

CONSTRUCTION DEFECT CLAIM PROCEDURES

I.

INTRODUCTION

In 1999, in response to intense lobbying by builders and builders' trade organizations who were concerned about an increase in the costs associated with residential construction litigation, Texas enacted the nation's first Residential Construction Liability Act ("RCLA"). Its sponsors argued that the Act was needed to remedy an expansion of residential construction litigation brought against homebuilders by homeowners. Many view the Act as providing significant benefits and protections to the homebuilders. Numerous states have adopted variants of the Texas RCLA.

All of the statutes share a common theme: the claimants must give written notice of the claimed defects and provide a fair opportunity to the builder to remedy the defects. In many states, such notice must be provided not only to builders but also to design professionals and even material suppliers. In most states, a legal action may be dismissed without prejudice or stayed until the claimant has complied with the notice provisions of the relevant state's Act. Following notice of claimed defects, each of the state's Acts provides a "time out" period during which the claimant and builder seek an out-of-court resolution to their dispute, while complying with certain statutory deadlines in which to respond to the other side's proposals. At the end of the process, if the dispute has not been resolved in good faith, none of the statutes bar subsequent legal actions. Many of the statutes limit the types of damage recoverable in a subsequent legal action, or provide certain legal defenses to home builders (i.e., absolving the builder of liability for the claimant's failure to mitigate damages or maintain the structure).

II.

APPLICATION TO SUBROGATION CLAIMS

Because each state's Act differs in some respect from others, and because each statute contains a complex schedule by which various milestones in the pre-suit process are to be completed, the relevant statute should be consulted before committing to any course of action. The statutes seem straightforward, however, it is unclear whether the statutes apply to subrogation claims? Except for the Texas RCLA, none of the statutes even hint at whether the requirements apply to subrogation claims or whether subrogating carriers may (or are required to) provide the requisite notice to builders. At this point in the development of the law, the best procedure to follow in subrogation claims is to provide notice of the loss to the home builder as soon as liability becomes apparent. If the circumstances allow, invite the homebuilder out to the loss site and advise that repairs are to be promptly made in order to restore the insured's property to its pre-loss condition. Because the statutes are newly enacted and adopted significant questions remain to their application in subrogation and other claims. What follows is a brief analysis of the statutes that exist in Arizona, California, and Nevada.

STATE: ARIZONA

(Effective Date: August 22, 2002. Amended Effective May 10, 2004)

1. Who is subject to Act?

Any purchaser of a dwelling claiming damages to a real property arising from a construction defect or condition of the property when sold. Ariz. Rev. Stat. Ann. §12-1361(4), (6).

2. Who is protected?

Designers, builders, or sellers of dwellings. Ariz. Rev. Stat. Ann. §12-1361(7).

3. Notice required before filing suit.

Written notice required at least 90 days before filing action, except where defect presents immediate threat to life or safety. Ariz. Rev. Stat. Ann. §12-1362(A), 1363(A).

4. Consequence of claimant's failure to comply.

None.

5. Consequences of respondent's failure to comply.

None.

6. Effect on statute of limitations.

Statute of limitations tolled until 90 days after respondent receives notice of claim, or for such reasonable time as the parties agree in writing. Ariz. Rev. Stat. Ann. §12-1363(H).

7. Effect on damages.

None.

8. Other considerations.

Act does not apply if contract of sale or homeowners association documents contain commercially reasonable alternative dispute resolution procedures. Ariz. Rev. Stat. Ann. §12-1366.

Act does not apply to claims for personal injury, death, fraud, or damage to property other than a dwelling. Ariz. Rev. Stat. Ann. §12-1366(A).

In an action filed by claimant, the court shall award the successful party costs, expert witness fees, and attorneys fees. “ Success ” is further defined by the Act. Ariz. Rev. Stat. Ann. §12-1364.

Liability carrier for respondent must work cooperatively and in good faith to meet deadlines of act. Ariz. Rev. Stat. Ann. §12-1362(B).

STATE: CALIFORNIA

(Effective Date: January 1, 2003)

1. Who is subject to Act?

Homeowners or homeowners associations. Cal. Civil Code §910, 938.

2. Who is protected?

Contractors, developers, or sellers who at the time of sale were in the business of constructing, developing, or selling residential units to the public. Cal. Civil Code §911.

3. Notice required before filing suit.

Written notice prior to commencing action. Cal. Civil Code §910.

If respondent has invoked the protections of the Act and made repairs following notice of claim, and the matter is still disputed, the claimant shall request in writing and participate in mediation of the claim before filing suit. Cal. Civil Code §928.

4. Consequences of claimant's failure to comply.

Suit may be stayed until requirements of Act complied with. Court may award costs and attorneys' fees to prevailing party in connection with a motion for stay. Cal. Civil Code §930(b).

5. Consequences of respondent's failure to comply.

Respondent who fails to comply with Act is not entitled to protections of Act and homeowner is released from obligations of Act. Cal. Civil Code §912(i), 920, 925.

6. Effect on statute of limitations.

Statute of limitations tolled as follows:

i. Until 100 days after agreed-upon repairs are completed; except that if repairs are completed but the dispute remains and is therefore required to be mediated pursuant to Cal. Civil Code §928, then the statute is tolled until the latest of the 100 day period or the next court day following completion of mediation; or

ii. Until 45 days after time for responding to claim has expired, if respondent fails to respond, fails to request an inspection, or elects not to abide by provisions of act; or

iii. Until 100 days after a contractual alternative dispute resolution proceeding is completed or is deemed unenforceable. Cal. Civil Code §927, 928.

7. Effect on damages.

None.

8. Other considerations.

Act does not limit contractual alternative dispute resolution mechanisms. Respondent must, in agreement of sale, make an election between the Act's alternative dispute resolution mechanism or contractual provisions. Cal. Civil Code §914(a).

Respondent may not obtain a release or waiver from claimant in exchange for repairs. Cal. Civil Code §926. However, respondent may obtain release or waiver in exchange for cash settlement. Cal. Civil Code §928.

If claim combines cause of action for construction defects with claims not otherwise subject to the Act (i.e., personal injuries, fraud, or class action remedies), the construction defects claim is still subject to the requirements of the Act; except that a class action solely alleging the incorporation of a defective component into a residence need not comply with the Act. Cal. Civil Code §931.

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 i) causing damage to real property; ii) presenting an unreasonable risk of injury to persons or property; iii) which have not been completed in a good and workmanlike manner; or iv) 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 i) contractor, subcontractor, supplier, or design professional has already filed action against claimant; or ii) 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).

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).

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 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 i) acts or omissions of persons other than contractor, its agent, employees, and subcontractors; ii) failure of others to mitigate damages or maintain residence; iii) normal wear, tear, or deterioration; iv) normal shrinkage, swelling, expansion, or settlement; or iv) defects disclosed in understandable writing prior to purchase of residence. NRS §40.640.

Claimant may only recover the following damages: i) reasonable attorneys' fees; ii) reasonable costs of repairs to remedy defect; iii) reduction of market value of residence, if any, because of structural failure; iv) loss of use; v) reasonable value of any other damaged property; vi) consultants' fees; and vii) interest provided by statute. NRS §40.655.

8. Other considerations.

In actions against design professionals, attorney for claimant shall file an affidavit of merit based on expert consultation together with complaint. NRS §40.6884.

The Nevada Act is complex, and recent amendments have not fully been codified as of the date of the survey.