

"Who's Liable? Understanding Responsibility for Construction Defects"

Allocating responsibility in construction defect cases is part science, part professional judgment. While the process involves structured analysis and data-driven methodologies, it also requires experienced interpretation, especially when multiple parties are involved — as is typically the case. Construction defect claims can arise from projects of any size, scope, or ownership structure, and it's rare that a single party bears full responsibility.

Because of this complexity, a credible allocation demands a methodical approach: identifying and categorizing the defects, assigning values, listing all potentially responsible parties, understanding their roles, and finally, allocating fair and defensible portions of responsibility. This is not a simple task — it involves collecting the project data to understand the underlying allegations and implicated parties, quantifiable analysis, and the informed judgment of expert witnesses, insurers, and legal counsel.

Our panel brings together experienced attorneys with deep knowledge of insurance coverage, along with insurance and construction and engineering professionals who understand building defects, roles, responsibilities, and real-world project dynamics. Together, we'll explore how to build a strong, supportable allocation framework in today's increasingly complex litigation environment, to resolve the case.

SESSION OVERVIEW AND OUTLINE:

Discussing effective and proven approaches to case management/handling that will aid in the reduction of fees/expenses prior to settlement, and which can advance early resolution. The panel includes professionals from various parts of the Country to provide a national discussion on the issues.

I. Panel Members

1. Shannon Guerrero Huff, Defense Counsel and Founder of Guerrero Huff Law Group
2. Jannea Rogers, Trial Attorney with Adams & Reese
3. Carrie Moss, Defense Counsel and Partner at Bendin Sumrall & Ladner, LLC
4. Frank Griffin, Jr., PE, LEED AP, F. ASCE, Senior Principal Engineer, Civil/Structural at Envista Forensics
5. Vadim Veksler, Complex Claims Manager - Construction Defect Corporate Claims – Selective Insurance Company of America

I. STEP ONE: Claimants' Pre-Litigation Obligations

In many states, the homeowner is required to provide written notice to the builder prior to filing a formal claim. The notice usually must include reasonable detail of each alleged construction defect. The builder is usually given the right to inspect, repair and/or respond in writing.

a. ARIZONA

- i. Prior to a lawsuit, the homeowner must provide a written Notice of Claim to the builder that includes a detailed and itemized list of each alleged construction defect, including the location of each defect and the impairment that has occurred and/or is likely to occur. A.R.S. § 12-1363(A).
- ii. If no timely written response is provided, the homeowner may proceed with filing suit. A.R.S. § 12-1363(E)(6)
- iii. If a homeowner fails to provide Notice and an opportunity to cure prior to filing suit, the suit may be dismissed without prejudice.

b. ALABAMA

- i. In Alabama there is generally no obligation to provide any pre suit notice to a builder or design professional related to defects in the project. There is no statutory or common law obligation. However, there may be contractual obligations that are conditions precedent to bringing suit.
- ii. With regard to statutory mention of contractors, Alabama Code 6-5-221 sets forth actions for defects alleged in construction must be commenced within two years after the cause of action accrues and in no event more than 7 years after substantial completion of the work unless the builder had actual knowledge of the defect and failed to disclose it. But there is no “right to cure” or “right to repair” notice on an owner unless it is part of the written contract.

c. WASHINGTON

- i. RCW § 64.50.20 requires the claimant to serve written notice of claim on the construction professional no later than 45 days before filing an action which general describes the nature of the defect.
- ii. If the builder does not respond or disputes the claim within 45 days, then the claimants can file suit.

d. TEXAS

- i. Sixty days prior to filing suit, claimants must provide notice to the builder of the nature of the defects; if requested, claimants must provide evidence that depicts the nature and cause of the defect, as well as the nature and extent of repairs necessary to remedy the defect (if known).

e. NEW MEXICO

- i. No notice or right to repair statute.
- ii. Suit for construction defect must be filed within ten years from the date of substantial completion.

f. GEORGIA

- i. Ninety days prior to filing suit, claimant must provide written notice of a claim on the contractor explicating stating the claim is made pursuant to Georgia's Right to Repair Act. O.C.G.A. § 8-2-38(a).
- ii. The notice shall describe the claim(s) in sufficient detail to explain the nature of the alleged construction defects and the results of the defects. The claimant must also provide the contractor with any discoverable evidence that depicts the construction defects, such as expert reports, photos, videos.
- iii. If the contractor rejects the claim or does not respond within 30 days, the claimant may file suit. O.C.G.A. § 8-2-38(c).
- iv. Georgia Right to Repair Act does not apply unless there is a written contract between the builder and owner providing the requisite notice in O.C.G.A. § 8-2-41.
- v. If the homeowner files suit without complying with the Act, the only remedy is a stay of the action until claimant complies with Act's procedure. O.C.G.A. § 8-2-37.

II. STEP TWO: Builder's Opportunity to Respond, Inspect and/or Repair Alleged Defects

Once reasonable details of a defect is provided, engage the expert early and inspect with the client. Talking in the field about the perceived defect, actual methods of construction and whether other trades are implicated can lead to substantive defenses, which can then be raised in a response letter. In many circumstances, it is beneficial to attend the inspection with an expert and the client to evaluate the merit of the allegations, discuss the client's precise scope of work and whether other trades' work overlapped to begin strategizing a defense and preparing a response to the Notice.

a. ARIZONA

- i. When a builder receives a Notice of Claim, it must promptly forward the notice to all construction professionals (i.e. subcontractors) whom they reasonably believe are responsible for any of the alleged defects. A.R.S. § 12-1363(A).
- ii. The builder is entitled to inspect the alleged defects; the homeowner must make the home available for inspection within 10 days of the request. A.R.S. § 12-1363(B).
- iii. The builder has 60 days from the receipt of the Notice to provide a good faith written response, which may include the builder's intent to repair any alleged defect, to have the defects repaired at the builder's expense, or a monetary offer. A.R.S. § 12-1363(C).
- iv. If the builder gives notice of its intent to repair, the homeowner must allow them a "reasonable opportunity" to make the repairs. The builder and homeowner are required to cooperate to coordinate repairs within 30 days. A.R.S. § 12-1363(E)(1).

b. ALABAMA

- i. There is no obligation to contractors. However, if there are contractual provisions requiring notice there may be provisions that provide guidelines to contractors on the response, time for response and nature of response.

c. WASHINGTON

- i. Within 21 days after service of the notice, the builder shall serve a written response on the claimant and may propose to inspect the defects. Within 14 days after the inspection findings, the builder shall serve the claimant an offer to remedy the defect, offer a payment, or dispute the claim.

d. TEXAS

- i. The builder has 35 days to inspect the alleged defects from when served with the notice.
- ii. Within 45 days of receiving the initial notice, the builder may make a repair offer to the homeowner,
- iii. If the claimant accepts the builder's offer to repair, the repairs shall be made within 45 days of the claimant's acceptance of the offer.
- iv. If the claimant is dissatisfied with a builder's offer, they have 25 days to respond in writing outlining the basis for rejection; the builder then has 10 days to present a counteroffer.
- v. If the claimant does not allow the builder an opportunity to inspect and/or repair the alleged defects or rejects a reasonable offer, the homeowner's potential recovery through a lawsuit/arbitration will be limited to the original offer and the homeowner's attorney's fees will be limited to those incurred before the reasonable offer was made.

e. NEW MEXICO

- i. No notice or right to repair statute.
- ii. Suit for construction defect must be filed within ten years from the date of substantial completion.

f. GEORGIA

- i. Within 30 days of receipt of a claim, the contractor shall serve a written response which either (1) offers to settle the claim by monetary payment, making repairs, or both; or (2) proposes to inspect the dwelling. O.C.G.A. § 8-2-38(b).
- ii. If an inspection is requested, claimant shall provide the contractor with access within 30 days. O.C.G.A. § 8-2-38(e).
- iii. Within 14 days after inspection, the contractor shall serve written notice of an offer to fully or partially remedy the construction defect, settle the claim by monetary payment, a combination, or provide reasons why the contractor rejects the claim. O.C.G.A. § 8-2-38(f).

g. THE INVESTIGATION

- i. Expert Building Investigations
- ii. Project Files
- iii. Inspection & Testing Data Analysis

III. EXPERT INVESTIGATION: Identifying and Categorizing the Alleged Defects – Expert Discussion

- a. Expert: Must analyze each of the issues, considering all alleged locations. This is mostly “science” but some parts include “art” of applying professional judgment.**
 - i. Inspection/Expert Building Investigation
 - ii. Collect Project Files
 - iii. Inspection & Testing Data Analysis
 - iv. Create a list of 100% of all issues.
 - v. Identify *where* these issues occur.
 - vi. Consider all locations where they *could* occur. (total population vs allegedly defective).
 - vii. Decide if issues will be repaired; decide method of repair.
 - viii. Understand the defenses or what others will say about the defect and repair method.
- b. Assigning Values to the Alleged Defects**
 - i. Determine how much the repair costs and what others will say about the cost of repair.
- c. Identifying Potentially Responsible Parties**
- d. Allocating Fair and Defensible Portions of Responsibility**
 - i. What issues to consider? Funding capability, insurance issues, coverage issues
 - ii. Entity no longer in business

IV. STEP THREE: Determine Impact of Indemnity Obligations on Potential Settlement (Not sure that we need this info)

Many states have statutes limiting the scope of written indemnity agreements and/or laws impacting non-contractual indemnity obligations

a. ARIZONA

- i. A.R.S. § 32-1159: an indemnification provision is void insofar as it requires an indemnitee to provide indemnification for damages caused by the sole negligence of the indemnitor.
- ii. A.R.S. § 32-1159.01: an indemnification provision is void to the extent it requires a subcontractor to indemnify a builder for damages that was not directly caused by the subcontractor.
- iii. “absent a written indemnity provision, a builder may still be entitled to indemnification from a subcontractor if the builder is completely free from fault.” *Herstam v. Deloitte & Touche*, 186 Ariz. 110, 919 P.2d 1381 (App. 1996).
- iv. “Even passive negligence or an omission of the builder, precludes them from a viable implied indemnification claim.” *Cella Barr Associates, Inc. v. Cohen*, 177 Ariz. 408, 868 P.2d 1063 (App. 1994).

b. ALABAMA

- i. Alabama does have legal limits on indemnity agreements although they are relatively limited and largely depend on contract language and public policy.
- ii. Alabama permits indemnity agreements that allow one party to indemnify another, but they are only allowed if in a written contract as there is no statutory indemnity. If a written provision exists it must use “clear and unequivocal language” establishing the intent. So, if two parties knowingly and intentionally and expressly enter into a contract for indemnity in Alabama the courts will honor and support indemnity.
- iii. Alabama law prohibits as against public policy any indemnity for an indemnitee’s intentional or willful and wanton misconduct and Alabama law voids those clauses as a matter of public policy. Also, there are specific limitations on indemnity provisions in public works contracts.

c. **WASHINGTON**

- i. RCW § 4.24.115: Construction indemnification provisions are void and unenforceable to the extent that they seek indemnification for defects and damages caused or resulting from the sole negligence of the indemnitee.
- ii. If the indemnitor and indemnitee both partially caused the defect or damages, the indemnitee is only entitled to indemnification for the portion of damages caused by the indemnitee is the provision specifically states.
- iii. The common-law right of indemnity between active and passive tortfeasors has been abolished. RWC 4.22.040(3)
- iv. Common law indemnity remains available between non-joint tortfeasors. *Sabey v. Howard Johnson & Co.*, 5 P.3d 73 (Wash. 2000)

d. **TEXAS:**

- i. Tx. Ins. Code § 151.102: any indemnification provision is void and unenforceable to the extent it requires an indemnitee to indemnify, hold harmless, or defend a third-party against a claim caused by the negligence or fault of any third-party other than the indemnitor or its employees/agents.
 1. This statute does not apply to: “an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to: (A) a single-family house, townhouse, duplex, or land development directly related thereto” § 151.105(10)(A).
- ii. Implied indemnity is limited to cases involving vicarious liability or products liability claims against an innocent product retailer. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W. 2d 816 (Tex. 1984).

e. **NEW MEXICO**

- i. NM Stat § 56-7-1: Indemnity provisions are only valid to the extent that it seeks indemnity for liability, damages, or losses that are “caused by, or arise out of, the acts or omissions” of the indemnitor or its employees/agents.
- ii. Allows for implied indemnity when an indemnitee without active fault is held liable for defects caused by the active fault of the indemnitor. *Amrep Southwest v. Shollenbarger Wood Treating*, 893 P.2d 438 (N.M. 1995).

f. GEORGIA

- i. An indemnification provision in a construction contract that requires one party to indemnify the other party for its sole negligence is invalid and against public policy. O.C.G.A. § 13-8-2(b).
- ii. However, an otherwise invalid indemnification clause can be saved by a waiver of subrogation clause. *See, e.g., Great Atl. & Pac. Tea Co. v. F.S. Assocs.*, 257 Ga. App. 534, 536 (2002) (“Where an insurance clause shifts the risk of loss to the insurance company, notwithstanding which party may be at fault, as here, an indemnification provision is not made void by O.C.G.A. § 13-8-2 (b).”)
- iii. Georgia recognizes contractual and common law indemnity based on vicarious liability and/or imputed negligence. *See Hines v. Holland*, 334 Ga. App. 292, 296 (2015) (“Georgia law continues to recognize two broad categories of indemnity: as created by contract, as between a surety and a debtor; and under the common law of vicarious liability, as between principals and agents.”).
- iv. Following the enactment of the apportionment statute (O.C.G.A. § 51-12-33), common-law indemnity based on the distinction between active and passive negligence no longer exists in Georgia. *ALR Oglethorpe, LLC v. Fid. Nat'l Title Ins. Co.*, 361 Ga. App. 776, 786 (2021).

V. STEP FOUR: Determine Impact of Indemnity and Warranty Obligations on Potential Settlement (Not sure that we need this)

Many states impose implied warranties, which may or may not impact the builder’s obligations under an express warranty.

a. ARIZONA

- i. Arizona Registrar of Contractors imposes a two-year workmanship warranty

b. ALABAMA

- i. Alabama does have an implied warranty of merchantability statute which can be argued to apply to construction projects. There is a specific two-year statute of limitation for construction warranties in Ala Code 6-5-227. Key concepts include implied warranties for new houses such as the implied warranty of habitability and the limited warranty of title in a warranty deed claim.
- ii. Alabama follows the Uniform Commercial Code (UCC) for the sale of goods which may apply to components in a construction project and to material suppliers.
- iii. Alabama honors all express written warranties using standard contract law.

c. WASHINGTON

- i. Two-year materials and labor warranty. RWC 64.35.305
- ii. Five-year building envelope warranty. RWC 64.35.310
- iii. Ten-year structural defects warranty. RWC 64.35.315

- iv. Dates triggered by actual occupancy or transfer of legal title, whichever is earlier.
RWC 64.35.320

d. **TEXAS**

- i. One year warranty/correction period for materials and labor

e. **NEW MEXICO**

- i. No state-imposed warranty for materials and labor.

f. **GEORGIA**

- i. One year warranty period for labor and materials where the work exceeds \$2,500.
O.C.G.A. § 43-31-7.

VI. STEP FIVE: Parties Can Engage in Settlement Negotiations

a. **ARIZONA**

- i. A homeowner can reject a monetary offer and can decline repairs made by construction professionals involved in the original construction and design of the home. A.R.S. § 12-1363(C).
- ii. Notably, a builder is not entitled to a release or waiver solely in exchange for any repair; however, a builder may negotiate a release or waiver in exchange for monetary compensation or other consideration. A.R.S. § 12-1363(E)(5).

b. **ALABAMA**

- i. Alabama has the standard rules you would expect to see related to settlement activities. AL Code 6-11-59 provides for confidentiality of settlement terms in some cases. There is a provision in the ALA Admin code (482-1-1250.07) that requires insurers to settle claims promptly and fairly and refrain from knowingly prolonging negotiations beyond a statute of limitation which would be considered bad faith. Payment is required within 30 days of accepting liability regardless of SOL.
- ii. But as there is no notice or right to repair laws in Alabama, there is nothing specific for contractors or design professionals to be concerned about related to settlement unless there are written contractual provisions to bind the parties.

c. **WASHINGTON:**

- i. A builder may offer to purchase the claimant's residence that is the subject of the claim, including paying the claimant's reasonable relocation costs.

d. **TEXAS**

- 1. Within 45 days of receiving the initial notice, the builder may make a settlement offer to the homeowner,
 - a. Notably, an offer of repair and settlement may be used as evidence in any subsequent trial or arbitration concerning the defects.

2. If the claimant is dissatisfied with a builder's offer, they have 25 days to respond in writing outlining the basis for rejection; the builder then has 10 days to present a counteroffer.
 - a. If the claimant does not allow the builder an opportunity to inspect and/or repair the alleged defects or rejects a reasonable offer, the homeowner's potential recovery through a lawsuit/arbitration will be limited to the original offer and the homeowner's attorney's fees will be limited to those incurred before the reasonable offer was made.

e. NEW MEXICO

1. No notice or right to repair statute.
2. Suit for construction defect must be filed within ten years from the date of substantial completion.

f. GEORGIA

- i. Within 14 days after an inspection, the contractor shall serve written notice of an offer to fully or partially remedy the construction defect, settle the claim by monetary payment, a combination, or providing reasons why the contractor rejects the claim. O.C.G.A. § 8-2-38(f).
- ii. A claimant has 30 days to accept an offer. Offer deemed accepted if no response. O.C.G.A. § 8-2-38(m).
- iii. If an offer is rejected by claimant, claimant must serve notice with reasons for the rejection, and the contractor may make a supplemental offer within 15 days. O.C.G.A. § 8-2-38(i)-(k).
- iv. If a claimant rejects a "reasonable" offer by the contractor or does not permit the contractor to make repairs, the claimant may not recover an amount in excess of (1) the fair market value of the offer of settlement or actual cost of repairs made; or (2) the amount of the offer of settlement. The claimant also cannot recover attorney's fees incurred after the date of rejection of the offer. O.C.G.A. § 8-2-38(l).