory pre-litigation procedures to file a construction defect complaint under Cal. Civ. Code § 895 et al., a Notice of Commencement of Legal Proceedings under Cal. Civ. Code § 910 triggers a defense and potential indemnity obligation under a CGL insurance policy. See, D.R. Horton L.A. Holding Co. v. Am. Safety Indem. Co., 2012 U.S. Dist. LEXIS 1881 (Notice of Commencement of Legal Proceedings under Cal. Civ. Code § 910 triggered a defense and potential indemnity obligation under an additional insured endorsement).

B. Indemnity Provisions and Risk Transfer in Pre-Litigation

- Under certain statutory schemes, developers and general contractors can obtain contractual defense and indemnification from implicated subcontractors during this pre-litigation process by placing subcontractors on notice of the claim during the Pre-Litigation Process. See, Cal. Civ. Code Section 916(e); Crawford v. Weather Shield Mfg., Inc., 44 Cal. 4th 541 (2008); Centex Golden Ins. Co. v. Dale Tile, Inc. Co., 78 Cal. App. 4th 992 (2000). We have attached a state by state Anti-Indemnity reference chart which identifies the existence of these statutes and provides key codes sections for easy reference.
- Contractual defense and indemnity obligations of subcontractors in third party claims are covered in some states under the “insured contract” coverage within commercial general liability policies. See, Golden Eagle Ins. Co. v. Insurance Co. of the West, 99 Cal. App. 4th 837 (2001) (holding that “an insured with contractual liability coverage would reasonably expect that the indemnitee's attorney fees and costs are sums the insured becomes "legally obligated to pay as damages because of" covered tort claims. "[M]ost construction agreements or contracts require downstream contractors or subcontractors to protect upstream contractors" by way of indemnity provisions, (Richmond & Black, Expanding Liability Coverage: Insured Contracts and Additional Insureds, supra, 44 Drake L.Rev. at p. 790) and many indemnification clauses in the construction industry "include language that can be read to require a defense as well as indemnity." (Id. at p. 793.) Indeed, in California an indemnity against

claims and liability "embraces the costs of defense against such claims" unless "a contrary intention appears." Golden Eagle Ins. Co., 99 Cal. App. 4th at 851-852.).

- Depending upon the language of an indemnity provision, developers and general contractors may be able to make repairs and seek contractual indemnification from implicated subcontractors on a first party basis without a lawsuit or claim having been made by a homeowner, homeowner's association or commercial landowner. See, Zalkind v. Ceradyne, Inc., 194 Cal. App. 4th 1010 (2011)) (holding that provision indemnifying party from damages arising from counterparty's breaches of agreement applied to direct, as well as third-party, claims; scope and extent of duty to indemnify are to be determined from contract itself); Spencer Sav. Bank, S.L.A. v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 217785 (New Jersey, 2018).

C. First Party and Third Party Construction Coverage Pre-Litigation Claims

- Whether "insured contract" coverage would extend to subcontractors first party indemnity claims by developers or general contractors that make repairs where no lawsuit or claim has been made by a third party homeowner, homeowner's association or commercial landowner is less clear based upon existing legal authority, but the argument would be the same as the argument for coverage under a third party indemnity claim assuming the indemnitor was found to be liable for negligent construction.

III. Challenges and Successes in Right to Repair Claims

A. Benefits of Right to Repair Approach to Resolution

The successful resolution of the pre-litigation claim has the ability to create success for all involved by achieving an early, cost efficient resolution of the construction issues in the claim, it can enhance good will and confidence in the builders and the carriers and case prevent exacerbation of existing problems which can be harmful to the project down the road.

B. Risks of Right to Repair Resolution Plan

Our presentation and outline of this program focusses on the key issues from each perspective on the perspective of the contractors, risk managers, coverage counsel, defense counsel and carriers on these types of approaches. These can be problematic if where a release of claims cannot be obtained or where the size of the

claims is significant. Repair approaches are becoming more common as an effective method of resolution claims where defective construction is a core component of the dispute, however prior experience in these areas and a proactive team committed to the process is essential to success the taking this path of resolution for your matter.

Construction Right to Repair Laws

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STATE	RIGHT TO REPAIR	STATUTE
Alabama	No	No Right to Repair Statute
Alaska	Yes	Alaska Stat. §§ 09.10.054, AS 09.45.881 - 09.45.899
Arizona	Yes	Ariz. Rev. Stat. §§ 12-552, 12-1361 - 12-1366
Arkansas	No	No Right to Repair Statute
California	Yes	CA Civil Code 895 - 945.5
Colorado	Yes	Colo. Rev. Stat. §§ 13-20-801 - 13-20-808
Connecticut	No	No Right to Repair Statute
Delaware	No	No Right to Repair Statute
District of Columbia	No	No Right to Repair Statute
Florida	Yes	Fla. Stat. §§558.001 - 558.005
Georgia	Yes	Ga. Code §§8-2-35 - 8-2-43
Hawaii	Yes	Haw. Rev. Stat. §§ 672E-1 - 672E-13
Idaho	Yes	Idaho Code §§ 6-2501 - 6-2504
Illinois	No	No Right to Repair Statute
Indiana	Yes	Ind. Code §§ 32-27-3-1 -3-27-3-14
Iowa	No	No Right to Repair Statute
Kansas	Yes	Kan. Stat. §§ 60-4701 - 60-4710
Kentucky	Yes	Ky. Rev. Stat. §§ 411.250 - 411.266
Louisiana	Yes	La. Rev. Stat. 9:3141 -9:3150
Maine	No	No Right to Repair Statute
Maryland	No	No Right to Repair Statute

STATE	RIGHT TO REPAIR	STATUTE
Massachusetts	No	No Right to Repair Statute
Michigan	No	No Right to Repair Statute
Minnesota	Yes	Minn. Stat. §§ 327A.01 - 327A.08
Mississippi	Yes	Miss. Code. §§ 83-58-1 -- 83-58-17
Missouri	Yes	Mo. Rev. Stat. §§ 436.350 - 436.365
Montana	Yes	Mont. Code §§ 70-19-426 - 70-19-428
Nebraska	No	No Right to Repair Statute
Nevada	Yes	Nev. Stat. §§ 40.600 - 40.695
New Hampshire	Yes	N.H. Rev. Stat. §§359-G:1 -- 359-G:8
New Jersey	No	No Right to Repair Statute
New Mexico	No	No Right to Repair Statute
New York	Limited	N.Y. Gen. Bus. Law §777-a
North Carolina	No	CPLR 214-d
North Dakota	Yes	N.D. Cent. Code § 43-07-26
Ohio	Yes	Ohio Rev. Code §§ 1312.01 -- 1312.08
Oklahoma	Limited	Okla. Stat. tit. 15 §§ 765.6, construction contracts may include a right to repair provision
Oregon	Yes	Or. Rev. Stat. §§ 701.560 - 701.600
Pennsylvania	No	No Right to Repair Statute
Rhode Island	No	No Right to Repair Statute
South Carolina	Yes	S.C. Code §§40-59-810 -- 40-59-860
South Dakota	Yes	S.D. Codified Laws §§ 21-1-15 - 21-1-16
Tennessee	Yes	Tenn. Code §§ 66-36-101 -- 66-36-103
Texas	Yes	Tex. Prop. Code Ann. §§ 27.001 -27.007
Utah	No	No Right to Repair Statute
Vermont	Limited	Vt. Stat. tit. 27A, § 3-124
Virginia	No	VA Code § 55-70.1 Repealed
Washington	Yes	Wash. Rev. Code §§ 64.50.005 - 64.50.060

STATE	RIGHT TO REPAIR	STATUTE
West Virginia	Yes	W. Va. Code §§21-11A-1 -- 21-11A-17
Wisconsin	Yes	Wis. Stat. §895.07
Wyoming	No	No Right to Repair Statute

A State-By-State Guide to Construction Anti-Indemnity Statutes

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
Alabama		No statute. Indemnity provisions generally held valid. Indemnification for an indemnitee's own negligence must be clearly and unequivocally stated. <i>Craig Constr. Co., Inc. v. Hendrix</i> , 568 So.2d 752 (Ala. 1990). There is a limit to Alabama's acceptance of broad indemnity agreements. "Agreements that purport to indemnify another for the other's intentional conduct are void as a matter of public policy." <i>Price-Williams Associates, Inc. v. Nelson</i> , 631 So. 2d 1016, 1019 (Ala. 1994)	Yes	Yes	Yes
Alaska	Construction & Design	Alaska Statute § 45.45.900	No	Yes	Yes
Arizona	Construction & Design	Ariz. Rev. Stat. § 34-226 & § 41-2586 (public construction) and 32-1159 (private construction)	No	Private Contracts Only	Yes
Arkansas	Construction & Design	A.C.A. § 4-56-104; <i>Arkansas Power & Light Co. v. Home Ins. Co.</i> , 602 F.Supp. 740, 746 (E.D. Ark. 1985). A.C.A. § 22-9-214 (public construction).	No	Yes	Yes
California	Residential Construction Contracts post Jan. 1, 2009	Cal. Civ. Code § 2782(d)	No	No	Yes

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
California	Non-residential Construction Contracts	Cal. Civ. Code § § 2782 & 2782.05 (Contracts entered into on or after January 1, 2013 will no longer be allowed to contain indemnification for the indemnitee's own active negligence.)	No	Yes but only for passive fault for contracts entered into before Jan 1, 2013	Yes
Colorado	Construction	C.R.S. § 13-21-111.5. (Applicable to construction agreements entered into on or after July 1, 2007). For construction contracts entered into before July 1, 2007, indemnification is allowed for the indemnitee's own negligence if clearly and unequivocally stated. <i>Williams v. White Mountain Constr. Co.</i> 749 P.2d 423, 426 (Colo. 1998)	No (except for contracts entered into before July 1, 2007)	No (except for contracts entered into before July 1, 2007)	Yes
Colorado	Construction & Design with Public Entities	C.R.S. § 13-50.5-102	No	No	Yes
Connecticut	Construction	Conn. General Statute § 52-572k (Applicable to contracts entered into on or after October 14, 1977.)	No	No	Yes
Delaware	Construction & Design	Del. Code Ann. Tit. 6 § 2704	No	No	Yes

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
District of Columbia	Construction	No statute.			Yes
Florida	Construction	Fla. Stat. § 725.06 (Applicable to contracts entered into on or after July 1, 2001.)	No, unless there is a monetary limit.	No, unless there is a monetary limit.	Yes
Florida	Design	Fla. Stat. § 725.08 (Applicable to contracts entered into on or after May 25, 2000.)	No	No	Yes
Georgia	Construction	Ga. Codes Ann. § 13-8-2(b)	No	Yes	Yes
Georgia	Design	Ga. Codes Ann. § 13-8-2	No	No	Yes

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
Hawaii	Construction	Hawaii Rev. Stat. § 431:10-222; <i>Haole v. State</i> , 111 Haw. 144 (Haw. 2006). (Applicable to contracts entered into on or after the statute's 1977 effective (specific date is not stated).	No	Yes	Yes
Idaho	Construction	Idaho Code Section § 29-114.	No	Yes	Yes
Illinois	Construction	740 ILCS 35/1	No	No	Yes
Indiana	Construction & Design (except Highway)	Ind. Code § 26-2-5-1 (construction & design) & § 26-2-5-2 (exception for construction and design contracts for projects that constitute dangerous instrumentalities and cannot be insured) ; <i>GKN Co. v. Starnes Trucking, Inc.</i> 798 N.E. 2d 548, 552 (Ind. Ct. App. 2003)	No	Yes	Yes
Iowa	Construction & Design	Iowa Code 537A.5.	No	No	Yes
Kansas	Construction & Design	Kan. Stat. Ann. § 16-121 (Applicable to contracts entered into on or after January 1, 2009.)	No	No	Yes

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
Kentucky	Construction & Design entered on or after	Ky. Rev. Stat. § 371.180 (Applicable to contracts entered into on or after June 20, 2005.)	No	No	Yes
Louisiana	Design & Construction	La. Rev. Stat. § 9:2780.1. Effective January 1, 2011. (prohibits indemnification for indemnitee's negligence over which	No	No	Yes
Maine		No statute. <i>State Farm Mutual. Ins. Co. v. Koshy</i> , 995 A.2d 651, 667-668 (Me. 2010)			Yes
Maryland	Construction & Design	Md. Code Ann., Cts & Jud. Proc. § 5-401	No	Yes	Yes
Massachusetts	Construction	Mass. Gen. Laws Ch. 149 § 29C; <i>Rush v. Norfolk Elec. Co., Inc.</i> 70 Mass. App. Ct. 373 (2007) (indemnity for entire loss, even	No	Yes	Yes
Michigan	Construction	Mich. Comp. Laws § 691.991; <i>Peeples v. Detroit</i> , 297 N.W.2d 839 (Mich. App. 1980)	No	Yes.	Yes
Minnesota	Construction	Minn. Stat. Ann. §§ 337.01- 337.05 (exceptions stated for an owner, a responsible party, or a governmental entity	No	No	Yes
Mississippi	Construction	Miss. Code Ann. § 31-5-41	No	No	Yes
Missouri	Construction	Mo. Rev. Stat. § 434.100 (exceptions stated for contracts between state agencies and private persons and governmental entities)	No	No	Yes
Montana	Construction	Montana Code Ann. § 28-2-2111 (private construction and design) (enacted 2003) & Montana Code Ann. § 18-2-124	No	No	Yes
Nebraska	Construction	Nebraska Rev. Stat. § 25-21, 187(1)	No	No	Yes
Nevada	Residential Contracts post February 24,	Nev. Rev. Stat. Ann. § 40.693 (contracts requiring subcontractor to indemnify the general contractor/developer for the	Limited	Limited	Yes
New Hampshire	Construction & Design	N.H. Rev. Stat. Ann. § 338-A:1 (design) N.H. Rev. Stat. Ann. § 338-A:2 (construction)	No	No	Yes
New Jersey	Construction & Design	N.J. Stat. Ann. § 2A:40A-1 (construction) & § 2A:40A-2 (design)	No	Yes	Yes
New Mexico	Construction & Design	N.M. Stat. Ann. § 56-7-1 (construction & design contracts) & § 56-7-2 (oil, gas, and water wells or mineral mines)	No	No	Yes

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
New York	Construction & Design	N.Y. Gen Oblig. Law § 5-322.1 (construction); N.Y. Gen. Oblig. Law § 5-324 (design professional seeking indemnity for defects in	No	No	Yes
North Carolina	Construction & Design	N.C. Gen. Stat. Ann. 22B-1	No	No	Yes
North Dakota		No specific anti-indemnity statute. N.D. Cent. Code § 9-08-02. (No indemnification for intentional conduct); N.D. Cent. Code § 9-08-			Yes
Ohio	Construction & Design	Ohio Rev. Code Ann. § 2305.31	No	No	Yes
Oklahoma	Construction	Okla. Stat. Ann. Tit. 15, § 221	No	No	Yes
Oregon	Construction & Design	Or. Rev. Stat. § 30.140; <i>Walsh Construction Co. v. Mutual Enumclaw</i> , 338 Or. 1 (2005) (statute applies to additional insured claims)	No	No	Yes
Pennsylvania	Design Contracts - Design	Pa. Stat. Ann. Tit 68 § 491	No	In limited circumstances – see statute.	Yes
Rhode Island	Construction & Design	R.I. Gen. Law § 6-34-1	No	No	Yes
South Carolina	Construction & Design	S.C. Code Ann. § 32-2-10	No	Yes	Yes
South Dakota	Construction & Design	S.D. Codified Laws § 56-3-16 (design) & § 56-3-18 (construction)	No	Yes	Yes
Tennessee	Construction	Tenn. Code Ann. § 62-6-123	No	Yes	Yes
Texas	Construction & Design	Tex. Ins. Code § 151.001 <i>et. seq.</i> , § 151.102 in particular. Effective Jan. 1, 2012. (Excluding residential construction and	No	No	Yes
Texas	Residential Construction	Texas imposes the fair notice requirement which includes the express-negligence test and the conspicuousness requirement.	If clearly stated.	If clearly stated.	Yes
Utah	Construction & Design	Utah Code Ann. § 13-8-1 (construction) (Applicable to contracts entered into on or after the statute's 1969 effective (specific	No	Yes, in limited circumstances (Utah	Yes
Vermont		No statute. Indemnification contracts allowed if clearly stated. <i>See Tateosian v. Vermont</i> , 945 A.2d 833, 841 (Vt. 2007)		Yes	

STATE	CONTRACTS	STATUTES & CASE LAW	INDEMNITY		
			Sole Negligence of Indemnitee	Indemnitee's Concurrent Negligence	Indemnitor's Negligence (Sole & Concurrent)
Virginia	Construction & Design	Va. Code Ann. § 11-4.1 (construction) & § 11-4.4 (design) (For construction contracts, applicable to	No	Yes	Yes
Washington	Construction & Design	Wash. Rev. Code Ann. § 4.24.115 (For concurrent negligence, applicable to contracts entered into after June 11, 1986.)	No	No (Concurrent limited to	Yes
West Virginia	Construction	W. Va. Code § 55-8-14	No		Yes
Wisconsin	Construction	Wis. Stat. § 895.447 Applicable to contracts entered into after July 1, 1978.)	No	No	Yes
Wyoming		No general anti-indemnity statute. Indemnification agreements allowed if clearly stated. <i>United Pacific Resources Co. v.</i>	If clearly stated.	If clearly stated.	Yes