

# Recent Legislation Relating to Construction Defect

(c) 2005

Barry Zalma

Construction defect litigation continues to proliferate. Courts are clogged since the suits are often complex and take an inordinate amount of court time to resolve. The people involved – both plaintiff and defendant – find the litigation expensive and often so complex as to make it impossible to obtain sufficient indemnity to repair the defective property.

Many states, mostly in the west, have enacted “notice and opportunity to repair” bills that attempt to avoid litigation. Many of the bills have been put into effect in the last three years and their ability to reduce the amount of litigation or the complexity of the suits that must be filed is still to be determined.

Those involved in claims or litigation in the states that have enacted such legislation will find that the Legislature has attempted to micro-manage litigation. Fulfilling the needs and requirements of the statutes may help reduce the cost of construction defect suits or may cause the claims and litigation process to be more complex, lengthy and expensive. Only time and a history of litigation over the next ten years will allow the parties to properly evaluate the effectiveness of the statutes.

The following are brief summaries of the newest statutes.

## *Arizona:*

A "notice and opportunity to repair bill," has been effective since August 2002.

A.R.S. § 12-1363 provides, in part:

At least ninety days before filing a dwelling action, the purchaser shall give written notice by certified mail, return receipt requested, to the seller specifying in reasonable detail the basis of the dwelling action. The notice in a multiunit dwelling action involving alleged defects that are substantially similar in multiple residential units may comply with this section by providing a reasonably detailed description of the alleged defects in a fair and representative sample of the affected residential units.

A.R.S. §12-1361(4)(the definitions section) shows the new statute seeks to control any action (court or arbitration) brought by a purchaser of a "dwelling" (as defined) against the seller related

to "the design, construction, condition, or sale of the dwelling." This is called a "dwelling action."

For this statute to apply, the seller who is being sued has to be a person or entity "engaged in the business of designing, constructing, or selling dwellings."

A purchaser's "dwelling action" or suit against a seller for misdeeds related to design, construction, condition of the dwelling, or sale of the dwelling *can occur only after* the purchaser has followed the Statute's requirements. If the purchaser-litigant fails to leap over the hurdles correctly, he may be stayed under A.R.S. §12-1362 for up to 90 days so that compliance can be performed.

Under A.R.S. §12-1632(A), 90 days before filing any suit or arbitration, the purchaser who wants to litigate must give the seller (by certified mail, return receipt requested) a written notice specifying in "reasonable detail" the bases for his dwelling action, which he wants to initiate. If it is a "multi-unit dwelling action" (5 or more owners joining in per A.R.S. §12-1361(5)), the description may list defects in "sample units."

## ***California:***

Civil Code Section 1375 et seq. provides controls and a right to repair before litigation can commence.

## ***Idaho:***

The state's most recent right to cure legislation went into effect July 2003. The statute, § 6-2503 provides:

(1) Prior to commencing an action against a construction professional for a construction defect, claimant shall serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect. Any action commenced by a claimant prior to compliance with the requirements of this section shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section. If a written notice of claim is served under this section within the time prescribed for the filing of an action under this chapter, the statute of limitations for construction-related claims is tolled until sixty (60) days after the period of time during which the filing of an action is barred.

## ***Colorado:***

Since 2003, § 13-20-803.5 provides:

“(1) No later than seventy-five days before filing an action against a construction professional, or no later than ninety days before filing the action in the case of a commercial property, a claimant shall send or deliver a written notice of claim to the construction professional by certified mail, return receipt requested, or by personal service.”

## ***Florida:***

In 2003 Florida adopted Title XXXIII - Chapter 558 - 558.004 Notice and opportunity to repair statute and provides, in language similar to that in the other states, “the claimant shall, at least 60 days before filing an action involving a single-family home, an association representing 20 or fewer residential parcels, a manufactured or modular home, a duplex, a triplex, or a quadruplex, or at least 120 days before filing an action involving an association representing more than 20 residential parcel owners, serve written notice of claim on the contractor, subcontractor, supplier, or design professional, as applicable, which notice shall refer to this chapter”

## ***Indiana:***

Since 2003 Indiana has a Notice and Opportunity to Repair Act similar to that in the other states starting at § IC 32-27-3-1. Like the other Notice and Opportunity to Repair Acts, the Indiana statute requires that: “At least sixty (60) days before filing a construction defect action against a construction professional, the claimant must serve written notice of claim on the construction professional. The notice of claim must state that the claimant asserts a construction defect claim against the construction professional and must describe the claim in reasonable detail sufficient to determine the general nature of the defect.” [§ IC 32-27-3-2]

## ***Kansas:***

Since 2004, Chapter 60.--PROCEDURE, CIVIL, Article 47.--CONSTRUCTION DEFECTS, Kansas Statute No. 60-4704 entitled “Initial notice of claim; service; response; inspection proposal; settlement offer; offer to remedy; acceptance or rejection of offer; failure to respond.” The statute provides, as does those from other states, requires – before suit can be filed – that the contractor be given the opportunity to inspect and repair.

## ***Kentucky:***

Since 2003 Kentucky KRS 411.250 to 411.266 were in effect and are known as the Notice and Opportunity to Repair Act.

## ***Montana:***

Since 2003 § 70-19-427. Residential Construction Disputes – Notice and Opportunity to Repair has been in effect. It provides, in part:

Prior to commencing an action against a construction professional for a construction defect, the claimant shall serve written notice of claim on the construction professional. The notice of claim must state that the claimant asserts a construction defect claim against the construction professional and must describe the claim in reasonable detail sufficient to determine the general nature of the defect.

## ***Minnesota:***

Unlike other states, Minnesota statutes provide Minnesota law provides statutory warranties that apply to new homes for a certain period of time after they are built (Minn. Stat. ch. 327A). There are three different warranty periods covering three different types of defects when those defects are caused by failure to comply with the State Building Code.

- For one year, the home must be free of defects caused by faulty workmanship or materials.
- For two years, the home must be free of defects caused by faulty installation of heating, cooling, electrical, or plumbing systems.
- For ten years, the home must be free of "major construction defects".

Separate statutory warranties apply to certain home improvements, and those warranties are also found in chapter 327A.

The statute defines a "major construction defect" as "actual damage to the load-bearing portion of the dwelling..., including damage due to subsidence, expansion or lateral movement of the soil, which affects the load-bearing function and which vitally affects or is imminently likely to vitally affect use of the dwelling or the home improvement for residential purposes." It excludes damage due to windstorms, hail, floods, and other natural disasters.

## ***Nevada:***

The session that ended June 2003 passed SB241, a "right to repair" bill similar to Washington state's "cure" bill.

## ***Oregon:***

Two new laws give Oregon builders alternatives to legal action and liability insurance.

## ***South Carolina:***

Since 2004, § 40-59-84 entitled “Notice of Claim; Timing; Contents: Request for Clarification requires:

In an action brought against a contractor or subcontractor arising out of the construction of a dwelling, the claimant must, no later than ninety days before filing the action, serve a written notice of claim on the contractor.

§ 40-59-850 the legislation provides:

The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs. Failure to respond within thirty days is deemed a denial of the claim.

## ***Texas:***

Since 2003, Texas adopted CHAPTER 27 § 27.004. Notice and Offer of Settlement that requires that “the claimant shall give written notice by certified mail, return receipt requested, to the contractor, at the contractor's last known address, specifying in reasonable detail the construction defects that are the subject of the complaint.” It also has the various protections and time limits of the other statutes.

## ***Washington:***

The legislature passed a contractor protection bill in July 2003 that reduces contractors' exposure to lawsuits to six years from 12, and gives builders seven "affirmative defenses" to counter defect complaints from homeowners. In RCW 64.50.020 that establishes that in every construction defect action brought against a construction professional, the claimant shall, “no later than forty-five days before filing an action, serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction defect claim

against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect.”