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Right to Repair Past, Present & Future

CONTACTS

Lisa M. Cappelluti
Partner

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Now that we are several years into a legislative implementation of Right to Repair statutes in many states, here are the highlights of the key practical and legal issues for consideration non right to repair efforts as a tool for resolution of your construction dispute.

I. Practical Issues of Pre-Litigation Repairs – Scope of Project, Coordination, Design Issues and Product Manufacturers

A. Use of Right to Repair Approach as Effective Tool for Claim Resolution

Are pre-litigation repairs the solution or the problem as a resolution option in our tool- box of resources to handle construction claims? Our industry has been encouraged for years to engage in early, "practical resolutions" of construction issues in various contexts that provide effective and productive means to handle these types of claims. Most states across the country have enacted right to repair legislation and have various risk transfer statutes aimed at encouraging these resolution efforts. All but 16 states currently have pre-litigation repair statutes and each have its own technical compliance and issues to consider so please refer to your current state statutes for these requirements and deadlines. We have attached our 50 State Survey of the Right to Repair Legislation which references the relevant statues for each jurisdiction.

B. Enforcement of Right To Repair Pre-Litigation Resolution For Construction Claims

Many states REQUIRE the use of the right to repair in advance of initiating litigation and right to repair requirements are now incorporated in numerous construction contracts. Right to repair legislation is also favored for code compliance and health/ safety including claims under licensing board statutes. Indemnity statutes that allow for risk transfer exist in nearly all states to shift responsibility for

workmanship issues to the indemnitor when allocating legal costs and expenses for handling these claims. Carriers do favor these types of approaches and have different positions in their policies for property damage that now include policy language on warranty and pre-litigation repair coverages. However, there are often unidentified risks that accompany the process which cause frustration and rejection of the process. The statues often preclude a release for the work performed, they may not be covered under the applicable insurance programs, they are often evolving and can end up costing more than projected at the time of resolution and can impact or extend the statutes of limitation.

C. Concerns to Address with Parties in Pursing the Right to Repair Process

The answer to whether a pre-litigation repair is the best course of action for a specific construction claim invariably depends on who is asked the question and is usually different depending upon the experience of the individual in trying to navigate the tricky aspects of the process. The claimant lawyers are often opposed to the approach and the insurance carrier may not want to participate in a pre-litigation repair resolution plan. Each claim should be considered on a case -by -case basis examining the numerous ramifications from a business, legal and insurance perspective. One of the most significant threshold questions to answer is determining which parties or companies should participate in the process that requires an assessment of the role in repairs for the developer, design professionals, general contractor, subcontractor and product manufacturers. Also, for each claim the parties need to understand how extensive the repairs will be, the risk transfer options in the process, the role of the insurance carrier involved and whether there is a final resolution in the process. In many cases the right to repair presents an expensive temporary patch to a bigger problem which leads to further litigation in the future and potential extensions of the deadlines to file claims and unending liability exposure to legal issues for the project.

II. Legal Issues Impacting Pre-Litigation Repairs: Risk Transfer, Funding Sources, Release of Claims, Coverage Obstacles

All but 16 states currently have pre-litigation repair statutes. Many states REQUIRE the use of the right to repair procedures in advance of initiating litigation and this requirement is mirrored in numerous contracts. Right to repair legislation is also favored for code compliance and health/ safety including claims under licensing board statutes. Anti-indemnity statutes are prevalent but many allow for risk transfer to shift responsibility for poor workmanship to the indemnitor when allocating legal costs and expenses for these claims. Many insurance carriers do favor pre-litigation resolution approaches and have different positions based on the specific provisions of the policy language pertaining to pre-litigation repair coverages in the applicable insurance policy. However, recent trends show a preference toward litigation over pre-litigation resolution where there are risk transfer options for the parties. This is an issue to be addressed at the beginning of the matter and with the key legal issues under constant watch over the course of the process.

Under certain statutory schemes, developers and general contractors can obtain contractual defense and indemnification from implicated subcontractors during this pre-litigation process by placing subcontractors on notice of the claim during the Pre-Litigation Process. See, Cal. Civ. Code Section 916(e); Crawford v. Weather Shield Mfg., Inc., 44 Cal. 4th 541 (2008); Centex Golden Ins. Co. v. Dale Tile, Inc. Co., 78 Cal. App. 4th 992 (2000).

Contractual defense and indemnity obligations of subcontractors in third party claims are covered in some states under the "insured contract" coverage within commercial general liability policies. See, Golden Eagle Ins. Co. v. Insurance Co. of the West, 99 Cal. App. 4th 837 (2001) which holds an insured with contractual liability coverage would reasonably expect that the indemnitee's attorney fees and costs are sums the insured becomes legally obligated to pay as damages because of covered tort claims. Indeed, in California an indemnity against claims and liability "embraces the costs of defense against such claims" unless "a contrary intention appears." Golden Eagle Ins. Co., 99 Cal. App. 4th at 851-852.).

Depending upon the language of an indemnity provision, developers and general contractors may be able to make repairs and seek contractual indemnification from implicated subcontractors on a first party basis without a lawsuit or claim having been made by a homeowner, homeowner's association or commercial landowner. See, Zalkind v. Ceradyne, Inc., 194 Cal. App. 4th 1010 (2011)) (holding that provision indemnifying party from damages arising from counterparty's breaches of agreement applied to direct, as well as third-party, claims; scope and extent of duty to indemnify are to be determined from contract itself); Spencer Sav. Bank, S.L.A. v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 217785 (New Jersey, 2018).

III. Strategy Considerations for Right To Repair

The approach to each of these projects is very case specific and carrier participation can impact the approach to a pre-litigation resolution plan. The process takes longer than parties would like and may not save time or be as efficient as people hope in the beginning of the process, but can avoid the expense and costs of formal discovery which has its own challenges. The pre-litigation approach does provide many advantages and can be a useful and creative solution for construction disputes and is most favored where a release of future claims is provided as part of the process. The best outcomes are obtained in situations with counsel who have worked through the challenges and addressed the issues in prior projects with a successful final outcome.