CONSTRUCTION DEFECT CLAIMS: LEGAL CONSIDERATIONS IN IDAHO, OREGON AND WASHINGTON

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The following is a summary of the law of Washington, Oregon, and Idaho on three issues that are common to construction defect claims: (1) notice of claim statutes, (2) statutes of repose, and (3) warranties of workmanlike performance. However, please be advised that these materials are only a summary and do not replace the need to seek legal advice based on the facts of any given case. As any set of circumstances may materially affect how these laws are construed by the courts, please use these materials only as a way to identify issues that may affect the claim you are working on. Please make sure that you seek legal advice when you need to determine how these issues impact your case.

I. NOTICE OF CLAIM STATUTES

A. Background: The construction lobby has been successful in getting legislation passed that limits a plaintiff's ability to pursue construction defect claims. One of the common pieces of legislation being passed by several state legislatures is the notice of claim acts. These statutes usually require the plaintiff/property owner to provide the general contractor with notice of the specific construction defect they are claiming, as well as details about the amount of repairs, and the property owner usually has to give the contractor an opportunity to cure the defect before filing a lawsuit. It is very important to pay particular attention to the requirements of these statutes because some jurisdictions require "strict compliance" with these provisions, and failure to do so will usually lead to a dismissal of suit.

B. Northwest Region Notice of Claim Statutes: The following is a brief review of the notice of claim statutes in Washington, Oregon, and Idaho.
1. Washington: RCW 64.50.020

   a. Requires written notice to construction professional forty-five (45) days before filing suit.

   b. Must state that the claimant asserts a "construction defect" claim, and provide a description of the general nature of the defect.

   c. The construction professional must provide a written response within twenty-one (21) days of receiving the notice letter, and state either:

      i. Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the construction professional shall, based on the inspection, offer to remedy the defect, compromise by payment, or dispute the claim.

      ii. Offer to compromise and settle the claim by monetary payment without inspection. A construction professional's offer to compromise and settle a homeowner's claim may include, but is not limited to, an express offer to purchase the claimant's residence that is the subject of the claim, and to pay the claimant's reasonable relocation costs.

         - or -

      iii. State that the construction professional disputes the claim and will neither remedy the construction defect nor compromise and settle the claim.

   d. If the construction professional does not provide a written response within the required time frame or disputes the claim, the property owner can bring suit immediately. No further notice of any kind is required.

   e. If the property owner rejects the offer to inspect or offer to settle, prompt written notice of the rejection must be given to the construction professional. Property owner can bring suit any time after service of the rejection.

   f. If the property owner does not serve any response on the construction professional within thirty (30) days of being served with the construction professional's response, then the construction professional can rescind its offer in any time, but must serve a written notice that it is terminating its proposal.
g. If the property owner allows the construction professional to perform an inspection, reasonable access to the premises must be provided during normal working hours.

h. Within fourteen (14) days of the inspection, the construction professional must provide, in writing, to the property owner either:

i. A written offer to remedy the construction defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction necessary to remedy the defect described in the claim, and a timetable for the completion of such construction;

ii. A written offer to compromise and settle the claim by monetary payment; or

iii. A written statement that the construction professional will not proceed further to remedy the defect.

i. If the construction professional does not take any action to cure the defect or settle by monetary payment, property owner can file suit without any further notice.

j. If the property owner rejects the post-inspection offer to cure the defect or settle, it must notify the construction professional in writing. If property owner does not respond within thirty (30) days, the construction professional can revoke the offer anytime afterward in writing.

k. If the property owner accepts the offer to cure the defect or settle, written notice must be served on the construction professional within thirty (30) days and reasonable access to the property must be provided during regular working hours.

l. Any action commenced by a property owner without complying with the requirements of this statute will be subject to dismissal without prejudice, and may not be recommenced until the claimant has complied with the requirements of this section.

m. RCW 64.50.050 provides specific language that a construction professional must include in its bid or contract with the property owner. If it fails to include this language, it cannot later seek to dismiss the property owner's action for failure to comply with the statute.
n. "Construction professional" means an architect, builder, builder vendor, contractor, subcontractor, engineer, or inspector performing or furnishing the design, supervision, inspection, construction, or observation of the construction of any improvement to real property, whether operating as a sole proprietor, partnership, corporation, or other business entity.

2. **Oregon: ORS 70.565**

a. A property owner may not compel arbitration or commence a court action against a contractor, subcontractor or supplier to assert a claim arising out of or related to any defect in the construction, alteration or repair of a residence or in any system, component or material incorporated into a residence unless the owner has sent that contractor, subcontractor or supplier a notice of defect.

b. Notice must be sent by registered mail, return receipt requested.

c. A notice of defect sent by an owner must include:

i. The name and mailing address of the owner or the owner's legal representative, if any;

ii. A statement that the owner may seek to compel arbitration or bring a court action against the contractor, subcontractor or supplier;

iii. The address and location of the affected residence;

iv. A description of (A) Each defect; (B) The remediation the owner believes is necessary; and (C) Any incidental damage not curable by remediation as described in subparagraph (B) of this paragraph; and

d. Any report or other document evidencing the existence of the defects and any incidental damage.

e. Any contractor or subcontractor receiving a notice of a construction defect may request an opportunity to inspect. Request must be made in writing within fourteen (14) days of receiving notice of claim.

f. The written request to visually inspect the property must state the estimated time it will take to perform the inspection.
g. Any contractor or subcontractor that receives either a notice of claim or secondary notice of claim (usually from general contractor to subcontractor) must supply a response within ninety (90) days of receiving the notice, and it must be sent by registered mail, return receipt requested.

h. The contractor or subcontractor's response must state one or more of the following for each defect described in the notice of defect or secondary notice or discovered during the course of any visual examination or inspection:

i. An acknowledgement of the existence, nature and extent of the defect without regard to responsibility for the defect.

ii. A statement describing the existence of a defect different in nature or extent from the defect described in the notice of defect or secondary notice, without regard to responsibility for the defect.

iii. A denial of the existence of the defect.

iv. A copy of the written report or other document evidencing the result of the inspection and the existence or nonexistence of the defects described in the notice of defect or discovered during the inspection.

v. One or more of the following: (A) An offer to perform some or all of the remediation. The offer must specify the date by which the offered remediation will be completed; (B) An offer to pay a stated amount of monetary compensation to the owner for some or all of the acknowledged defects and any incidental damage. The offer must specify the date by which payment will be made; or (C) A denial of responsibility for some or all of the acknowledged defects or incidental damage.

i. If the property owner wants to accept the contractor, subcontractor, and/or supplier's offer to remedy or settle, it must accept the offer in writing within thirty (30) days. Failure to accept in writing within thirty (30) days means the offer is rejected.

j. If the contractor, subcontractor and/or supplier does not respond within thirty (30) days of receiving the notice letter, does not offer to cure or settle by monetary payment, does not perform as required by the offer to cure, or the property owner rejects the offer, the property owner may compel arbitration or file suit at any time without further notice.
k. Notice of defect letter and/or contractor's inspection reports are admissible in court and/or arbitration.

l. Written responses that contain offers that are rejected and any responses that contain rejections (unless counteroffer is accepted) are not admissible in court or at arbitration.

m. ORS 701.585 provides that the service of any written notice of construction defect tolls the statute of limitations for differing periods of time (check statute to see which period applies), but does not extend the statute of repose.

n. ORS 701.590 contains specific language for notice requirements that all contractors must include in their bids or contract.

o. If a property owner compels arbitration or commences a court action against any contractor, subcontractor or supplier to assert a claim arising out of or related to the construction, alteration or repair of a residence, and the owner has not followed this statutory procedure, the arbitrator or court must dismiss the arbitration or action without prejudice. The owner may not commence a new arbitration or action unless the owner follows the procedure set forth in this statute.

p. Statute does not apply to claims against architects, landscape architects, landscaping companies, professional engineers, or any claims involving personal injury or death.

3. **Idaho: Idaho Code §6-2503**

   a. Prior to commencing suit against a construction professional due to a construction defect, the property owner must serve notice on the construction professional that they are claiming a construction defect, including a reasonable description of the defect.

   b. Applies to architect, subdivision owner or developer, builder, contractor, subcontractor, engineer or inspector, performing or furnishing the design, supervision, inspection, construction or observation of the construction of any improvement to residential real property, whether operating as a sole proprietor, partnership, corporation, limited liability company or other business entity.
c. Any action commenced without complying with this requirement will lead to dismissal without prejudice until the property owner complies with the statute.

d. Service of written notice of a construction defect claim tolls the applicable statute of limitations for sixty (60) days, during which time the property owner cannot file suit.

e. Within twenty-one (21) days of service of notice of the claim, the construction professional must serve a written response that states:

i. Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the construction professional shall, based on the inspection, offer to remedy the defect, compromise by payment, or dispute the claim;

ii. Offer to compromise and settle the claim by monetary payment without inspection; or

iii. State that the construction professional disputes the claim and will neither remedy the construction defect nor compromise and settle the claim.

f. If the construction professional disputes the claim or does not respond, the property owner may commence suit without providing any further notice.

g. If the property owner rejects the proposal to inspect or offer to compromise and settle, it must provide the construction professional with notice in writing. Property owner may commence suit as soon as the rejection is served.

h. If the construction professional does not receive an acceptance or rejection within thirty (30) days after service of the offer or proposal, then it may terminate the proposal or offer by written notice at any time, and property owner may commence suit thereafter.

i. If property owner agrees to allow inspection, then reasonable access to property must be provided during normal working hours.

j. Within fourteen (14) days of completion of the inspection, the construction professional must serve on the property owner the following:
i. A written offer to remedy the construction defect at no cost to the claimant, including a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction necessary to remedy the defect described in the claim and a timetable for the completion of such construction;

ii. A written offer to compromise and settle the claim by monetary payment; or

iii. A written statement that the construction professional will not proceed further to remedy the defect.

k. If the construction professional does not cure the defect according to the agreed timetable or does not comply with the post-inspection requirements outlined above, then the property owner can file suit without any further notice.

l. If the property owner rejects the construction professional's offer to cure the defect or settle by monetary payment, the property owner must serve notice of such in writing. After serving the rejection, the property owner can file suit at any time without further notice.

m. If the construction professional does not receive an acceptance or rejection within thirty (30) days of service of the offer or proposal, it may terminate the offer at any time in writing to the property owner.

n. If the property owner accepts the construction professional's offer to cure the defect, it must accept in writing within thirty (30) days of receiving the offer.

o. §6-2504 limits the damages that are recoverable against a construction professional under a construction defect claim. Property owners should make sure that they comply with all of the conditions set forth in this section of the statute.

II. STATUTES OF REPPOSE

A. General/Background: Statutes of repose operate to limit the time period during which an action based on a construction defect claim can be filed. Filing after the statute of repose has expired will usually lead to dismissal of the lawsuit. The statute of repose usually commences upon the date of "substantial completion," which most often is the date that the certificate of occupancy is obtained. Each state may have a different way of measuring the statute of repose, and particular attention should be paid
to (a) when the statute of repose period commences (i.e., when the clock begins to tick), (b) whether the
discovery rule applies to extend the statute of repose period, and (c) to whom the statute is applicable.

B. Application: The statute of repose and the statute of limitations must be taken together to
determine the deadline for filing an action. Both of these time limitations apply to construction claims,
and the failure to compute the deadlines created by both could have negative consequences such as
dismissal of the claim.

C. Northwest Territory Statutes of Repose:

1. Washington- RCW 4.16.310
   a. Applies to "any person, arising from such person having constructed, altered or repaired any
      improvement upon real property, or having performed or furnished any design, planning, surveying,
      architectural or construction or engineering services, or supervision or observation of construction, or
      administration of construction contracts for any construction, alteration or repair of any improvement
      upon real property." RCW 4.16.300.
   b. All claims must accrue within six (6) years of date of substantial completion and be brought
      within applicable statute of limitation. The phrase "substantial completion of construction" shall mean the
      state of completion reached when an improvement upon real property may be used or occupied for its
      intended use.
   c. "Discovery rule" does not apply to extend period for filing suit beyond the six (6) year repose
      period. Claim must accrue within six (6) year period, and then must be filed within applicable statute of
      limitations period.
   d. If written notice of claim is properly served, statute of limitations for bringing construction defect
      claim is tolled for 60 days.

2. Oregon: ORS 12.135
   a. Applies to actions "arising from such person having performed the
      construction, alteration or repair of any improvement to real property or the
      supervision or inspection thereof, or from such person having furnished the
      design, planning, surveying, architectural or engineering services for such
      improvement…"
   b. Action must be commenced within ten (10) years of substantial completion,
      and within the applicable statute of limitations.
c. Actions against architects, landscape architects, and engineers must be brought within two (2) years of discovery of construction defect, and must also be brought within ten (10) year statute of repose.

d. "Substantial completion" is measured from date of certificate of occupancy or from date of written acceptance of work.

e. Statute may be applied retroactively to actions accruing before its effective date.

3. **Idaho: ICA 5-241**

   a. Applies to persons who "performed or furnished the design, planning, supervision or construction of an improvement to real property…"

   b. All causes of action must accrue, and the statutes of limitation must begin to run, on the date of substantial completion. Tort actions must be brought within six (6) years of this date. Therefore, the latest date that the accrual must occur (and statute of limitations begins to run), is six (6) years after substantial completion. Actual deadline for filing suit may be six (6) years plus the statute of limitations.

**III. WARRANTIES OF WORKMANLIKE PERFORMANCE**

A. **General/Background:** These warranties can be either express or implied. That means that they either appear in the construction contract or the contract for sale, or (in certain circumstances) they may be an implied term of the contract even if they are not specifically written on the document.

   B. **Application:** Warranties of workmanlike performance may apply differently to different types of property. For example, implied warranties may apply only to new homes sold to the initial occupier of the property. Or, they might apply to homes sold directly by the contractor, or only to certain types of properties such as condominiums, etc.

   C. **Law in Northwest Territory:**

      1. **Washington:**

b. An implied warranty of quality construction exists under the Condominium Act, RCW 64.34.445. This warranty requires that the condominium is (a) free from defective materials, and (b) constructed in accordance with sound engineering and construction standards, and in a workmanlike manner in compliance with all laws then applicable to such improvements.

c. Where contractor is also seller of newly constructed homes, and sale is made to first occupier of property, warranty of workmanlike performance may be implied.

2. **Oregon:**

   a. When a contractor/vendor builds a new house for the purpose of sale to the general public, the sale of the house carries with it an implied warranty that the house was constructed in a reasonably workmanlike manner and is fit for habitation. *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974). Express warranties in contracts will be enforced just like any other contractual provision.

3. **Idaho:**

   a. In cases involving personal services such as construction contracts, there is an implied warranty of workmanlike performance, and a general contractor that sells a home impliedly warranties that it is reasonably fit for occupancy. *Hoffman v. Simplot Aviation, Inc.*, 97 Idaho 32, 36, 539 P.2d 584, 588 (1975); *Bethlahmy v. Bechtel*, 91 Idaho 55, 67, 415 P.2d 698, 710 (1966).

   b. The implied warranty of workmanlike performance does not apply to every minute defect, but only to major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution.
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