

# ‘RIGHT TO REPAIR’ STATUTES: THE FIX TO CONSTRUCTION DEFECT LITIGATION



## INTRODUCTION – “RIGHT TO REPAIR” IN THE UNITED STATES

More than thirty states have enacted legislation that requires homeowners to notify builders of claimed defects and to provide them with an opportunity to repair the defects *before* the owners initiate legal proceedings. These “right to repair” statutes are the legislatures’ response to the increased filing of time-consuming and expensive construction defect lawsuits. Right to repair statutes provide an avenue to avoid litigation whereby the builder can address the homeowner’s claimed defects and attempt to repair the defects and allow homeowners to seek repairs without having to file a lawsuit.

In general, right to repair statutes impose procedural requirements and a timeline for managing construction defects prior to filing a lawsuit. As a preliminary matter, some states (such as California and Washington) require that the builder opt-in or reserve the right to proceed via right to repair statutes in the purchase contract at the outset of the project. When a defect is discovered, the owner is typically required to notify the builder of the defect within a certain period before filing suit. The statutes further provide deadlines for the builder to respond, conduct an inspection, notify the subcontractors, and make an offer to repair, settle, or deny the claim. Additionally, the statutes sometimes limit applicability of the right to repair procedures to certain types of construction and/or defects through statutory definitions. While right to repair statutes are aimed at facilitating out-of-court resolution for construction defect claims, some argue that, in certain states, the statutes are poorly constructed to meet this goal.

For instance, some states impose an unreasonably compressed timeframe for certain procedural benchmarks to occur. Additionally, several states only require that the owner give “reasonable detail” to the builder when notifying them of the defect, which can sometimes lead to vague and frustrating defect notifications. Ultimately, the legislatures’ goal of reducing litigation and facilitating out-of-court resolution, while laudable, is oftentimes frustrated by right to repair statutes. Because most states allow the homeowner to reject the builder’s offer to repair, right to repair statutes are sometimes nothing more than an additional procedural hurdle in the litigation process.

Although the right to repair statutes are seemingly straightforward, the interpretation and application of the statutes is oftentimes highly litigated. Recently, for example, litigation has concerned the issues of whether right to repair procedures are mandatory or optional and the effect of the right to repair procedures on insurance obligations. In California, courts have recently disagreed as to whether or not 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.<sup>1</sup> In Florida, the United States District Court recently held that actions taken under the right to repair statutes were not a “civil proceeding” for purposes of the insured’s insurance policy and, therefore, not a “suit” obligating the insurer to defend or indemnify.<sup>2</sup> As a result of continued litigation, legislatures are attempting to address the ambiguities in these statutes and several states passed amendments just this year. It is therefore important that practitioners remain current on right to repair statutes and the issues surrounding them.

This article will identify and discuss some highlights and nuances of right to repair statutes and draw attention to recent legislation and key developments in certain key states: Arizona, California, Colorado, Florida, Nevada, Texas and Washington.

## ARIZONA

Earlier this year, the Governor of Arizona approved H.B. 2578 which modified the existing Purchaser’s Dwelling Act.<sup>3</sup> As amended by H.B. 2578, Ariz. Rev. Stat. Ann. §§ 12-1361 – 1366 (West 2015) requires that a purchaser first undertake certain notice procedures before filing a “dwelling action,” which is now defined as “any action involving a construction defect brought by a purchaser against the seller of a dwelling arising out of or related to the design, condition or sale of the dwelling.”<sup>4</sup> In addition, H.B. 2578 codifies a definition for previously undefined terms such as “construction defect” and “construction professional.”<sup>5</sup> Most significantly, now, a purchaser has an absolute duty to notify the seller of the construction defect before filing a claim<sup>6</sup> and the seller has an absolute right to attempt to repair or replace the defects.<sup>7</sup> In practice, the contractor must respond to the purchaser’s notice within sixty days of receipt<sup>8</sup>; if the contractor fails to do so, the purchaser may file suit.<sup>9</sup>

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## CONTACT

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### **CALIFORNIA**

Cal. Civ. Code §§ 895-945.5 (West 2014), also referred to as “S.B. 800,” establishes pre-litigation procedures that must be followed before a suit alleging construction defects is filed. As a preliminary matter, when the sales agreement is executed, the builder must notify the homeowner of the builder’s intent to opt-in to the procedures under S.B. 800.<sup>10</sup> Or, alternatively, the builder may create and enforce its own pre-litigation procedures if the alternative procedures are included in the sales contract.<sup>11</sup> Prior to filing an action, the claimant must provide written notice to the builder that describes “in reasonable detail” the claimed violation.<sup>12</sup> S.B. 800 then requires that the builder provide certain documentation to the claimant and that the builder, upon election, conducts an inspection the property within 14 days of acknowledging receipt of the claim.<sup>13</sup> Within 30 days of inspection, the builder may make an offer to repair the defect,<sup>14</sup> at which point the homeowner has 30 days to authorize the repair.<sup>15</sup> Alternatively, if the builder fails to acknowledge the notice of claim<sup>16</sup> or does not make an offer to repair, the claimant may file suit.<sup>17</sup> S.B. 800 precludes the builder from obtaining a release or waiver in exchange for repair work.<sup>18</sup>

### **COLORADO**

Colo. Rev. Stat. §§ 13-20-801 – 808 (West 2014), the “Construction Defect Action Reform Act,”<sup>19</sup> requires that the construction professional is notified via written notice of claim no later than 75 days (or 90 days in the case of commercial properties) before an action is filed.<sup>20</sup> Within 30 days of the notice, the claimant must provide the construction professional and its contractors with access to the property for inspection.<sup>21</sup> Next, within 30 days (or 45 days if a commercial property), the construction professional may send the claimant an offer to settle or repair.<sup>22</sup> If no offer is made or if the claimant rejects the offer, the claimant may bring an action for construction defect – unless, of course, the parties have contractually agreed to mediation.<sup>23</sup>

There are several limitations on damages that may be awarded to the claimant.<sup>24</sup> For example, damages awarded in an action asserting personal or bodily injury as a result of a construction defect cannot exceed \$250,000.<sup>25</sup> Additionally, in certain circumstances, the contractor will not be liable for more than “actual damages,”<sup>26</sup> which are defined as “the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect, whichever is less, together with relocation costs, and, with respect to residential property, other direct economic costs related to loss of use, if any, interest as provided by law, and such costs of suit and reasonable attorney fees as may be awardable pursuant to contract or applicable law.”<sup>27</sup>

Earlier this year, S.B. 15-177 died in the House of Representatives.<sup>28</sup> Had it passed, the bill would have modified the timeframe and procedure for pursuing construction defect claims by condominium homeowners associations.<sup>29</sup> Local governments have started to address these issues themselves; for example, Aurora, a city just east of Denver, will vote this month on an ordinance affecting construction defect suits and multi-unit construction.<sup>30</sup>

### **FLORIDA**

In June of this year, H.B. 87 was approved by the Florida Governor and amends Fla. Stat. Ann. §§ 558.001 – .005 (West 2014).<sup>31</sup> The amendment will take effect in October of this year.<sup>32</sup> Significantly, the amendments require notification of the claim at least 60 days (or 120 days if an action involving an association representing 20 parcels) before filing an action. The notice must describe the nature and damage of each defect in “reasonable detail” and describe, based on visual observation, the location of the defect.<sup>33</sup> Otherwise, the Florida procedure is relatively unaffected by H.B. 87.

In general, the statutes require that the contractor respond within 45 days (or 75) after service of the notice of claim and the response must either offer to remedy, offer to compromise or settle, or dispute the claim.<sup>34</sup> At that point, if the contractor disputes the claim or fails to respond timely, the claimant may file suit.<sup>35</sup> Additionally, the statutes provide for certain notice requirements where the contractor alleges that subcontractor or other professionals are responsible for the noticed defects.<sup>36</sup>

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### **NEVADA**

In 2015, the Nevada Governor signed A.B. 125 which modified the state’s right to repair statutes.<sup>37</sup> Now, under Nev. Legis. 2 (2015), 2015 Nevada Laws Ch. 2 (A.B. 125) (amending Nev. Rev. Stat. §§ 40.600 – .695 (West 2013)), before a claimant can commence an action or amend a complaint to include an additional cause of action for a construction defect, the claimant must give written notice to the contractor and any party the claimant knows may be responsible for the defect.<sup>38</sup> The written notice must now identify each defect, damage, and injury in “specific detail,” whereas the statute previously required only “reasonable detail.”<sup>39</sup> Additionally, the notice must describe the exact location of the defect, the cause of the defect (if known) and the nature and extent of damage or injury.<sup>40</sup> Even more, it must include a signed statement by each named owner verifying that the defect, damage and injury exist.<sup>41</sup> Until the claimant has submitted a claim under the homeowner’s warranty and the insurer has denied the claim, a claimant is precluded from sending notice or pursuing a claim governed by these statutes.<sup>42</sup> Further, no later than 90 after receiving the notice from the owner, the contractor or subcontractor must respond to the owner stating whether the contractor or subcontractor elects to repair, an offer to settle, or a disclaimer of liability.<sup>43</sup> If the contractor or subcontractor elects to repair, the claimant must provide reasonable opportunity to do so.<sup>44</sup> The election to repair may not be conditional upon a release of liability.<sup>45</sup> If the contractor or subcontractor elects not to repair, the claimant or contractor may bring a cause of action for the defect.<sup>46</sup>

### **TEXAS**

In Texas, Tex. Prop. Code. Ann. §§ 27.001 - .007 comprise the state’s right to repair statute. First, the claimant must provide the contractor with 60 days’ notice of a defect suit.<sup>47</sup> If the contractor requests, the claimant must provide the contractor with information as to the nature and extent of repairs necessary (including reports, photos, and videotapes).<sup>48</sup> If Subtitle D does not apply, the contractor may make an offer of settlement 45 days after notice of the suit.<sup>49</sup> If the claimant then rejects a reasonable offer or fails to permit repairs, then the amount that the claimant may recover is limited.<sup>50</sup> If the claimant finds an offer made by the contractor to be unreasonable, then the claimant is required to notify the contractor “in reasonable detail” of the reasons why it is considered unreasonable within 25 days after receiving the offer.<sup>51</sup> Moreover, the amount of economic damages proximately caused by the defect is limited in circumstances where the claimant rejects a reasonable offer.<sup>52</sup>

### **WASHINGTON**

With new construction or a remodel that costs more than one-half of the assessed value of the real property,<sup>53</sup> Wash. Rev. Code Ann. §§ 64.50.005 – .060 requires that the claimant give written notice to the contractor or other construction professional at least 45 days before filing a lawsuit.<sup>54</sup> However, as a preliminary matter, the statutes require that the construction professional provide notice to the homeowner upon entering into a contract for construction or substantial remodel.<sup>55</sup> If the construction professional fails to provide the statutorily prescribed notice,<sup>56</sup> the Washington Supreme Court has interpreted these sections in a manner that does not preclude suit in circumstances where the owner fails to provide pre-litigation notice.<sup>57</sup> In instances where the owner is required to provide notice, although the contractor has 21 days from the notice of claim to serve a written response that either proposes an inspection, offers to compromise or settle the claim, or disputes the claim, the claimant is not required to accept the proposed repairs.<sup>58</sup>

### **CONCLUSION**

The issue of right to repair statutes is an evolving and dynamic area of law. Although legislatures intend to simplify and streamline the defect repair process, the meaning and application of right to repair statutes are highly litigated issues. Many states are still wrestling with the concept in order to determine appropriate and effective legislation to provide avenues for builders to avoid litigation without creating overwhelming obstacles and impractical hurdles for owners with genuine defect claims. It is critical that practitioners stay current with the evolving legislation and case law in order to ensure that they comply with the requirements of right to repair statutes.

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Mr. Glucksman is a founding partner of Chapman, Glucksman, Dean, Roeb & Barger which has offices throughout California. Mr. Glucksman is an AV Preeminent Rated Lawyer with Martindale-Hubbell, which is the highest rating available. He has been named “Super Lawyer” for the last 8 years, including 2015. He is well known in the construction and business legal community for his representation of builders, developers and business clients.

Mr. Glucksman specializes in complex multi-party litigation, including construction defect claims, environmental, commercial, business and catastrophic casualty litigation.

## CITATION

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2. *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 2015 WL 3539755, at \*9 (S.D. Fla., June 4, 2015, 13-80831-CIV)
3. COURTS—COURT RULES—PURCHASES AND PURCHASING, 2015 Ariz. Legis. Serv. Ch. 60 (H.B. 2578) (WEST), approved by the Governor on March 23, 2015.
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6. Ariz. Rev. Stat. Ann. § 12-1363(A)
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8. Ariz. Rev. Stat. Ann. § 12-1363(C)
9. Ariz. Rev. Stat. Ann. § 12-1363(D)
10. Cal. Civ. Code, § 914
11. *Id.*
12. Cal. Civ. Code, § 910
13. Cal. Civ. Code, § 916
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19. Colo. Rev. Stat. Ann. § 13-20-801 (West)
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23. Colo. Rev. Stat. Ann. § 13-20-803.5(6) (West)
24. Colo. Rev. Stat. Ann. § 13-20-806 (West)
25. Colo. Rev. Stat. Ann. § 13-20-806(4)(a) (West)
26. Colo. Rev. Stat. Ann. § 13-20-806(1)(a) (West)
27. Colo. Rev. Stat. Ann. § 13-20-802.5 (West)
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30. <http://www.aurorasentinel.com/news/after-state-stalemate-aurora-tackles-construction-defects/>
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37. CONSTRUCTION—CONTRACTORS—DEFECTS, 2015 Nevada Laws Ch. 2 (A.B. 125)
38. Nev. Rev. Stat. Ann. § 40.645(1) (West)
39. Nev. Rev. Stat. Ann. § 40.645(2)(b) (West)
40. Nev. Rev. Stat. Ann. § 40.645(2)(b)-(c) (West)
41. Nev. Rev. Stat. Ann. § 40.645(2)(d) (West)
42. Nev. Rev. Stat. Ann. § 40.650(3) (West)

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43. Nev. Rev. Stat. Ann. § 40.6472(1) (West)
44. Nev. Rev. Stat. Ann. § 40.6472(5) (West)
45. Nev. Rev. Stat. Ann. § 40.648(4) (West)
46. Nev. Rev. Stat. Ann. § 40.6472(4) (West)
47. TX PROPERTY § 27.004(a) (West)
48. Id.
49. TX PROPERTY § 27.004(b) (West)
50. TX PROPERTY § 27.004(e) (West)
51. TX PROPERTY § 27.004(b) (West)
52. TX PROPERTY § 27.004(e) (West)
53. Wash. Rev. Code Ann. § 64.50.010(8)
54. Wash. Rev. Code Ann. § 64.50.020(1)
55. Wash. Rev. Code Ann. § 64.50.050
56. Wash. Rev. Code Ann. § 64.50.050(2) provides:

The notice required by this subsection shall be in substantially the following form: CHAPTER 64.50 RCW CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE SELLER OR BUILDER OF YOUR HOME. FORTY-FIVE DAYS BEFORE YOU FILE YOUR LAWSUIT, YOU MUST DELIVER TO THE SELLER OR BUILDER A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE YOUR SELLER OR BUILDER THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE BUILDER OR SELLER. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

57. *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. Partnership*, 156 Wash.2d 696, 702 (Wash., 2006) (holding that since “the Act states it ‘shall not preclude or bar any action’ if the ‘construction professional fails to give the homeowner notice,’ the [owner’s] action cannot be precluded or barred for failing to give prelitigation notice.”)
58. Wash. Rev. Code Ann. § 64.50.020(3)(b)