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From Defects to Dollars: Measuring Damages in Construction Defect Cases

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I. INTRODUCTION

Construction defect disputes largely hinge on how—and, more specifically, when—damages are measured. Jurisdictions differ, however, in their approach to this outcome-determinative issue.[1] Some courts, for example, look to the date of breach, while others focus on completion milestones. For contractors, insurers, risk managers, and attorneys working across the country, these differences matter. This paper examines the common approaches to measuring damages in construction defect litigation, categorizing jurisdictions accordingly,[2] and offers practical guidance for navigating these approaches when evaluating, litigating, and resolving construction defect claims.

II. WHY THE MEASUREMENT DATE MATTERS

Like the entire construction process—from design sequencing to delivery schedules—timing is an invariably critical component of the construction dispute damages calculation, which often entails, among other things, the cost of repair or remediation, damages for delay, diminution in property value, and losses tied to labor or material fluctuations. Accordingly, even a relatively minor change in the date from which damages are calculated can have an outsized impact on the value of those damages. By way of illustration, a $250,000 repair at completion can easily double in cost when valued at trial years later. Risk managers must therefore not only understand how damages are calculated but also the event or milestone to which the calculation is pegged.

III. THE FOUR NATIONAL APPROACHES

a. THE FLORIDA APPROACH: DATE OF BREACH

In the Sunshine State, damages for breach of a construction contract "should be measured as of the date of the breach."[3] Until recently, however, plaintiffs often presented damages calculated at or near trial, often many years after the breach. In 2025, Florida appellate courts

[1] See infra, Appendix A.
[2] See infra, Appendix B.
[3] Grossman Holdings Ltd. v. Hourihan, 414 So. 2d 1037, 1039 (Fla. 1982) (citing Nat'l Comm'cns Indus., Inc. v. Tarlini, 367 So. 2d 670 (Fla. 1st DCA 1979)); Lake Region Paradise Island, Inc. v. Graviss, 335 So. 2d 341 (Fla. 2d DCA 1976)).

resoundingly clarified in a trilogy of cases that the value of damages must be tied to the date of the breach: In *Bandklayder Development, LLC v. Sabga, III*,[4] *Eloquence on the Bay Condominium Ass'n, Inc. v. CBC Builders, Inc.*,[5] and *Vuletic Group L.L.C. v. Malkin*,[6] the courts reversed or denied recovery where plaintiffs relied solely on trial-date repair estimates to prove damages, making clear that litigants must present evidence of repair costs as of the date of the breach, not as of the date of the trial. While it is clear that, under Florida law, damages must be measured from the date of breach, courts have reached different conclusions as to when this date occurs.[7] Other jurisdictions that follow Florida's date-of-the-breach approach include Missouri, Tennessee, Maryland, and Louisiana.

b. THE NEW YORK APPROACH: SUBSTANTIAL COMPLETION DATE

Following a timing rule similar to Florida's, in the Empire State, courts routinely hold that damages for breach of contract are generally measured as of the date of the breach, albeit with the added nuance that, in the construction defect context, the date of the breach is moored to the date when the damages become ascertainable, i.e., upon substantial completion or when a detailed invoice of the work performed is submitted.[8]

c. THE CALIFORNIA APPROACH: DATE OF REPAIR

In the Golden State, courts typically measure construction-defect damages based on repair costs at the time the repair work is performed or estimated, even if the repair occurs long after the breach accrues. In *Rovetti v. City and County of San Francisco*, the court upheld a 1978 repair estimate for damage that occurred in 1972, explaining that using the current repair costs accounts for inflation and prevents defendants from paying with depreciated dollars.[9] The court cautioned, however, that plaintiffs will not be allowed to profit from rising construction costs by intentionally delaying repair work. Broadly speaking, courts in Georgia, Nevada, Connecticut, Mississippi, Alaska, and Washington align with the California approach.

d. THE TEXAS APPROACH: SUBSTANTIAL COMPLIANCE / FLEXIBLE TIMING

The Lone Star State adheres to a "substantial compliance" framework, whereby the damages measure "depends on whether the contractor has substantially complied with the contract," but the timing of the valuation is flexible.[10] When the contractor has substantially

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[4] 406 So. 3d 265, 266 (Fla. 3d DCA 2025).
[5] 415 So. 3d 259 (Fla. 3d DCA 2025).
[6] 418 So. 3d 627 (Fla. 4th DCA 2025).
[7] Peach State Roofing, Inc. v. 2224 S. Trail Corp., 3 So. 3d 442, 445 (Fla. 2d DCA 2009) ("date of breach was the completion date for the work done"); Jeremy Stewart Constr., Inc. v. Matthews, 324 So. 3d 41, 42 (Fla. 1st DCA 2021) (date of breach was date in which homeowner sustained "significant damage to her home caused by water intrusion and/or moisture accumulation"); Bandklayder Dev., LLC, 406 So. 3d at 269 (date of breach occurred, at the earliest, when developer closed transaction and turned over property to owner, or, at the latest, when owner served mandatory pre-suit statutory notice); Eloquence on the Bay Condo. Ass'n, Inc., 415 So. 3d at 263 (condominium association required to prove damages from the date of developer turnover); Vuletic Grp. L.L.C., 418 So. 3d at 630 (finding latest date of breach to be date in when contractor terminated and ceased work).
[8] Arnell Constr. Corp. v. N.Y. City Sch. Constr. Auth., 186 A.D.3d 542, 542 (N.Y. 2d Dep't 2020).
[9] 131 Cal. App. 3d 973, 977 (1982).
[10] Precision Homes, Inc. v. Cooper, 671 S.W.2d 924, 927 (Tex. Ct. App. 1984).

complied with the contract, courts apply the remedial measure of damages.[11] But when substantial compliance is absent (e.g., when bringing the project into compliance would require structural changes, damage to the completed work, or significant expenditure), a difference-in-value measure applies.[12] In either scenario, however, courts do not require damages to be measured as of the date of the breach but instead accept repair or difference-in-value evidence at or near trial. In permitting post-breach damage estimates and/or market data, the Texas approach aligns more closely with that of California than the Florida framework.[13]

IV. DIFFERING APPROACHES TO PREJUDGMENT INTEREST AWARDS FOR CONSTRUCTION DEFECT DAMAGES

In analyzing the financial risk of a construction defect claim, risk managers must also evaluate their potential exposure to prejudgment interest that may be awarded alongside construction defect damages. Entitlement to and accrual of prejudgment interest, like the measure of damages, varies jurisdictionally, as surveyed below.

a. "DATE OF BREACH" DAMAGES AND PREJUDGMENT INTEREST

Plaintiffs in "date of breach" (e.g., Florida, Missouri, Tennessee, Maryland, Louisiana) or "substantial completion" (e.g., New York) jurisdictions often point to the apparent inequity which arises from having to fix their damages well before rendition of a final judgment. In circumstances where the plaintiff delays making repairs, it would presumably (although not necessarily) suffer out-of-pocket expenses (or, estimated expenses at the time of trial) which would exceed those damages calculated from the earlier date of breach or substantial completion.

At least three of the aforementioned jurisdictions—Florida, Louisiana, and New York—address this issue by mandating the award of prejudgment interest from the date of breach.[14] In contrast, Tennessee, a "date of breach" state, leaves the issue of prejudgment interest in the "sound discretion of the trial court," such that plaintiff is to be "fully compensated […] for the loss of use of funds to which it is entitled."[15] Thus, while these jurisdictions permit defendants in construction defect litigation to reduce the amount of damages to an earlier date, plaintiffs are entitled to recover prejudgment interest from the beginning of this earlier date, through rendition of a final judgment.

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[11] Id.
[12] Id.
[13] See Brighton Homes, Inc. v. McAdams, 737 S.W.2d 340, 341 (Tex. Ct. App. 1987).
[14] Argonaut Ins. Co. v. May Plumbing Co., 474 So. 2d 212, 215 (Fla. 1985) (recognizing that prejudgment interest is intended to remedy "a wrongful deprivation by the defendant of the plaintiff's property"); Sharbono v. Steve Lang & Son Loggers, 696 So.2d 1382, 1387–88 (stating that prejudgment interest compensates a party "for the time-value of money to which that party was entitled ... but over which the defendant, in retrospect, had wrongfully continued to exercise dominion and control while the suit was pending."); Halsey v. Connor, 287 A.D.2d 597, 597 (2d Dep't 2001) (holding that award of damages for breach of construction contract should be accompanied by an award of prejudgment interest).
[15] Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998).

b. "Date of Repair" Damages and Prejudgment Interest

Jurisdictions which permit evidence of damages on the date of repair vary greatly in terms of a plaintiff's ability to recover prejudgment interest. For instance, in California, prejudgment interest will not be awarded on a breach of contract claim if underlying damages are not easily ascertained or clearly determined at the time a complaint is filed.[16] Connecticut permits an award of prejudgment interest if, "in the discretion of the trier of fact, equitable considerations deem that it is warranted."[17] Finally, Nevada courts have held that "prejudgment interest was properly awarded on [an] entire verdict," including both "past damages" incurred, and "unexpended costs to repair constructional defects," […] even though the defects will be repaired in the future."[18]

c. Prejudgment Interest under Texas's Substantial Compliance / Flexible Timing Approach

Texas offers a relatively straightforward approach to the calculation of prejudgment interest, which accrues "on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered."[19]

V. The Insurability of Prejudgment Interest

Prejudgment interest is awarded to compensate the prevailing party for the loss of use of money owed during the period between the accrual of the claim and the entry of judgment. As such, prejudgment interest is generally considered to be an element of compensatory damages.[20]

In construction defect litigation, prejudgment interest is frequently sought on claims for the cost to repair resulting property damage or to remediate defective work. Whether an award of prejudgment interest in a construction defect case constitutes an insurable risk turns on the language of the applicable policy and case law interpreting similar provisions in the relevant jurisdiction.

Commercial general liability ("CGL") policies—which are a primary risk transfer mechanism in construction defect cases—cover sums the insured is legally obligated to pay as damages because of covered property damage or bodily injury, unless the policy expressly excludes the damages or the policy limits are exhausted. The standard ISO CG 00 01 form includes a Supplementary Payments provision obligating the insurer to pay "[p]rejudgment interest awarded against the insured on that part of the judgment we pay."[21] In construction defect cases, this means

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[16] Cal. Civ. Code § 3287(a)-(b) (2025).
[17] Paulus v. LaSala, 56 Conn. App. 139, 742 A.2d 379, 384 (1999).
[18] Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 549 (2005).
[19] Tex. Fin. Code Ann. § 304.104.
[20] Alexander C. Black, Liability of insurer for prejudgment interest in excess of policy limits for covered loss, 23 A.LR.5th 75 (1994); see also Anthony E. Rothschild, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192, 212 (1982) ("The twin goals of . . . prejudgment interest awards are to promote settlements and to compensate plaintiffs for the loss of use of their damage awards between the time of injury and the time of judgment.").
[21] Commercial General Liability Coverage Form CG 00 01 04 13, copyright Insurance Services Office, Inc., 2012, at Supplementary Payments – Coverages A and B, 1.f.

that where a party is found liable for property damage, the associated prejudgment interest ordinarily falls within the insurer's coverage obligations so long as the property damage itself is covered.

Importantly, the payment of prejudgment interest under the Supplementary Payments provision does not reduce the policy's limits.[22] This feature is significant in construction defect litigation, where multi-year disputes and substantial repair costs can cause prejudgment interest to materially increase a defendant's exposure. The availability of coverage for prejudgment interest outside of policy limits creates a strong incentive for insurers and insureds to settle covered liability claims that may result in a significant award of prejudgment interest.[23]

Critically, however, prejudgment interest is only payable under the Supplementary Payments provision for that portion of a judgment that the insurer actually pays. In Ash v. Gen. Cas. Co. of Wisconsin,[24] an insurer investigated a liability claim but declined to defend because its policy limits had already been exhausted. The policy at issue contained a standard[25] Supplementary Payments provision, which stated that "[w]e will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: . . . Prejudgment interest awarded against the Insured on that part of the judgment we pay." The plaintiff argued that because the insurer had investigated the claim, the Supplementary Payments provision required payment of prejudgment interest. The court disagreed, holding that although the policy extended Supplementary Payments to claims the insurer investigated, it expressly limited prejudgment interest coverage to interest on "that part of the judgment we pay." Because the policy was already exhausted, the insurer did not pay any part of the judgment and there was no coverage for prejudgment interest.[26]

The Supplementary Payments provision typically also states that if the insurer offers to pay its policy limit, it will not pay prejudgment interest that accrues after that offer.[27] This language gives the insurer a contractual tool—a policy limits offer—to cut off further prejudgment interest exposure. The timing of a policy limits offer therefore often becomes a critical strategic inflection point for both insurers and policyholders.

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[22] See id.; see also Fed. Ins. Co. v. Tri-State Ins. Co., 157 F.3d 800, 806 (10th Cir. 1998) (confirming that the plain language of the Supplementary Payments provision obligates the insurer to pay prejudgment interest beyond the policy limits).

[23] See, e.g., Am. Alternative Ins. Corp. v. Hudson Specialty Ins. Co., 938 F. Supp. 2d 908 (C.D. Cal. 2013) (involving a dispute between primary and excess insurer over the failure to settle a liability claim, which exposed the primary insurer to significant liability for defense costs and interest on the judgment).

[24] 685 S.W.3d 565 (Mo. Ct. App. 2024), reh'g and/or transfer denied (Jan. 29, 2024), transfer denied (Apr. 2, 2024).

[25] The Supplementary Payments provision at issue in Ash was modified by endorsement; however, the modifications did not affect the standard policy provisions regarding prejudgment interest.

[26] For comparison purposes, the Supplementary Payments provision also affords coverage for postjudgment interest, but the language of that provision does not limit coverage to interest on that part of the judgment the insurer pays. As such, the majority of courts have held that "under the language of the standard interest clause, an insurer is liable for all post-judgment interest even if the insurer is not contractually obligated to indemnify the insured for the entire judgment. . . . This point is sharpened by the preceding paragraph in the standard CGL policy's supplementary payments provision, which limits the insurer's obligation to pay prejudgment interest awarded against the insured to that part of the judgment the insurer pays. It is logical to conclude that the insurer could have similarly limited its post-judgment interest obligation if it wished to do so." Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Jeffers, 244 Md. App. 471, 499, 501–02, 223 A.3d 1146, 1163, 1164 (2020) (citations and quotation marks omitted).

[27] See id.

Prejudgment interest may also constitute an insurable risk in the absence of a standard Supplementary Payments provision, or in the context of claims implicating other types of liability policies that may respond to construction defect-related disputes, such as professional liability policies or pollution liability policies. Liability policies typically cover amounts the insured must pay as damages, and many courts treat prejudgment interest as compensatory in nature.[28] However, this is not a bright-line rule, as some courts have considered prejudgment interest to be a claim expense.[29]

In sum, in construction defect litigation, prejudgment interest is generally an insurable risk because it is a statutorily authorized component of the insured's compensatory liability for covered property damage. Whether it is covered in a given case ultimately depends on (1) the scope of coverage triggered by the alleged defective work and resulting damage, (2) whether the insurer pays any portion of the ultimate judgment, and (3) how the policy's Supplementary Payments provision or other relevant language applies. Understanding these mechanics is essential for parties, insurers, and counsel navigating construction defect disputes, where prejudgment interest can significantly influence both settlement strategy and overall financial exposure.

VI. PRACTICAL GUIDANCE FOR RISK MANAGERS

Given the varying frameworks outline above, risk managers do well to identify early in any dispute the date or event that fixes damages: the date of breach, the date of repair, the date affixed by the trial-date approached tied to substantial compliance, or the date of substantial completion. Further, in the context of any construction project, ensuring thorough documentation and record-keeping is advised to mitigate damages inflation stemming from calculation thereof years after the fact. To be sure, in most jurisdictions, claimants have an affirmative duty to mitigate their damages through reasonable efforts.[30] Thus, expert involvement in assessing deficiencies and estimating repair scope and pricing can insulate claimants against a defendant's affirmative defense of failure to mitigate damages.[31]

If there is a reasonable likelihood that some measure of damages will be awarded in favor of the plaintiff, defendants and their insurers should consider service of an early statutory offer of judgment. As an example, Florida's offer of judgment statute permits a defendant in a construction defect lawsuit, 90 days after the filing of a lawsuit, to serve a monetary settlement offer on

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[28] See, e.g., Guin v. Ha,, 591 P.2d 1281 (Alaska 1979) (where medical malpractice policy covered all sums the insured was "liable to pay for damages" up to the policy limit, plus costs and expenses incurred in the defense of said claim in addition to the policy limits, the court held that prejudgment interest was an item of compensatory damages designed to make Plaintiffs whole for the loss of the use of money and was therefore covered subject to the policy limit).

[29] See, e.g., McDonald v. Schreiner, 2001 OK 58, 28 P.3d 574, opinion after certified question answered, 260 F.3d 1211 (10th Cir. 2001) (where professional liability policy covered claim expenses in addition to the policy's limit of liability, the court held that prejudgment interest was a covered claim expense, reasoning that "[w]here the insurer has complete control of litigation, prejudgment interest is the direct result of the insurer's conduct and must be considered an expense which results from the investigation, adjustment, defense and appeal of a claim.") (quotation marks omitted).

[30] See, e.g., In re Std. Jury Instrs.-Contract & Bus. Cases, 116 So. 3d 284, 335-36 (Fla. 2013); Shaffer v. Debbas, 17 Cal. App. 4th 33 (1993); LTV Aerospace Corp. v. Bateman, 492 S.W.2d 703, 708 (Tex. Ct. App. 1973).

[31] See Gulf Bldg. LLC v. Philadelphia Indem. Ins. Co., 689 F. Supp. 3d 1183, 1243-44 (S.D. Fla. 2023), appeal dismissed, No. 23-13208-D, 2023 WL 10553821 (11th Cir. Dec. 11, 2023) (applying Florida law).

plaintiff.[32] If plaintiff fails to accept this offer within 30 days of service, and then fails to better this offer by greater than 25% at trial, the defendant-offeror is entitled to prevailing party attorney's fees.[33] One complicating factor in serving such offers is that, at least in Florida, a plaintiff is entitled to add pre-offer of judgment prejudgment interest and taxable costs in determining whether the judgment obtained exceeds 25% of the statutory offer of judgment.[34] Thus, in circumstances where a construction defect defendant or its insurer is able to perform an early assessment of the plaintiff's damages, it can limit its liability to prejudgment interest and taxable costs which might accrue after expiration of an offer of judgment.[35]

VII. CONCLUSION

The damages calculation for construction defect cases turns not only on liability but also on the timing of when the loss is measured. As this paper summarizes, jurisdictions anchor damages to different milestones, and these differences can materially shift outcomes for litigants. Accordingly, risk managers operating across jurisdictions must familiarize themselves with the varying frameworks to be able to identify the operative date or event that fixes damages to help achieve better exposure assessments and efficient dispute resolution.

[32] Fla. R. Civ. Pro. 1.442(b) (2025).
[33] See generally, Fla. Stat. §768.79 (2025).
[34] Maddox v. Trombetta, 332 So. 3d 1091, 1093 (Fla. 2d DCA 2022) (recognizing that only pre-offer of judgment costs are added to the "judgment obtained" in determining the statutory prevailing party).
[35] Petri Positive Pest Control, Inc. v. CCM Condo. Ass'n, Inc., 271 So. 3d 1001, 1006 (Fla. 4th DCA. 2019), approved, 330 So. 3d 1 (Fla. 2021) (holding that only pre-offer prejudgment interest is to be used in the threshold calculation for purposes of Florida's offer of judgment statute).

APPENDIX A

The Four National Approaches

Jurisdiction & Approach	When Damages Are Measured	Controlling Principle	Key Case(s)
Florida – Date of the Breach	Date of the breach, i.e., when defective work is completed	Damages must reflect the cost of repair at the time of breach, not at trial.	*Bandklayder Dev., LLC v. Sabga*; *Eloquence on the Bay*; *Vuletic Group v. Malkin*
California – Date of Repair	Date of repair estimation or performance, as applicable	Measuring damages by current repair costs prevents defendants from paying with depreciated dollars, but plaintiffs cannot delay repairs to inflate damages	*Rovetti v. City & County of San Francisco*
Texas – Substantial Compliance / Flexible Timing	At or near trial (damages assessed using trial-date evidence for repair cost or diminution in value)	Timing is flexible and may rely on trial-date evidence.	*Precision Homes v. Cooper*
New York – Substantial Completion	Date damages become ascertainable (typically substantial completion date)	Damages are pegged to the date damages become ascertainable, which is typically the date of substantial completion	*Brushton-Moira Central School Dist. v. Thomas Assocs.*

APPENDIX B

Jurisdictional Groupings[36]

Approach	Representative Jurisdictions
1. Date of the Breach	Florida, Missouri,[37] Tennessee,[38] Maryland,[39] Louisiana[40]
2. Date of Repair	California, Georgia,[41] Nevada,[42] Connecticut,[43] Mississippi,[44] Alaska,[45] Washington[46]
3. Substantial Compliance / Flexible Timing	Texas
4. Substantial Completion	New York

[36] See generally, 41 A.L.R.4th 131 (Originally published in 1985), Modern Status of Rule as to Whether Cost of Correction or Difference in Value of Structures Is Proper Measure of Damages for Breach of Construction Contract, § 19[a]–[b] (database updated 2023).

[37] See Ribando v. Sullivan, 588 S.W.2d 120 (Mo. Ct. App. 1979) (holding that diminution in value must be determined at or immediately after the breach).

[38] See BancorpSouth Bank, Inc. v. Hatchel, 223 S.W.3d 223 (Tenn. Ct. App. 2006) (holding that because the Plaintiff only presented evidence of the value of the property as of the time of trial, it had not satisfied its burden of proof at trial by presenting evidence of the value of the property at the time of breach).

[39] See Hall v. Lovell Regency Homes Ltd. P'ship, 121 Md. App. 1 (1998) (rejecting use of a post-breach valuation of damages)

[40] See Campagna v. Smallwood, 428 So. 2d 1343 (La. Ct. App. 1983) (holding that cost-of-repair damages must be measured "within a reasonable period after discovery of the defective work").

[41] See Ryland Group v. Daley, 537 S.E.2d 732 (Ga. Ct. App. 2000) (rejecting builder's argument to measure damages at closing and allowing damages reflecting later increased repair costs attributable to builder's refusal to cure).

[42] See Josh M. Leavitt & Daniel G. Rosenberg, Toward a Unified Theory of Damages in Construction Cases: Part I – Navigating Through the Diminution of Value vs. Cost of Repair Debate in Defect Cases and Allocating Burdens of Proof, 2 J. Am. C. Constr. Laws. 1, 6 (2025) (quoting Nevada Supreme Court rule permitting damages to be valued as of a date later than breach where "special circumstances show proximate damages of an amount greater than existed on the date of the breach").

[43] See Centimark Corp. v. Village Manor Associates, 2007 WL 2081276 (Conn. Super., 2007) (awarding damages pegged to current cost of repair).

[44] See Harrison v. McMillan, 828 So. 2d 756 (Miss. 2002) (allowing "actual repair costs and loss-of-value damages calculated at the time of trial").

[45] See Wallace Constr. Co. v. Rude, 535 P.2d 1218 (Alaska 1975) (affirming award of damages for temporary repairs "to the time of trial").

[46] See Eastlake Const. Co. v. Hess, 686 P.2d 465 (Wash. 1984) (holding that construction-defect damages are generally measured by the reasonable cost to remedy the defects (i.e., at the time the repairs will be performed)).