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What is Broken in Right to Repair Statutes?

I. Introduction

Approximately 33 states have enacted so-called Right to Repair statutes to address the growing number of construction defect suits by homeowners against builders and other construction professionals. The legislative intent of these statutes is to provide owners and builders an opportunity to resolve claims without the need for protracted litigation. Initially, the framework and application of these statutes was very broad, and they tended to be pro-homeowner. More recently, homebuilder groups have lobbied for amendments to make the pre-litigation process more meaningful, though they now tend to be more cumbersome.

There are certain common elements within the statutes across jurisdictions, on which we will focus in this session. In general, right to repair statutes impose procedural requirements and a timeline for managing construction defect claims prior to filing a lawsuit. When a defect is discovered, the owner is typically required to notify the builder of the defect within a certain period before filing suit. Builders are then generally subject to deadlines to respond to the owner's notice, conduct inspection(s), notify subcontractors, and make an offer to repair or settle, or deny the owner's claim. Right to repair statutes are aimed at facilitating resolution for construction defect claims without the need for litigation. However, some statutes are not effectively constructed to meet this goal.

II. Notice Requirements

A. Timelines and Specificity

In addition to deadlines for an owner to provide a builder with notice of alleged defects prior to filing suit, many statutes impose strict timelines for a builder to respond to that notice. In addition, the specificity of the required notice by the owner varies considerably. Several states only require the owner to provide "reasonable detail" to the builder when notifying them of defects, which can lead to vague defect notifications, frustrating a builder in his ability to respond.

In Florida, an owner must file a written notice of claim to the person they deem responsible at least 60 days prior to filing suit (120 days if the matter involves an association representing 20 or more parcels). Typically, the owner does not know who the subcontractors are, so notice is going to the general contractor. While the notice must reasonably describe each alleged defect and its location, the owner has no obligation to perform destructive or other testing for the purpose of the notice. The responding builder has only 10 days (30 days of > 20 parcels) from receipt of the notice to place subcontractors on notice and may perform reasonable inspection within 30 days (50 days if > 20 parcels). Subcontractors then have 15 days to provide a written response to the builder. The builder ultimately has 45 days from receipt of the notice to respond to the owner with an offer to (1) repair, (2) settle by payment, (3) settle with a combination of repair and payment or (4) dispute the claim. (Fla. Stat. Sec. 558.001 - .005).

As a result of the short timeframes, subcontractors are often not included in the process and there is minimal if any destructive testing completed. Thus, it is difficult to identify the actual responsible party(ies). Moreover, if the builder makes an offer of repairs, the owner is not obligated to accept them and litigation often ensues.

By contrast, the requirements under Nevada's recently revised Right to Repair statute (Nev. Rev. Stat. 40.600, *et seq*.) are more specific, and the timelines less restrictive. Once an owner provides written notice to a builder, the builder has 30 days to forward the notice to any subcontractors. Subcontractors have 30 days from receipt of notice to inspect and provide the builder with a written statement indicating if the subcontractor has elected to make repairs and the timeframe for said repairs. Within 90 days of receipt of notice from the owner, the builder must submit a written response to the owner stating whether the builder elects to repair, settle by payment or disclaim liability, including the reasons for doing so. If the parties agree to repairs, they must be completed with 105 days (150 if there are more than 5 owners). Additional time may be agreed upon by the parties.

The notice from an owner in Nevada must be signed by each named homeowner, verifying the existence of the defects in his or her residence. If a notice is sent on behalf of a homeowners' association, it must be signed by a member of the executive board or an officer of the HOA. The notice must identify in specific detail each alleged defect and the exact location of each defect. In addition, the owner must describe in reasonable detail the cause of the defects, if known, and the nature and extent of the damage or injury resulting from the defects.

Other states notice requirements and timelines may vary significantly. For instance, California Civil Code Sec. 895, *et seq.* (also known as S.B. 800) gives a builder the option of participating in the statutory process or creating and enforcing its own pre-litigation procedures, so long as those procedure re included in the sales contract (Cal. Civil Code Sec. 914). By statute, an owner must provide written notice to the builder that describes "in reasonable detail" the claimed defect. The builder may then conduct an inspection the property within 14 days of acknowledging receipt of the claim. Within 30 days of inspection, the builder may make an offer to repair the defect, at which point the homeowner has 30 days to authorize the repair. If the builder fails to acknowledge the notice of claim or does not make an offer to repair, the claimant may then file suit.

In Arizona, the Purchaser Dwelling Action (PDA) statutes address "sellers" of new homes, which can include builders. With recent amendments to the PDA (A.R.S. Sec. 12-1361 *et al*.), an owner must provide written notice to a builder, specifying in reasonable detail the alleged defects. A.R. S. Sec. 12-1363 (A). The builder has 60 days to submit a written response offering either repair/replacement of the defects or payment for the defects. The owner may reject the offer and must provide the factual

basis for the rejection. In a multiunit dwelling action, the owners comply by providing "fair and representative sample(s)" of the alleged defects.

See the appendix for a summary of the various notice requirements and timelines.

B. Impact on Insurance Benefits

In Florida, the United States District Court has held that actions taken under the right to repair statutes did not constitute a "civil proceeding" under an insurance policy and, therefore, not a "suit" obligating the insurer to defend or indemnify. Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co., 2015 WL 3539755, at *9 (S.D. Fla., June 4, 2015, 13-80831-CIV). Thus, some carriers will not participate in the investigation or defense until a suit is filed. General contractors are nonetheless putting subcontractors on notice and issuing additional insured tenders. While there is no current duty to defend, if arbitration is invoked or suit filed, it could trigger the duty to defend, depending on the language of the respective AI endorsements.

Despite the Altman case, some carriers are participating early on in the process and attempting to determine actual damages and liability when possible in order to assist in resolution of the claim, prior to litigation. This is done on a case by case basis for the most part and depends on the trade and number of homes/size of project involved.

At the other end of the spectrum, in Colorado, Section 13-20-808 of the Colorado Revised Statues specifically mandates that an insurer's duty to defend a construction professional is triggered by a notice of claim under its Construction Defect Action Reform Act, or CDARA.

Another aspect impacting insurer's participation in a statutory process will depend on the coverage trigger. In Florida, there is a split decision on trigger. It is between manifestation and injury in fact. Due to the conflicting trigger, it is difficult to determine which policy/policies are triggered. This is further compounded by some carriers agreeing to participate in the process and others withholding until actual suit is filed. California has recognized a continuous trigger, which acts to encourage insurer participation in the process. Jurisdictions with an Injury-In-Fact trigger will also encourage insurer participation.

It will ultimately be at the discretion of insurers whether to exercise the right to investigate construction defect claims made within the context of right to repair statutes. Generally, it is in the interest of insurers to take advantage of the discovery available within the process and work to resolve claims at an early stage.

III. Procedure

In Florida, upon request, the owner and the builder have a mutual duty to exchange specific documents relating to the construction defects, including design plans, specifications, and as-built plans; any documents detailing the design drawings or specifications; photographs, videos and expert reports that describe any defect upon which the claim is made; subcontracts; and purchase orders for the work that is claimed defective or any part of such materials. In addition, the owners must disclose maintenance records and other documents related to the discovery, investigation, causation, and the extent of the

alleged defect identified in the notice of claim and any resulting damage. The request must specifically reference Fla. Stat. 558.004(15) and indicate that the requesting party will pay reasonable reproduction costs.

In the event of subsequent litigation, any party who failed to provide such requested documents shall be subject to such sanctions as the Court may impose for discovery violations. Expert reports exchanged between the parties may not be used in any subsequent litigation for any purpose, unless the expert, or a person affiliated with the expert, testifies as a witness or the report is used or relied upon by an expert who testifies on behalf of the party for whom the report was prepared.

The advantage to the process in Florida is that it can be utilized by a builder to develop knowledge of the claims being brought against it. Assertive use of the process by a builder can result in access to the property for inspection, destructive testing, photographs and videos and review of plans and records, including contracts, to identify appropriate responsible parties. In addition, the process also allows for early mediation to avoid litigation costs commonly sought by owners in litigation.

In Nevada, the owner must allow the builder and subcontractors access to the property to determine the nature and extent of any defects and the necessary repairs, and be present for the inspection to identify the exact location of each alleged defect, and must provide a reasonable opportunity to repair. The challenge here is the tight time constraints, as noted above.

California's process is voluntary, at the discretion of the builder, pursuant to the sales contract, and allows a builder to make a cash offer, an offer to repair, or to request additional inspection. The owner may also request alternative contractors inspect. The statute also requires mediation before a legal action may be filed.

In Arizona, the PDA provides the builder a right, after receiving written notice of a claim, "to repair or replace any alleged construction defects." In addition, the builder need not repair all of the alleged defects. The owner may not file suit until after repairs are completed. A.R. S. Sec. 12-1362. Arbitration may only be commenced after any repairs. The statute of repose is tolled during the repair period. A.R. S. Sec. 1363(6).

IV. Post-Investigation/Resolution

Mediation is a commonly sought in Florida to avoid litigation costs. However, the success of mediation is dependent on the participation of all parties, including subcontractors and insurers.

In California, S.B. 800 precludes the builder from obtaining a release or waiver in exchange for repair work and requires mediation before suit may be filed by an owner.

While an election to repair may not be conditional upon a release of liability, the Nevada statute does provide for dismissal without prejudice of any action filed by an owner that does not comply with the above notice requirements. The Nevada statute also requires mediation prior to filing suit, unless all parties agree in writing to waive this requirement. In addition, an owner may not send a notice of defects to a builder unless he has submitted the claim under a homeowners warranty or insurance that that claim has been denied. Finally, if an owner unreasonably rejects a reasonable settlement offer, the

court may deny his request for attorneys' fees and costs and may award such fees and costs to the builder.

Arizona's PDA requires the court to award reasonable attorney fees, expert fees and taxable costs to the "successful party." A.R. S. Sec. 12-1364. The builder is considered the successful party if its offer is rejected and the judgment obtained is "less favorable" to the purchaser. If the judgment is more favorable, the purchaser is the successful party.

California courts have disagreed as to whether the procedures outlined by the right to repair statute are the exclusive remedy for addressing construction defect claims, precluding plaintiffs from filing suit for common law claims without complying with the right to repair procedures. Liberty Mut. Ins. Co. v. Brook eld Crystal Cove LLC, 219 Cal.App.4th 98 (Cal.App.4 Dist., 2013); McMillin Albany LLC v. Super. Ct., 239 Cal.App.4th 1132 (Cal. App. 5 Dist., 2015).

V. Conclusion

While there are common elements in the 30+ right to repair statutes, the nature and effectiveness of such pre-litigation processes varies based on a number of considerations. These include the laws of the various states, the participation of builders, subcontractors and insurers in the process and the level of remedies enforced by the courts for non-compliance with the statutes.