

**TORT REFORM AND THE CURRENT STATE OF
LEGISLATION ACROSS THE COUNTRY;**

**ADR/"FIX-IT" STATUTES
MOLD LEGISLATION
INDEMNITY AND ANTI-INDEMNITY EFFORTS**

LEGISLATIVE UPDATE PANEL

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Rachel's efforts and assistance in preparing the written materials are greatly appreciated.

INTRODUCTION

The body of this paper is filled with dry synopses of statutes, regulations, and reference materials. Therefore, a brief departure from that hopefully useful information to speculate on another factor contributing to the growth of construction defect and construction dispute claims will be indulged here. Naturally, the most significant and probably most valid causes have all been recognized, analyzed, and thoroughly discussed. The insurance crunch, rising material and production costs, greater consumer expectations, tension between increased production goals and decreased skill labor pools, a generally more litigious society, a more regulatory-minded government, and the deluge of mold claims are all compelling and familiar factors. However, it appears the mold hysteria may have introduced additional members of an aggressive species of trial lawyers into construction defect litigation. Although there have always been skilled and very effective homeowner/consumer advocates, there is now a greater number who have entered the arena after gaining specialized knowledge and familiarity of construction practices by virtue of mold litigation. Once armed with this new expertise, discerning eyes fix doggedly on expanded opportunities to apply their recently acquired knowledge. The timing of this arguable development coincides with a shrinking and more skeptical personal injury and medical malpractice atmosphere which is threatened by further tort reform.

Even if this speculation has a modicum of merit, would it influence the volume of future construction defect or construction dispute litigation? We will probably never know. The wave of “fix-it” or “notice and repair” legislation sweeping the states certainly alters the landscape and should at least stem the tide, if not reverse the current trends. Now the frivolity of speculation has ended, representative sample legislation, much source material, and enumerable lists follow.

I. Representative Residential Construction Defect/ADR Statutes

Almost every legislative effort to enact “fix-it” statutes (a.k.a. notice and opportunity or right to repair) incorporates an alternative dispute resolution process. For a thorough and comprehensive list of such statutes, see David Stern’s excellent work on right to repair/notice and opportunity statutes prepared for this seminar. The very detailed and comprehensive nature of these statutes makes it risky to concisely distill all relevant portions. Moreover, the abundance of internet sources and statutory citations make such an effort superfluous.

ADR State Statutes. For a complete list of all ADR statutes by state, go to the American Arbitration Association website at www.adr.org/index. Note: the list is comprehensive and is not limited to construction industry acts.

Nevada: NEV. REV. STAT. ANN. § 40.600, *et seq.* The Nevada act, effective August 1, 2003, contains provisions requiring homeowners to provide a contractor notice of construction defect claims, gives contractors the right to inspect and repair before a claim can proceed to formal litigation, and provides the Nevada State Contractor’s Board an active role in construction defect disputes. The act defines construction defects as a defect in the design, construction, manufacture,

repair, or landscaping 1) done in violation of the law, local codes or ordinances; 2) which proximately causes physical damage to a residence, appurtenance, or real property; 3) which is not accomplished in a good or workmanlike manner in accordance with generally accepted standards of care in the industry; or 4) which presents an unreasonable risk of injury. The provision provides time limits during which the contractor must exercise his right to repair.

The pre-litigation notice requirements of the act additionally require the homeowner to provide notice to all potentially liable subcontractors, in addition to the contractor. Homeowners also must provide contractors notice of inspections, and allow the contractors to be present at any home inspection likely to result in a construction defect claim.

The Nevada provision also has notice requirements for the contractor, with respect to notifying potentially liable subcontractors of claims by the homeowner. Additionally, and specifically applicable to new development, contractors may provide notice to other homeowners in the same subdivision as the claimant. If the alleged defect is dangerous to the homeowner's safety, the contractor is required to provide notice of the claim to other homeowners in the same subdivision.

Homeowners may request the assistance of the State Contractor's Board with questions regarding their rights and responsibilities vis-a-vis other parties and proposed repairs. Once homeowners request the board's assistance, the board must investigate the matter and give a non-binding advisory opinion, inadmissible in any subsequent proceeding.

Complaints of this provision include that it discourages contractors from electing the right to repair because it specifically provides that contractors may not condition the right to repair on a release from liability. Additionally, the strict time limits may make compliance difficult for contractors, including the requirement that repairs be completed in 105 days from the date of the homeowner's notice.

California: CAL. CIV. CODE § 895, *et seq.* California's new law is considered one of the most far-reaching of all the states' residential construction defect laws. In addition to providing a means for "prompt and fair" settlement of construction defect claims through its own pre-litigation procedure (including a requirement that a builder's offer to repair be accompanied by an offer to mediate), it also establishes specific minimum performance standards for almost every component of new homes, and places limitations on damages recoverable by homeowners. The law applies to all new homes sold after January 1, 2003.

Like the pre-litigation procedure in other states, California provides the builder the right to repair defects before a homeowner can file a claim against the builder. California's law, however, only applies to new construction, not remodel work or condominium conversions. The statute of repose for most construction components is 10 years, but California shortened repose for certain defects, including: 1) operation of plumbing, sewer and electrical systems (4 years); 2) cracks in hardscape

improvements (4 years); 3) noise transmission into adjacent units (1 year); 4) irrigation systems and drainage (1 year); 5) decay of untreated wood posts and steel fencing (2 years); 6) exterior paint (5 years); 7) landscaping systems (2 years); and 8) dryer ducts (2 years). For “fit and finish” items, such as cabinets, mirrors, flooring, etc., the builder need only provide a one-year warranty.

California’s law specifically excludes application to defects in manufactured products. However, if the manufactured product causes damage to the residential structure, the new law will apply to the manufacturer.

California’s law allows the homeowner to sue the builder after repairs have been made. The builder may not require a release from the homeowner conditioned on its repair of the defect. However, if the builder elects cash payment to the homeowner instead of repair, the builder may obtain a “reasonable release.”

California law provides affirmative defenses to the builder, including: 1) unforeseen acts of nature; 2) homeowner’s unreasonable failure to prevent or minimize damages; 3) homeowner’s failure to follow the builder’s or manufacturer’s recommendations or commonly accepted maintenance obligations; 4) homeowner’s alteration, wear and tear, misuse, etc.; 5) statutes of limitations or repose that bar the claim; 6) builder has obtained a valid release; and 7) builder’s repair was successful in correcting the defect.

The new California law also provides that all conduct during the pre-litigation procedure phase is not considered “settlement negotiations,” and is, therefore, admissible at trial.

For detached housing, damages are limited to the lesser of the cost of repair of the construction defect or the diminution in value of the home caused by the defect.

California’s Construction Dispute Framework & Mediation.¹ California’s Senate Bill 800, enacted in 2002 and applicable to claims regarding builder-homeowner agreements entered after January 1, 2003, aimed to reduce lawsuits by setting up a pretrial procedure to encourage dispute resolution out of court. The builder must comply with the procedural requirements of the bill or it will lose the protection of the pre-litigation procedures and release the homeowner from those requirements before filing suit. The homeowner must also follow the procedure or forfeit possible remedies if the dispute goes to trial.

First, the statute involves notice, inspection, and opportunity to cure or settle measures before going to arbitration or trial, as seen in other state’s statutes. **However, the California bill also**

¹ Pamela D. Ferry, *California SB 800–The “Builder’s Right to Repair” Bill*, available at <http://www.diputesolutionsllp.com/pg26.cfm> (last visited Oct. 29, 2004).

provides additional specifics on mediation of residential construction disputes. “The statutes require all builders to provide new homeowners with extensive information on the statute in their sales documents and allows each builder to determine, for each project, whether it will comply with the pre-litigation mediation program set forth in the statutes [“opt in”] or will not comply with the pre-litigation mediation program [“opt out”].” If the builder opts out, then the builder is required to provide an alternative form of pre-litigation dispute resolution. The builder’s decision to opt in or out is binding on the builder.

The statute’s pre-litigation mediation program. A builder’s offer to settle must be accompanied by an offer to mediate the dispute at the homeowner’s election. The homeowner then has 30 days to accept repair and compensation, request work done by an alternative contractor, or request mediation. The homeowner may elect to select the mediator jointly with the builder and split the costs. Additionally, if a builder has invoked pre-litigation procedures, and completed repair, then, if there has been no previous mediation, the homeowner must request a mediation in writing prior to filing suit. During mediation, the statute of limitations is tolled. California’s ADR statute is very specific and strongly encourages settlement and a resolution out of court through mediation.

California’s Civil Code Section 1375, a.k.a. the “Calderon Process,” sets up an analogous pre-litigation ADR process for common interest development projects such as condominiums.²

Arbitration & Construction Claims in California:³ (from Allen Matkins on FindLaw)

[M]any builders are attempting to add contractual arbitration or judicial reference to arbitration after the SB 800 pre-litigation procedures are completed. In other words, these builders are arguing that they are not opting out of the pre-litigation procedures, but rather electing to go to arbitration rather than litigation after the SB 800 procedures are finished.

Unfortunately, California case law is making such provisions increasingly more difficult to enforce in real estate purchase agreements. The recent case of *Pardee v. Superior Court*, 100 Cal. App. 4th 1081 (2002), held that contract clauses for judicial reference and for waiver of punitive damages were unenforceable because the underlying residential purchase and sale agreement was an agreement of adhesion and the clauses were unconscionable.

Further, Code of Civil Procedure § 1298.7 precludes binding arbitration in real estate purchase contracts involving construction defects. However, in *Basura v. U.S. Home*, 98 Cal. App. 4th 1205 (2002), the appellate court held that the Federal Arbitration Act pre-empted § 1298.7, and the court upheld a purchase

² Gordon & Rees, LLP, *California SB800 General Summary*, available at <http://www.housingzone.com/request/printerfriendly.asp> (last visited Oct. 29, 2004).

³ Bryan C. Jackson & Lee Gotshall-Maxon, *Getting a Fix on the Right to Repair: Builders Must Be Careful When Altering SB 800's Pre-Litigation Procedures*, available at [http://library.lp.findlaw.com/articles/file/00991/008957/title/Subject/topic/Alternative%20Dispute%20Resolution%20\(ADR\)_1_52](http://library.lp.findlaw.com/articles/file/00991/008957/title/Subject/topic/Alternative%20Dispute%20Resolution%20(ADR)_1_52) (last visited Oct. 13, 2004).

agreement arbitration clause as “valid, irrevocable and enforceable, save upon ground such as exists at law or in equity for the revocation of any contract.”

Therefore, even under *Basura*, “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements” *Id.*

With *Pardee* and *Basura* in mind, if a builder wishes to utilize arbitration or judicial reference in its residential purchase agreements, it should carefully follow the procedures outlined in Code of Civil Procedure §1298, *et seq.* The builder will also have to overcome the adhesion and unconscionability concerns raised in *Pardee* by providing alternatives to the purchaser and by eliminating issues regarding unfairness and surprise.

The following approaches may overcome the court’s concerns raised in *Pardee*: (1) providing the purchaser with the right to choose arbitration, judicial reference or litigation along with a detailed description of the pros and cons of each choice in laymen’s terms; (2) permitting claims for punitive damages since a waiver of punitive damage claims was found by the *Pardee* court to have taken away substantial rights of the homeowners; (3) providing that if litigation is chosen, a jury trial is not waived unless specific advantages can be articulated in laymen’s terms to waive a jury trial such as a faster resolution of the dispute and avoiding juries and judges that do not understand the complexities of construction defect matters versus utilizing an expert construction arbitrator who can make a more informed or timely decision to the benefit of both parties; and (4) providing that the builder will pay for arbitration or judicial reference thereby avoiding the *Pardee* argument that the homeowners did not understand the economic burdens of judicial reference or arbitration.

Pending in California: Currently the California Assembly is reviewing a number of bills related to residential construction claims, including AB 2812. This bill was introduced in February 2004, and was initially to set out a pre-litigation procedure for claims relating to residential construction contracts entered into prior to January 1, 2003 (the start date for application of SB 800 pre-litigation procedures). However, the bill has been taken down to intent language and appears to have stalled in committee. The current version of the bill provides, “[I]t is the intent of the Legislature to consider whether the existing process for resolution of residential construction claims pursuant to Title 7 (commencing with Section 895) of Part 2 of Division 2 of the Civil Code could be revised for the mutual benefit of consumers, builders, contractors, building trades, subcontractors, insurers, and others who may be interested in the equitable and expeditious resolution of these controversies.”

Texas: RCLA and RCCA; TEX. PROP. CODE ANN. § 27.001, *et seq* (RCLA) and TEX. PROP. CODE ANN. § 401.001, *et seq* (RCCA)

The Texas Residential Construction Liability Act (“RCLA”) was originally enacted in 1989, and has since been amended five times. This “factoid” is even more significant since the Texas legislature only meets every other year. Generally, the statute creates defenses, limits damages, and establishes notice requirements and settlement opportunities. The most recent amendment, enacted September 1, 2003, contains significant alterations in the RCLA’s provisions. In addition to the RCLA amendments, the Texas legislature also enacted the Texas Residential Construction

Commission Act (“RCCA”) in 2003. The latest alternative dispute legislation related to construction in Texas is contained within the RCCA (TEX. PROP. CODE ANN. § 401.001, *et seq*) which essentially creates an additional administrative hurdle for homeowners wishing to assert a claim against a contractor in the form of alternative dispute format. The legislation sets up a commission to oversee the dispute resolution process and a state-sponsored inspection process. The commission is comprised of four registered builders, three representatives of the general public, one licensed engineer who practices in residential construction, and either a licensed architect who practices in residential construction or a residential building inspector. The commission is charged with adopting rules associated with residential construction, implementing the RCCA’s provisions, and registering, certifying, and disciplining residential builders. The RCCA also establishes statutory warranties and building performance standards, as well as warranty periods for residential construction.

The Processes. The RCLA and RCCA have different processes. The RCCA process will apply to most disputes with a homebuilder, as the RCCA trumps the RCLA to the extent it conflicts with the RCLA. However, the RCCA does except from its provisions contractors who only replace or repair a roof of an existing home, contractors whose work only included interior improvements not exceeding \$20,000, and state licensed individuals and business entities performing work within the scope of their licenses. Presumably, the RCLA process still applies to these contractors.

RCCA Process. The RCCA establishes an administrative requirement for homeowners wishing to assert a claim against a contractor. 1) Before filing a claim against a contractor, a homeowner must submit a request for state-sponsored inspection and dispute resolution process⁴ to the Residential Construction Commission (“the commission”) on or before the tenth anniversary date of the initial transfer of title from the homebuilder to the initial homeowner or, for alterations to existing residences, the date on which the improvement contract was formed. The homeowner must submit the name of any inspector(s) used in connection with the construction defect prior to initiation of the RCCA process. Otherwise, the homeowner may not use any inspection reports produced by these inspectors as evidence or designate the inspectors as experts. A state-sponsored inspector inspects the property and makes a report with a recommendation on the existence of a construction defect and its appropriate repair. This report creates a rebuttable presumption. The builder may also inspect the property, but must make full disclosure of such inspections to the homeowner. [This step essentially replaces the RCLA pre-action notice procedure.] 2) Within 15 days after the date of a final, unappealable determination of a dispute under the RCCA, the contractor may make a written settlement offer to either repair the defects alleged by the homeowner or to have repaired by an independent contractor some or all of the defects alleged by the homeowner, detailing the repairs to be made, or to provide a monetary settlement. 3) if the homeowner believes the settlement

⁴ Costs for filing the request and for the state sponsored inspection are incurred by the homeowner.

offer is unreasonable, the homeowner has 25 days after receipt of the settlement offer to advise the contractor in writing, detailing why the offer is unreasonable; 4) the contractor then has 10 days after receipt of this notice to make a supplemental offer. If the homeowner does not follow the RCCA pre-action procedure, a court or arbitration tribunal *shall dismiss* the homeowner's action.⁵

RCLA Process. 1) The homeowner *must* send to the contractor written notification, detailing construction defects about which the homeowner is complaining, 60 days prior to filing an action; 2) the contractor *may*, within 35 days from receipt of the notice, inspect the property and document the alleged defect; 3) the contractor *may*, within 45 days from receipt of the notice, make a written settlement offer to either repair the defects alleged by the homeowner or to have repaired by an independent contractor some or all of the defects alleged by the homeowner, detailing the repairs to be made, or to provide a monetary settlement; 4) if the homeowner believes the settlement offer is unreasonable, the homeowner has 25 days after receipt of the settlement offer to advise the contractor in writing, detailing why the offer is unreasonable; 5) the contractor then has 10 days after receipt of this notice to make a supplemental offer.⁶ If the homeowner does not follow the pre-action notice procedure, a court or arbitration tribunal *shall dismiss* the homeowner's action. [Previous RCLA versions provided for an abatement, rather than a dismissal. It can be argued that the 2003 change to a requirement of dismissal means that the homeowner's action will be dismissed with prejudice. However, there is an "out" for homeowners who need to file their claims to be within limitations periods.] If the homeowner accepts either of the contractor's settlement offers, the contractor has 45 days after receipt of written notice of acceptance from the homeowner to initiate the repairs specified.

Arbitration of Residential Construction Claims in Texas. The RCCA requires that arbitrations involving residential construction defects be conducted in the county in which the property at issue is located, and provides that this cannot be waived by contract. Additionally, the RCCA sets out requirements for filing a summary of any arbitral award with the commission not later than 30 days after the award is made. Section 437.001(a) provides that the summary must include the following:

⁵ Steps 2-4 are outlined in the RCLA, not the RCCA.

⁶ If the contractor makes a reasonable settlement offer and the homeowner rejects the offer or does not allow the contractor to inspect or repair the property pursuant to an accepted settlement offer, a homeowner who prevails in an action against a contractor may not recover more than the fair market value of the contractor's last settlement offer or the amount of the contractor's reasonable monetary settlement offer or purchase offer (*see* "Remedies" discussion *infra* regarding purchase offers) and attorney's fees are capped at the amount of reasonable attorney's fees incurred before the offer was rejected.

- (1) the names of the parties to the dispute;
- (2) the name of each party's attorney, if any;
- (3) the name of the arbitrator who conducted the arbitration;
- (4) the name of the arbitration services provider who administered the arbitration, if any;
- (5) the fee charged to conduct the arbitration;
- (6) a general statement of each issue in dispute;
- (7) the arbitrator's determination, including the party that prevailed in each issue in dispute and the amount of any monetary award; and
- (8) the date of the arbitrator's award.

As part of this provision, the RCCA also establishes, "Any agreement prohibiting the disclosure of the information listed . . . is unenforceable." § 437.001(b).

Mediation of Residential Construction Claims in Texas. The RCLA allows either party to a residential construction dispute to compel mediation once the claimant has filed suit, and requires the court to order mediation where such a motion is timely filed. Participation is mandatory and costs are shared equally.

Georgia:⁷ In May 2004, the governor signed into law SB 563, providing an alternative dispute mechanism for resolving construction defects claims, including a notice and opportunity to repair procedure, but not addressing mediation.

Michigan:⁸ In 2001, the governor signed into law a bill allowing licensed homebuilders and remodelers to include alternative dispute resolution provisions in their contracts.

Missouri:⁹ In July, the governor vetoed a bill that would have required homeowners to use mediation proper to filing suit over construction defect claims, citing the bill's failure to properly protect consumers and its mandatory nature. The governor's main concerns were the unequal bargaining position of homeowners relative to homebuilders, possibilities of bad-faith negotiation, and that costs to mediate prior to litigating may exceed the value of a small claim.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

Oregon:¹⁰ Oregon’s SB 909, introduced August 8, 2003, provides a notice and opportunity to remediate procedure the homeowner and builder must comply with prior to initiating a lawsuit or arbitration. Oregon’s bill does not provide mediation language.

South Carolina:¹¹ “The South Carolina Supreme Court may soon adopt a new rule mandating alternative dispute resolution for all civil and family law cases filed in circuit court, with mediation serving as the default process” “Under the proposed rule, all civil and family law cases filed in circuit court would be referred to mandatory mediation, unless the parties opt for a non-binding or binding arbitration process.”

II. Mold Legislation. 2003 was an active year for introduction of mold legislation in many states; however many bills subsequently stalled.¹² In 2003 the following states passed some form of mold legislation: Illinois, Louisiana, Montana, Oklahoma, Rhode Island, and Texas.¹³ This year, the following states have passed mold legislation: Louisiana, Oklahoma, South Carolina, and Virginia. Other states have bills pending, including Texas and Pennsylvania.¹⁴ There were five bills introduced in Texas which are still pending related the training for certain insurance adjusters, procedures by insurance for handling water damage claims, and licensing and regulation of mold assessors and remediators.

2003 Mold Legislation

Illinois. HJR 12, resolution passed. Creates a joint task force on mold in indoor environments to examine the mold issue and make recommendations to the General Assembly pertaining to the regulation of mold in indoor environments.

Louisiana. LA. REV. STAT. ANN. § 37-2181 - 2192. Licenses persons who perform mold assessment and mold remediation services.

Louisiana. LA. REV. STAT. ANN. § 37:1449(A) and (B); 37:1431(33) and 1470. Licenses persons who perform mold assessment and mold remediation services.

¹⁰ *Id.*

¹¹ <http://www.adrworld.com>.

¹² <http://www.insurancejournal.com/news/national/2003/09/08/32047.htm>.

¹³ <http://www.moldupdate.com/legislation.htm>.

¹⁴ *Id.*

Massachusetts. SB 657. Authorizes the study of the health effects from indoor exposure to toxic mold.

Montana. MONT. CODE ANN. § 70-16-701, *et seq.* This law permits, but does not require, a seller, landlord, seller's agent, buyer's agent, or property manager to provide a mold disclosure statement on at least one document, form, or application executed prior to or contemporaneously with an offer for the purchase and sale, rental, or lease of inhabitable real property.

Oklahoma. HCR 1011. Creates a joint task force on mold and mold remediation.

Oregon. SB 557, in committee upon adjournment 8/27. Modifies a seller's obligation to disclose information about real property to a prospective buyer to include disclosures related to mold and health-related problems potentially related to mold.

Pennsylvania. HB 1187, pending in Senate. Requires the Department of Health to establish a task force on mold.

Rhode Island. SB 983 (Substitute A as amended). Creates a Senate commission to study the health effects of toxic mold.

2004 Mold Legislation

Louisiana. LA. REV. STAT. ANN. § 9:2800.14. Immunizes from liability, unless contractually agreed in writing otherwise, commercial and marine contractors licensed in the state for any personal injuries, property damages or any other claims related to mold or mold damage, arising out of work performed by the contractor on manufactured homes.

Oklahoma. OKLA. STAT. § 765.10. Prevents any one person from performing both mold assessment and mold mediation services for a consumer on the same property and structure. Additionally, any mold assessor remediator would need to comply with a public statewide education program by distributing any educational materials made available by the program to customers.

Pennsylvania. HB 1187, pending. Creates a task force on mold.

South Carolina. S.C. CODE ANN. § 40.57.135, *et seq.* Specifies that no cause of action may be brought against a real estate licensee acting as a seller's or buyer's agent, or advising an individual outside an agency relationship, who has truthfully disclosed to the seller, buyer or customer, respectively, any known material defect including, but not limited to, moisture or mold problems and conditions. No cause of action would be able to be brought against a real estate licensee by a seller, buyer, or customer for information contained in reports or opinions prepared by an

engineer, land surveyor, geologist, wood destroying inspection control expert, termite inspector or other home inspection expert, or other similar reports.

Virginia. VA. CODE ANN. § 55-248.11:2, 55-248.13, and 55-248.16. Requires landlord disclosure to prospective tenants about visible evidence of mold in a dwelling. If the landlord reports no evidence of mold, and the tenant finds otherwise, the tenant can object in writing within five days. If the landlord reports visible evidence of mold, the tenant has the option of terminating the tenancy or accepting the unit in an “as is” condition.

III. Indemnity Statutes, Trends, and Issues

Obviously, the focus of this section deals only with construction-related statutes. For example, both Texas and Louisiana have anti-indemnity statutes applicable to the oil and gas industry. Those statutes condition indemnity on insurance availability and limit the amount of indemnified loss to the amount of available insurance. It appears those types of requirements will serve as a model for drafting construction industry legislation in those states. Another approach being explored is to broaden the definition of “statutory employer” to include all entities “above” the affected contractor, e.g., owners, architects, general contractor, etc.

Pending in California. The California Assembly has a current bill related to construction defect actions declaring, “It is the intent of the legislature to protect the interests of builders, contractors, subcontractors, laborers, and building purchasers, and to facilitate the expeditious and equitable resolution of construction defect claims and litigation.” AB 2333. The previous version of this bill, introduced in February 2004, related to joint-cost sharing agreements between builders who received notice of a claim and other potentially responsible parties. The old version of the bill stated, “Among other things, the bill would provide that, to the extent a person and his or her insurer timely enter into a perform all of their responsibilities pursuant to the agreement, the defense and indemnity obligations of the parties to the agreement and their insurers regarding the specific claim shall be allocated on a comparative fault basis and any provision to the contrary would be void and unenforceable.”

Indemnity in Construction Contracts in Texas. Legislative committee hearings are scheduled for January 2005 to explore banning indemnity provisions in construction contracts.

Statutes Barring Indemnity for Indemnitee’s Sole Negligence

- a. These statutes void provisions for losses or damages arising from the indemnitee’s sole negligence. This type of legislation is currently present in 15 states:

- (i) Alaska, Arizona, California, Georgia, Hawaii, Idaho, Indiana, Maryland, Michigan, New Jersey, South Dakota, Tennessee, Virginia, West Virginia.
 - (ii) South Carolina's statute is arguably a "sole negligence" statute because it bars indemnity for the indemnitee's sole negligence, but excepts indemnity for indemnitor's own negligence from the provision, while not addressing partial negligence of the indemnitee.
- b. Some "sole negligence" statutes also bar indemnification for the indemnitee's willful misconduct: Alaska, California, Hawaii, Indiana.

Statutes Barring Indemnity for Indemnitee's Sole or Concurrent Negligence

- a. These acts void provisions for losses or damages arising from the indemnitee's negligence, whether sole or concurrent. At least 20 states have enacted a form of this legislation.
- (i) Colorado, Connecticut, Delaware, Florida, Illinois, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Washington.
 - (ii) Louisiana's statute only protects prime contractors on public projects.
 - (iii) Utah's statute excepts the owner from its anti-indemnity provisions.

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Statutes Barring Indemnity of Design Professional

- a. This third kind of statute voids provisions that purport to indemnify a "design professional" from liability arising from its services.
- b. Some states have this type of statute, that voids only this type of indemnification and lacks a broader, general anti-indemnification statute: New Hampshire, North Dakota, Pennsylvania, Texas.

¹⁵ Construction Lawyer (Summer 2003); American Subcontractor's Association Inc., *Subcontractor's Chart of Anti-Indemnity Statutes*, available at <http://www.asaonline.com/pdfs/antiindchart062104.pdf>.

- c. Three states have a general anti-indemnification statute applicable to others on the construction project and a separate law for design professionals: New Jersey, New York, South Dakota.
- d. Twelve states have a general anti-indemnification statute and expressly include design professional within its scope: Arizona, California, Delaware, Florida, Indiana, Louisiana, Missouri, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina.

Anti-Indemnity and Contractual Requirements to Name Another Party as an Additional Insured

A key to advising construction-industry related clients requires some recognition of the relative advantages and disadvantages of additional insured status versus indemnitee status. Some of the most practical and simplistic distinctions when advising your client are as follows: as an additional insured there is a right of defense, separate defenses, broader coverage, and subrogation rights. A disadvantage of additional insured status is that there are coverage restrictions, approximately 30 different endorsement forms, the parties covered usually does not include employees, agents, assigns, and principals; other insurance clauses are automatically triggered, exhaustion of policy limits and the inevitable dispute of “arising out of . . .” language. Indemnity provisions frequently cover items including breach of contract for which insurance is not available.

Additional insured protection triggers consideration of deductibles and self-insured retention unlike protection provided by indemnification clauses. When a deductible is involved, the carrier keeps control of the adjustment process and subsequently charges the insured for the deductible. Under a Self-Insured Retention, the insured controls the adjustment process to the extent of its retention either through its employees or independent contractors and there is no duty on the part of the carrier to provide a defense until the SIR is exhausted. The SIR is considered a condition precedent to coverage. However, both the deductible and the SIR require the insured to pay the first dollar of the loss. Additionally, an SIR or even a self-insured program would not necessarily qualify as insurance under any provision in anti-indemnity statute which bars indemnity but permits insurance to cover a party’s own negligence.

In some states, the statute expressly permits one to get around the anti-indemnity statute through this contractual requirement. In other states, where anti-indemnity statutes are silent on this issue, court cases have decided what the legislature intended. The following is a partial list of how many states have addressed the attempts to circumvent anti-indemnity efforts by requiring additional insured status.

Examples of States and Their Approaches (Current as of 11/1/04)

Florida. FLA. STAT. ANN. § 725.06 bars indemnity for indemnitee's negligence and includes gross negligence, willful, wanton, and intentional misconduct. Section 725.06 expressly bars indemnification of design professional. Section 725.08 limits indemnification by design professionals on public projects. A contract requirement to name indemnitee as additional insured does not violate the statute.

Michigan. MICH. COMP. LAWS ANN. § 691.991 bars indemnity for indemnitee's sole negligence. *Peeples v. Detroit*, 297 N.W.2d 839, held that the Michigan legislature had declared it to be contrary to public policy in Michigan for anyone in the construction industry to make any agreement that would absolve him from liability for his sole negligence. Thus, there can be no contractual requirement to name another party to the contract as an additional insured to circumvent the anti-indemnity statute.

Montana. MONT. CODE ANN. § 28-2-2111. Construction contract indemnification provisions:

- (1) Except as provided in subsections (2) and (3), a construction contract provision that requires one party to the contract to indemnify, hold harmless, insure, or defend the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs that are caused by the negligence, recklessness, or intentional misconduct of the other party or the other party's officers, employees, or agents is void as against the public policy of this state.
- (2) A construction contract may contain a provision:
 - (a) requiring one party to the contract to indemnify, hold harmless, or insure the other party to the contract or the other party's officers, employees, or agents for liability, damages, losses, or costs, including but not limited to reasonable attorney fees, only to the extent that the liability, damages, losses, or costs are caused by the negligence, recklessness, or intentional misconduct of a third party or of the indemnifying party or the indemnifying party's officers, employees, or agents; or
 - (b) requiring a party to the contract to purchase a project-specific insurance policy, including but not limited to an owner's and contractor's protective insurance, a project management protective liability insurance, or a builder's risk insurance.

- (3) This section does not apply to indemnity of a surety by a principal on a construction contract bond or to an insurer's obligation to its insureds.
- (4) As used in this section, "construction contract" means an agreement for architectural services, alterations, construction, demolition, design services, development, engineering services, excavation, maintenance, repair or other improvement to real property, including any agreement to supply labor, materials, or equipment for an improvement to real property.

New Mexico. N.M. STAT. ANN § 56-7-1 bars indemnity for indemnitee's negligence and bars indemnification of design professional. There are no published cases regarding whether a contract requirement to name indemnitee as additional.

Ohio. OHIO REV. CODE ANN. § 2305.32 bars indemnity for indemnitee's negligence. OHIO REV. CODE ANN. § 2305.31 bars indemnification of design professional. Courts are split as to whether contract requirement to name indemnitee as additional insured violates the statute. *See, Strickovich v. Cleveland*, 757 N.E.2d 50 (no violation) and *Buckeye Union. Ins. v. Zavarella Bros.* 699 N.E.2d 127 (court held that the contract could not be construed as covering the contractor for its own negligence, because it was against the statute and public policy therein).

Pennsylvania. Case law allows indemnification where intent is clear and powerful. PA. STAT. ANN. Tit. 68, § 491 bars indemnification only if design professional. A contract requirement to name indemnitee as additional insured does not violate the statute.

South Carolina. S.C. CODE ANN. § 32-2-10. Hold harmless clauses in certain construction contracts void as against public policy.

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or worker's compensation agreements; nor shall it apply to any electric utility,

electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

Utah. UTAH CODE STAT. ANN. § 13-8-1. Construction industry—Agreements to indemnify.

- (1) For purposes of this section:
 - (a) “Construction contract” means a contract or agreement relative to the design, construction, alteration, repair, or maintenance of a building, structure, highway, appurtenance, appliance, or other improvement to real property, including moving, demolition, or excavating, connected to the construction contract between:
 - (i) a construction manager;
 - (ii) a general contractor;
 - (iii) a subcontractor;
 - (iv) a sub-subcontractor;
 - (v) a supplier; or
 - (vi) any combination of persons listed in Subsections (1)(a)(i) through (v).
 - (b) “Indemnification provision” means a covenant, promise, agreement or understanding in, in connection with, or collateral to a construction contract requiring the promisor to insure, hold harmless, indemnify, or defend the promisee or others against liability if:
 - (i) the damage arises out of:
 - (A) bodily injury to a person;
 - (B) damage to property; or
 - (C) economic loss; and
 - (ii) the damages are caused by or resulting from the fault of the promisee, Indemnatee, others, or their agents or employees.
- (2) Except as provided in Subsection (3), an indemnification provision in a construction contract is against public policy and is void and unenforceable.
- (3) When an indemnification provision is included in a contract related to a construction project between an owner and party listed in Subsection (1)(a), in any action for damages described in Subsection (1)(b)(1), the fault of the owner shall be apportioned among the parties listed in Subsection (1)(a) pro rata based on the proportional share of fault of each of the parties listed in Subsection (1)(a), if:

- (a) the damages are caused in part by the owner;
 - (b) the cause of the damages defined in Subsection (1)(b)(i) did not arise at the time and during the phase of the project when the owner was operating as a party defined in Subsection (1)(a).
- (4) This section may not be construed to affect or impair the obligations of contracts or agreements, that are in existence at the time this section or any amendment to this section becomes effective.

Washington. WASH. REV. CODE ANN. § 4.24.115. Validity of agreement to indemnify against liability for negligence relative to construction, alteration, improvement, etc., of structure or improvement attached to real estate.

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving and demolition in connection therewith, purporting to indemnify against liability for damages arising out of bodily injury to persons or damage to property:

- (1) Caused by or resulting from the sole negligence of the indemnitee, his agents or employees is against public policy and is void and unenforceable;
- (2) Caused by or resulting from the concurrent negligence of (a) the indemnitee or the indemnitee's agents or employees, and (b) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's negligence and only if the agreement specifically and expressly provides therefor, and may waive the indemnitor's immunity under industrial insurance, Title 51 RCW, only if the agreement specifically and expressly provides therefor and the waiver was mutually negotiated by the parties. This subsection applies to agreements entered into after June 11, 1986.