Subrogation & Recovery Alert!

News Concerning Recent Subrogation & Recovery Issues

April 26, 2004

When the Dream House Becomes a Nightmare: A Survey of the Recent Spread of “Builder Friendly Construction Acts” in the U.S., Part 4

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We conclude our survey of Residential Construction Liability-type Acts with a review of the statutes adopted in Nevada, Oregon, South Carolina, Texas, Washington and West Virginia. As you will recall, Part 1 of our survey reviewed the statutes adopted in Alaska, Arizona and California. Part 2 reviewed those adopted in Colorado, Florida and Idaho; and Part 3 looked at the RCLA-type statutes adopted in Indiana, Kansas, Kentucky and Montana.

STATE: NEVADA
(effective date: July 1, 1995, amended effective August 1, 2003)

1. Who Is Subject to Act?
Owners of residences, including homeowners’ associations, asserting claims for construction defects 1) causing damage to real property, 2) presenting an unreasonable risk of injury to persons or property, 3) which have not been completed in a good and workmanlike manner, or 4) which violate law, ordinances or codes. NRS § 40.610, 40.615

2. Who Is Protected?
Contractors, subcontractors, suppliers, design professionals, and developers. NRS §40.620.

3. Notice Required Before Filing Suit
Written notice to contractors required prior to filing action. Notice may be sent to subcontractors, suppliers or design professionals if claimant knows contractor is no longer doing business in state or is no longer licensed. NRS §40.645.

No notice is required if 1) contractor, subcontractor, supplier or design professional has already filed action against claimant or 2) claimant has filed a criminal complaint alleging that a criminal act has been committed or is threatened by respondent against claimant or claimant’s property. NRS §40.645(6).

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<th>Cherry Hill</th>
<th>Denver</th>
<th>Newark</th>
<th>Seattle</th>
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*Affiliated with the Law Offices of J. Goldberg & D. Grossman
Claim must be submitted to mediation prior to filing action unless waiver in writing by parties. NRS §40.680.

4. Consequences Of Claimant’s Failure To Comply
Action shall be dismissed without prejudice and court shall order claimant to comply with Act’s requirements before refiling. If dismissal without prejudice would cause subsequent action to be barred by applicable statute of limitations or statute of repose, then court shall stay proceedings until claimant complies with Act. 2003 Nev. Stat. Chap. 362, §11(2).

If claimant unreasonably rejects a written settlement offer from respondent prior to action, then claimant may be denied attorneys fees and costs in action, and costs and attorneys fees may be awarded to respondent. NRS §40.650.

5. Consequences Of Respondent’s Failure To Comply
If respondent fails in good faith to respond to notice of claim, fails to make a good faith offer of settlement, fails to agree to or accept a mediator or fails to participate in pre-suit mediation, then claimant need not comply with Act’s provisions and the Act’s limitations on damages and defenses to liability do not apply. NRS §40.650(2).

6. Effect On Statute Of Limitations
If dismissal without prejudice would cause subsequent action to be barred by applicable statute of limitations or statute of repose, then court shall stay proceedings until claimant complies with Act. 2003 Nev. Stat. Chap. 362, §11(2).

Statute of limitations is tolled until 30 days after mediation is concluded or waived in writing. NRS §40.695.

7. Effect On Damages
Contractor is not liable for damages resulting from 1) acts or omissions of persons other than contractor, its agent, employees and subcontractors, 2) failure of others to mitigate damages or maintain residence, 3) normal wear, tear or deterioration, 4) normal shrinkage, swelling, expansion or settlement, or 5) defects disclosed in understandable writing prior to purchase of residence. NRS §40.640.

Claimant may only recover the following damages: 1) reasonable attorneys fees, 2) reasonable cost of repairs to remedy defect, 3) reduction in market value of residence, if any, because of a structural failure, 4) loss of use, 5) reasonable value of any other damaged property, 6) consultants’ fees, and 7) interest provided by statute. NRS §40.655.

8. Other Considerations
In actions against design professionals, attorney for claimant shall file affidavit of merit based on expert consultation together with complaint. NRS §40.68843

The Nevada Act is complex, and recent amendments have not been fully codified as of the date of this survey.
STATE: OREGON  
(effective date: January 1, 2004)

1. Who Is Subject to Act?  
Owners of a residence, including those who possess an interest in the residence or in the land, or who have entered into a contract for the purchase of an interest in a residence, and includes a homeowners’ association. 2003 Or. Laws. Chapt. 660, §1(3).

2. Who Is Protected?  
Contractors, subcontractors or suppliers. 2003 Or. Laws. Chapt. 660, §2(1).

3. Notice Required Before Filing Suit  
Written notice prior to commencing action or arbitration. 2003 Or. Laws. Chapt. 660, §2(1).

4. Consequences Of Claimant’s Failure To Comply  
Action or arbitration must be dismissed without prejudice. A new action or arbitration may not be commenced unless the claimant follows the Act’s procedures. 2003 Or. Laws. Chapt. 660, §8.

5. Consequences Of Respondent’s Failure To Comply  
None

6. Effect On Statute Of Limitations  
Statute of limitations or statute of repose shall be extended until the later of: 1) 120 days after the claimant receives notice of denial of the claim, 2) 120 days after claimant rejects a written offer to perform repairs or pay monetary compensation, or 3) 30 days after the date agreed upon for completion of repairs or payment of monetary compensation. 2003 Or. Laws. Chapt. 660, §6(1).

7. Effect On Damages  
None

8. Other Considerations  
Act does not apply to claims for personal injury or death, or claims filed pursuant to ORS 671.703, ORS 701.139 or against persons licensed under ORS 671.010 to 671.220. 2003 Or. Laws. Chapt. 660, §9.

STATE: SOUTH CAROLINA  
(effective date: July 2, 2003)

1. Who Is Subject to Act?  
Homeowners, including subsequent purchasers, making claims for damage to real or personal property caused by a defect in the design, construction, condition, sale or remodeling of a dwelling. S.C. Code Ann. §40-59-820(1).

2. Who Is Protected?  

3. Notice Required Before Filing Suit  

4. Consequences Of Claimant’s Failure To Comply  
Suit will be stayed until claimant has complied with Act. S.C. Code Ann. §40-59-830.
5. Consequences Of Respondent’s Failure To Comply
   None

6. Effect On Statute Of Limitations
   None

7. Effect On Damages
   None

8. Other Considerations
   Compliance with applicable building codes in effect at the time of construction “conclusively establishes” that the dwelling was constructed in accordance with accepted trade standards for good and workmanlike construction. S.C. Code Ann. §40-59-820(3)(d).


STATE: TEXAS
(effective date: 1989, as amended; latest amendments effective September 1, 2003)

1. Who Is Subject to Act?
   Persons making claims against contractors for damage or other relief in connection with residential construction defects, including subsequent purchasers. Tex. Prop Code §27.001, §27.002.

2. Who Is Protected?
   Contractors, builders and any persons contracting with an owner for construction and sale of a new residence or alteration or repair of a residence. Also includes a risk retention group that insures all or part of a contractor’s liability. Tex. Prop Code §27.001(5).

3. Notice Required Before Filing Suit
   Written notice 60 days before filing action or arbitration. Tex. Prop Code §27.004(a).
   Subrogee or assignee of claimant is required to comply with notice requirements of Act.

   If subrogee or assignee fails to comply with Act or fails to request state-sponsored inspection and dispute resolution under Chapter 428, if applicable, before performing repairs, then contractor is not liable for cost of repairs or any damages caused by repairs made by others at the request of the subrogee or assignee. Tex. Prop Code §27.003(a)(2).

4. Consequences Of Claimant’s Failure To Comply
   Action shall be automatically dismissed on motion of contractor unless dismissal is controverted by claimant; however, action shall be abated rather than dismissed if applicable statute of limitations has expired, in order to allow claimant to comply with the Act’s requirements. Tex. Prop Code §27.004(c), (d).

   If claimant rejects reasonable offer to settle or fails to permit a reasonable opportunity to inspect or repair the defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of 1) the fair market value of the contractor’s last offer or 2) the amount of a reasonable monetary settlement or purchase offer,
and may only recover costs and attorneys fees incurred before the offer was rejected. Tex. Prop Code §27.004(e).

5. Consequences Of Respondent’s Failure To Comply
   If contractor rejects reasonable offer to settle, limitations of damages in Tex. Prop Code §27.004(e) do not apply. Tex. Prop Code §27.004(f). If contractor refuses to initiate repairs under an accepted settlement offer, limitations on damages in Tex. Prop Code §27.004(g) do not apply. Tex. Prop Code §27.004(q).

6. Effect On Statute Of Limitations
   See above.

7. Effect On Damages
   Contractor not liable for damages caused by 1) negligence of a person other than contractor and its agents, employees and subcontractors, 2) failure of others to mitigate damages, 3) failure of others to maintain the residence, 3) normal wear, tear or deterioration, 4) normal shrinkage, or 5) contractor’s reliance on written information from official government records, if the contractor did not know or could not reasonably have known that the information was false or inaccurate. Tex. Prop Code §27.003.

Claimant may only recover the following economic damages: 1) reasonable cost to repair construction defect, 2) reasonable and necessary cost for the replacement or repair of damaged goods in the residence, 3) reasonable costs for temporary housing, 4) reduction in current market value, if any, after defect is repaired, if defect is a structural failure, and 5) attorneys fees and consulting fees. Tex. Prop Code §27.004(g).

8. Other Considerations
   Act’s notice requirements do not apply to claims for personal injuries, survival, wrongful death or for damage to goods. Tex. Prop Code §27.002(a)(1).

   Party who files groundless action, or action brought in bad faith or for purposes of harassment is liable to defendant for costs and attorneys fees. Tex. Prop Code §27.0031.

   Act does not prohibit parties from agreeing to other forms of alternative dispute resolution, such as binding arbitration. High Valley Homes, Inc. v Fudge 2003 Tex. App. LEXIS 3273 (3rd Dist. Ct. App., April 17, 2003).


STATE: WASHINGTON
(effective date: June 13, 2002)

1. Who Is Subject to Act?
   Homeowners, including subsequent purchasers, or homeowners’ associations, asserting claims for defects in construction of a residence causing damage to real or personal property. Wash. Rev. Code Ann. §64.50.010(1), (3), (5).
2. Who Is Protected?
Architects, builders, builder vendors, contractors, subcontractors, engineers, or inspectors. Wash. Rev. Code Ann. §64.50.010(4).

3. Notice Required Before Filing Suit
Written notice 45 days before filing action. Wash. Rev. Code Ann. §64.50.020(1).

Within 30 days after filing action, claimant must file and serve list of known construction defects. Wash. Rev. Code Ann. §64.50.030(1).

4. Consequences Of Claimant’s Failure To Comply
Action shall be subject to dismissal without prejudice and may not be recommenced until the claimant has complied with the Act’s requirements. Wash. Rev. Code Ann. §64.50.020(6).

5. Consequences Of Respondent’s Failure To Comply
Claimant need not comply with Act’s requirements unless respondent provides written notice in construction contract of Act’s requirements. Wash. Rev. Code Ann. §64.50.050(3).

6. Effect On Statute Of Limitations
Notice of claim tolls applicable statutes of limitations or repose. Wash. Rev. Code Ann. §64.50.020(8).

7. Effect On Damages
None

8. Other Considerations
Act does not apply to claims for personal injury or wrongful death. Wash. Rev. Code Ann. §64.50.010(1).

STATE: WEST VIRGINIA
(effective date: June 6, 2003)

1. Who Is Subject to Act?
Homeowner, including subsequent purchaser, who asserts a claim for damage to real or personal property caused by a construction defect. W. Va. Code §21-11A-4(1), (3).

2. Who Is Protected?
Licensed contractors who have entered into a contract directly with claimant. W. Va. Code §21-11A-4(6), §21-11A-8(b).

3. Notice Required Before Filing Suit
Written notice of claim no later than 90 days prior to filing an action, including alternative dispute resolution procedure. W. Va. Code §21-11A-8(d).

4. Consequences of Claimant’s Failure To Comply
Action shall be dismissed without prejudice and may not be refiled until claimant has complied with requirements of Act. W. Va. Code §21-11A-7(b).

5. Consequences of Respondent’s Failure To Comply
None

6. Effect On Statute Of Limitations
Statute of limitations tolled until six months after termination of

7. Effect On Damages
None

8. Other Considerations
Act does not apply to the following: 1) consumer claims under Chapter 46A; 2) actions against unlicensed contractors; 3) actions demanding $5,000 or less; 4) actions alleging imminent threat of injury to persons or property; 5) actions alleging a defect that causes the property to be uninhabitable; 6) for personal injury or death. W. Va. Code § 21-11A-2.

Act does not apply to action by contractor, subcontractor, supplier or design professional against claimant or claimant’s counterclaims in such action. W. Va. Code §21-11A-3.

Compliance with applicable codes in effect at the time of construction is prima facie evidence of construction in accordance with accepted trade standards for good and workmanlike construction. W. Va. Code §21-11A-4(D).

Conclusion: As you have seen from the Alerts! in this series, each state’s statute differs in some respect from all others. It is very important to consult the specific statute involved in any subrogation claim involving residential, and in some cases commercial, construction defects before committing to any course of action.