Right to Repair Statutes: A Fix to Construction Defect Litigation?

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INTRODUCTION

“Right to Repair” statutes are legislative creations aimed to reduce expensive and time-consuming construction defect litigation that have been enacted in over 30 states. Typically, the statutes require an owner to notify the builder of any claimed defects and provide the builder with an opportunity to repair the defects before initiating legal proceedings. The goal of these statutes is to provide an informal avenue to resolve claimed construction defects without requiring owners to resort to legal proceedings.

For example, Colorado has enacted the Construction Defect Action Reform Act (“CDARA”).¹ CDARA provides, in part:

(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.

(2) Following the mailing or delivery of the notice of claim, at the written request of the construction professional, the claimant shall provide the construction professional and its contractors or other agents reasonable access to the claimant’s property during normal working hours to inspect the property and the claimed defect. The inspection shall be completed within thirty days of service of the notice of claim.

(3) Within thirty days following the completion of the inspection process conducted pursuant to subsection (2) of this section, or within forty-five days following the completion of the inspection process in the case of a commercial property, a construction professional may send or deliver to the claimant, by certified mail, return receipt requested, or personal service, an offer to settle the claim by payment of a sum certain or by agreeing to remedy the claimed defect described in the notice of claim. A written offer to remedy the construction defect shall include a report of the scope of the inspection, the findings and results of the inspection, a description of the additional construction work necessary to remedy the defect described in the notice of claim and all damage to the improvement to real property.

caused by the defect, and a timetable for the completion of the remedial
construction work.

(4) Unless a claimant accepts an offer made pursuant to subsection (3) of
this section in writing within fifteen days of the delivery of the offer, the offer
shall be deemed to have been rejected.

(5) A claimant who accepts a construction professional's offer to remedy or
settle by payment of a sum certain a construction defect claim shall do so
by sending the construction professional a written notice of acceptance no
later than fifteen days after receipt of the offer. If an offer to settle is
accepted, then the monetary settlement shall be paid in accordance with
the offer. If an offer to remedy is accepted by the claimant, the remedial
construction work shall be completed in accordance with the timetable set
forth in the offer unless the delay is caused by events beyond the
reasonable control of the construction professional.

(6) If no offer is made by the construction professional or if the claimant
rejects an offer, the claimant may bring an action against the construction
professional for the construction defect claim described in the notice of
claim, unless the parties have contractually agreed to a mediation
procedure, in which case the mediation procedure shall be satisfied prior to
bringing an action.

(7) If an offer by a construction professional is made and accepted, and if
thereafter the construction professional does not comply with its offer to
remedy or settle a claim for a construction defect, the claimant may file an
action against the construction professional for claims arising out of the
defect or damage described in the notice of claim without further notice.

(8) After the sending of a notice of claim, a claimant and a construction
professional may, by written mutual agreement, alter the procedure for the
notice of claim process described in this section.

(9) Any action commenced by a claimant who fails to comply with the
requirements of this section shall be stayed, which stay shall remain in
effect until the claimant has complied with the requirements of this section.

(10) A claimant may amend a notice of claim to include construction defects
discovered after the service of the original notice of claim. However, the
claimant must otherwise comply with the requirements of this section for the
additional claims.

(11) For purposes of this section, actual receipt by any means of a written
notice, offer, or response prepared pursuant to this section within the time
prescribed for delivery or service of the notice, offer, or response shall be
deemed to be sufficient delivery or service.

(12) Except as provided in section 13-20-806, a claimant shall not recover
more than actual damages in an action.

Unfortunately, “Right to Repair” statutes oftentimes present little more than a procedural hurdle for plaintiffs to overcome as a result of poorly-constructed legislation. This paper seeks to identify which states currently have enacted “Right to Repair” statutes, identify the key provisions of the statutes, evaluate an insurer’s duty to defend pre-suit claims, and identify ways in which an insurer can take advantage of “Right to Repair” statutes.

**SURVEY OF “RIGHT TO REPAIR” LEGISLATION**

The following states have enacted “Right to Repair” statutes:

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<td>Idaho</td>
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FEATURES OF “RIGHT TO REPAIR” STATUTES

In general, “Right to Repair” statutes follow the same basic template; however, there are key differences between the statutes, which can greatly influence the effectiveness of a particular state’s statute. Those differences include, but are not limited to, the following:
Applicability to Certain Types of Construction

Some states, such as Missouri, limit the applicability of its “Right to Repair” statute to construction defect claims involving new residential construction and substantial residential remodes. Other states, such as Colorado, include both new residential and commercial construction. Additionally, some states limit the applicability of the statute to property damage claims, while others include both property damage and personal injury claims.

Requirement to Opt-In at the Outset

Several states, including California and Washington, allow the contractor to opt-in prior to the commencement of the construction. Some states even allow the contractor to modify the provisions of any pre-litigation dispute resolution requirements so long as the procedure is disclosed to the plaintiff prior to construction.

Notification of the Defect to the Contractor

The initiation of the “Right to Repair” process is the owner’s notification of the defect to the contractor. Many “Right to Repair” statutes state that the owner must provide “reasonable detail” of the alleged defect; however, nearly all statutes that provide for “reasonable detail,” fail to define what “reasonable detail” actually requires. Some states, such as Nevada, have begun to require “specific detail.” Frequently, owners provide only vague descriptions of the alleged defect, which is not sufficient to put the contractor on notice of the potential seriousness of the defect, and which, in turn, leads contractors to fail to notify to their insurers.
Builder’s Response

After receiving the owner’s notice, “Right to Repair” statutes give contractors an opportunity to inspect the property, and some states even allow contractors to perform destructive testing to investigate the alleged defect. Contractors are also often given an opportunity to place their subcontractors and material-providers on notice of the potential claim. The states, however, vary considerably on the timeline for the contractor’s investigation. Many states provide such a shortened timeline for the investigation of the alleged defect that a proper investigation into the claim is impossible. For example, in residential claims, Nevada provides 90 days from the owner’s notice before the contractor must provide a response; whereas, Colorado only provides 60 days.

Owner’s Requirement to Accept Builder’s Offer

Once the investigation is complete, or the response deadline approaches, under most “Right to Repair” statutes, the contractor must either offer to repair the alleged defect, offer a monetary settlement, or deny the owner’s claim. However, even if the contractor offers to repair or settle the claim, most states do not require that the owner accept the contractor’s offer. As a result, most “Right to Repair” statutes offer little more than a procedural headache to claimants and their counsel.
INSURER’S DUTY TO DEFEND PRE-SUIT CLAIMS

Provisions of Standard CGL Policies

The insuring agreement contained in standard Commercial General Liability (CGL) policies set forth by the Insurance Services Office (ISO) requires insurers to pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies. Further, the insuring agreement provides that the insurer will defend the insured against any suit seeking those damages.

Prior to 1986, the term “suit” was not defined in the ISO standard CGL policy. The lack of a definition of the word “suit” led to vast amounts of contested coverage litigation, which led to an array of inconsistent approaches taken by courts throughout the country. To alleviate the inconsistency and uncertainty created by the courts, the ISO standard CGL policy was modified to include a specific definition of the term “suit”. The term “suit” is now defined in standard CGL policies as follows:

“Suit” means a civil proceeding in which damages because of “bodily injury,” “property damage,” “personal injury,” or “advertising injury” to which this insurance applies are alleged. Suit includes:

a) An arbitration proceeding in which such damages are claimed and to which the insured must submit or do submit with our consent; or

b) Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.
With the inclusion of a specific definition of the term “suit,” the standard CGL policy now differentiates between the terms “claim” and “suit,” with only the latter giving rise to an insurer’s duty to defend.

**Whether “Right to Repair” Statutes Give Rise to a Duty to Defend**

The question then becomes whether pre-suit claims under “Right to Repair” statutes give rise to an insurer’s duty to defend. Courts across the country have reached differing conclusions on this issue, with the characterization of the particular state’s statute playing an important role.

**States that have determined duty to defend**

In *Clarendon America Ins. Co. v. StarNet Ins. Co.*, a California appellate court determined that a notice of commencement pursuant to California’s version of a “right to repair” statute constituted a “suit” under a CGL policy such that the insurer had a duty to defend. 113 Cal. Rptr. 3d 585 (Cal. Ct. App. 2011).

In *Clarendon*, a homeowner’s association presented its residential developer with a list of alleged construction defects to which the developer sought coverage under several of its subcontractors’ CGL policies on which it was listed as an additional insured. *Id.* at 587. Under the California “Right to Repair” statute, the parties were required, among other things, to select a dispute resolution facilitator “to preside over the mandatory dispute resolution process.” *Id.* at 589. The final event required before the association could file a lawsuit, pursuant to the statute, was a “[f]acilitated dispute resolution of the
claim, with all parties, including peripheral parties, as appropriate, and insurers, if any, present and having settlement authority.” *Id.*

The *Clarendon* court held that defined as “a civil proceeding,” “a suit is broader than an action or lawsuit initiated by a complaint filed in court.” *Id.* at 591. The court determined that the “right to repair” statute at issue was “more than a prelitigation alternative dispute resolution requirement” and that “[it] is part and parcel of construction or design defect litigation initiated by an association and, as such, cannot be divorced from a subsequent complaint.” *Id.* 592. In other words, the court stated that the process was “an integral part of the litigation process precisely because of the application and legal effect described in the . . . Act.” *Id.* 593. The court, therefore, determined that the process set forth in the statute was “an integral part of the litigation process precisely because of the application and legal effect described in the . . . Act” and therefore constituted a “suit” for purposes of an insurer’s duty to defend. *Id.* at 592–93.

While some states, such as California, define their “right to repair” statute as a “civil proceeding,” other courts consider it to be “other alternative dispute resolution proceedings.” For example, in *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, the Florida Supreme Court held that the presuit process outlined in the state’s “Right to Repair” statute was not a “suit” under the policy provision defining “suit” as “a civil proceeding,” but was a “suit” under policy provision defining “suit” as “[a]ny other alternative dispute resolution proceeding.” 232 So. 3d 273, 278-79 (Fla. 2017).

Under the Florida version of the “Right to Repair” statute, before a construction defect lawsuit may be filed, the claimant is required to serve a written notice on the
contractors, suppliers, design professionals, etc. responsible for the alleged defects, identifying the defects and offering an opportunity to inspect and/or make repairs. *Id.* at 266-67. The recipient of the notice has the option to participate in the process, or ignore the claim. If the recipient participates, it must serve a written response within the statutorily prescribed period offering to settle the claim by remedying the alleged defects, making payment (or a combination of both), or disputing the claim in whole or in part. *Id.* at 267. If a response is not timely received or the claim is disputed, the claimant may proceed with filing a lawsuit. *Id.*

The *Altman* court determined that this constituted an alternative dispute resolution proceeding, thus triggering the insurer’s duty to defend. *Id.* at 279; *see also Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328 (Co. App. 2012) (holding that process under Colorado’s “right to repair” statute constituted a “suit” as defined in the insurance policy, as it constituted both “a civil proceeding” and “an alternative dispute resolution proceeding,” thus, triggering duty to defend). However, it is important to note that because the court defined it as an alternative dispute resolution proceeding, the insurer is only deemed to have a duty defend under the terms of the policy if both the insurer and insured consent to the proceeding. *Id.* at 279.

**States that have determined no duty to defend**

While some states conclude that pre-litigation proceedings mandated by right to repair statutes qualify as “suits” so as to give rise to an insurer’s duty to defend, this view is not universally adopted by all courts.
For example, in *Cincinnati Ins. Co. v. AMSCO Windows*, the Tenth Circuit Court of Appeals addressed whether the pre-litigation procedures of Nevada’s “right to repair” statute was a “suit,” such that it trigged the insurer’s duty to defend. 593 Fed. Appx. 802 (10th Cir. 2014). In that case, a window manufacturer was sued by a homeowner for defective products that allegedly caused property damage. *Id.* at 804. Under the Nevada “Right to Repair” statute, before the homeowners could pursue a lawsuit they had to provide a detailed written notice to the manufacturer, affording it the opportunity to inspect and repair the damage. *Id.* “At the conclusion of the prelitigation process, any unresolved claims may proceed to Nevada state court.” *Id.*

The *AMSCO Windows* court held that the pre-suit proceedings under the statute did not constitute a “suit” under the terms of the CGL policy, such that the insurer had no duty to defend. *Id.* at 810-11. In so holding, the court reasoned that although the statute mandates participation by the insured, noncompliance does not result in an adverse judgment against the insured. *Id.* at 810–11. In other words, the limited consequences of non-compliance “are not parallel to the often case-determinative consequences of noncompliance in the context of lawsuits or mandatory arbitrations.” *Id.* at 810.

**Conclusion**

Unless the claim arises in a jurisdiction that has already decided the issue, the insurer should carefully review the language and legislative intent of the “Right to Repair” statute, the policy language, and the jurisdiction’s duty to defend standard to determine whether the pre-litigation process could give rise to a defense obligation.
TAKING ADVANTAGE OF “RIGHT TO REPAIR” STATUTES

Regardless of whether a particular jurisdiction requires an insurer to defend claims brought under a “Right to Repair” statute, insurers can utilize the statutes to their advantage in performing a pre-suit investigation of the claim and assessment of potential liability.

First, “Right to Repair” statutes almost universally require prospective plaintiffs to provide notice and a description of the alleged construction defect with most requiring “reasonable detail” of the defect. At this point, the plaintiffs are almost always represented by counsel, and plaintiffs’ counsel may have already retained a construction expert to offer preliminary opinions as to the cause and scope of damages of any alleged defect. If plaintiffs and/or plaintiffs’ counsel are serious about pre-suit resolution of the claim, they may be willing to share their expert’s report and/or opinions. By securing as much information as possible about the claim up-front, an insurer can make a more informed decision as to the seriousness of the alleged defect, its potential liability exposure, and whether any coverage issues exist.

Second, “Right to Repair” statutes also almost universally allow the contractor, and its agents, access to the property in order to conduct an inspection. Some “Right to Repair” statutes even allow destructive testing. An insurer can utilize this pre-suit inspection to retain a qualified expert to give an objective opinion as to contractor’s potential liability and scope of damages. Additionally, this “inspection period” provides an insurer an opportunity to work with its insured to place any subcontractors or material-
providers on notice of a potential third party claim and to tender defense and indemnity obligations onto the third parties, if appropriate.

Finally, even if a jurisdiction’s “Right to Repair” statute does not require a plaintiff to accept a contractor’s offer to repair or require the parties to submit to a pre-suit dispute resolution procedure, an insurer can utilize all the information it gathered during its pre-suit investigation to determine whether a particular claim is well-suited to early resolution. If an insurer is allowed to conduct a diligent inspection utilizing the statute’s provisions, early resolution may save significant litigation costs (attorneys’ fees, expert’s fees, etc.), and more importantly, early resolution may cap the insurer’s damages exposure by limiting recoverable consequential and delay damages.