

H.B. 1455: New Texas Law Governing Condominium Association Construction Defect and Design Claims

By Mark A. Goodman and Patrick J. Casey – (June 23, 2015) – On May 29, 2015, the Texas state legislature voted to send House Bill No. 1455 to Governor Abbott’s desk, which he signed on June 17, 2015. The new legislation amends the Texas Uniform Condominium Act, Tex. Prop. Code § 82.001 et seq., by requiring condominium associations to fulfill certain preconditions prior to initiating a construction defect or design lawsuit.



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At its core, House Bill No. 1455 (the Act) prevents a condominium board from making litigation decisions without meaningful input or approval from the unit owners themselves.

Ned Muñoz, General Counsel, Texas Association of Builders, an industry group that advocated for the passage of the Act, highlighted the important connection between this legislation and affordable housing in Texas.

Muñoz noted, “Requiring proper notice and owner approval prior to a condominium board pursuing a construction defect claim will help ensure that unit owners are provided with adequate information to make an informed decision that affects their private property, and protect unit owners from resale and refinance limitations due to unknown cases involving their property.

“Doing so will help ensure that the condominium form of ownership, which can be beneficial to the promotion of housing affordability, will not be unduly damaged by the filing of frivolous and costly litigation,” he said.

This article reviews the pre-suit procedures imposed by the Act, including *inter alia*, (1) the requirement for a third-party inspection and written report; (2) the opportunity for construction professionals to address potential defect or design claims; and (3) the requirements of notice to and approval of the unit owners prior to commencing litigation. Further, the article includes a summary checklist of the requirements mandated by the new law.



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ENGINEER’S INSPECTION AND WRITTEN REPORT

Prior to filing suit or initiating an arbitration proceeding to resolve a construction defect or design claim, a condominium association must obtain an inspection and written third-party report from a licensed professional engineer that:

- Identifies the specific units or common elements subject to the claim;
- Describes the present physical condition of the units or common elements subject to the claim; and
- Describes any modifications, maintenance, or repairs to the units or common elements performed by the unit owners or the association. (Tex. Prop. Code § 82.119(b)(1)).

Each party subject to a defect or design claim must be given timely notice of the inspection. Specifically, the Act requires the association to provide the construction professional with written notice of the inspection at least ten (10) days prior to the inspection. (Tex. Prop. Code § 82.119(c)). >

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The notice must identify the party engaged to prepare the report, identify the specific units or common elements to be inspected and include the date and time of the inspection. (Id.) Any party subject to a claim may attend the inspection personally or through an agent. (Tex. Prop. Code § 82.119(d)). Following completion of the written report, the condominium association must provide the report to each unit owner and each party subject to a claim. (Tex. Prop. Code § 82.119(e)(1)).

The Act's new inspection report requirement is a helpful starting point for unit owners and construction professionals alike. Because the Act requires the identification and description of the property alleged to be defective, a unit owner will be given the necessary information to assess the scope of the claim and the extent to which his or her property is affected.

The construction professional will likewise be informed of the specific defect issues subject to the claim. The construction professional will have the necessary information to identify potentially liable persons as third-party defendants or to designate nonparties at fault. Furthermore, the inspection report requirement will assist all parties involved in the litigation by documenting any subsequent repair or maintenance work performed to the property.

OPPORTUNITY FOR REPAIRS

The engineer's written inspection report not only appraises a construction professional of the claimed construction and design defects, but also triggers a 90 day statutory period for repairs. Under the Act, the association must allow each party subject to a claim at least 90 days after the date of the report's completion to inspect and correct any condition identified in the report. (Tex. Prop. Code § 82.119(e)(2)).

This provision of the Act guards against unnecessary and costly litigation to the extent that it gives the construction professional an opportunity to investigate and repair the conditions identified by the third-party engineer.

NOTICE TO UNIT OWNERS

The Act was drafted in part to prevent condominium associations from commencing construction defect litigation without sufficient unit owner approval and involvement. In light of this aspect of the Act, one of its centerpieces is the requirement of detailed written notice to the unit owners.

At least 30 days prior to a meeting of the unit owners to decide to pursue a construction defect claim, the association must provide each unit owner with written notice of the date, time and location of the meeting. (Tex. Prop. Code § 82.119(f)). The notice must include the following:

- A description of the nature of the claim, relief sought, anticipated duration of prosecuting the claim and the likelihood of success;
- A copy of the written report by the licensed professional engineer;
- A copy of the contract or proposed contract between the association and the attorney selected by the board to prosecute the claim;
- A description of the attorneys' fees, consultant fees, expert witness fees, and court costs, whether incurred by the association directly or for which the association may be liable as a result of prosecuting the claim;
- A summary of the steps previously taken by the association to resolve the claim;
- A statement that initiating a lawsuit or arbitration proceeding to resolve a claim may affect the market value, marketability or the ability to refinance a unit while the claim is prosecuted; and
- A statement that initiating a lawsuit or arbitration proceeding to resolve a claim may affect the market value, marketability or the ability to refinance a unit while the claim is prosecuted; and >

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Of critical importance to note: The notice required by the Act cannot be prepared or signed by the attorney who represents or will represent the association in prosecuting the claim, a member of that attorney's law firm or a person employed by or otherwise affiliated with that attorney's law firm. (Tex. Prop. Code § 82.119(g)).

Construction defect litigation is often extraordinarily costly and time-consuming, given the number of parties, complex nature of the issues, the involvement of expert witnesses and the amount of claimed damages. Consequently, the Act's notice requirement ensures that unit owners will have adequate information prior to initiating a construction defect lawsuit or arbitration proceeding. The many benefits to unit owners provided with the requisite notice include the following:

- Much less uncertainty as to the scope of the litigation, both in terms of time and expense
- Right to review the specific basis for the claim and to understand what, if any, other avenues have been taken, without success, to resolve the claim
- Ability to evaluate the risks and costs, both direct and indirect, of litigation, and weigh that information against the likelihood of success
- Opportunity to review the proposed representation by counsel
- Sufficient notice that the litigation may affect their property values and ability to market or refinance the property while the claim is being prosecuted

In short, the Act's substantive notice requirements will ensure that each unit owner's decision to move forward with a construction defect or design claim is an informed decision.

VOTE BY UNIT OWNERS

A final prerequisite imposed by the Act is approval by the unit owners. Prior to filing suit or initiating an arbitration proceeding to

resolve a construction defect or design claim, a condominium association must obtain approval from unit owners holding more than 50 percent of the total votes allocated under the declaration, voting in person or by proxy. (Tex. Prop. Code § 82.119(b)(2)).

The vote must take place at a regular, annual or special meeting that is called in accordance with the applicable declaration or bylaws. (Id.) This voting requirement in the Act ensures that a construction defect claim only moves forward with appropriate unit owner support.

MISCELLANEOUS PROVISIONS AND BINDING ARBITRATION

The Act also incorporates certain provisions as to its scope and applicability. First, the Act's pre-suit procedures do not apply to an association with less than eight units. (Tex. Prop. Code § 82.119(a)) Second, the Act includes a tolling provision for any condominium association that initiates the Act's procedures during the final year of the applicable limitations period. (Tex. Prop. Code § 82.119(h)).

Specifically, the period of limitations for filing suit is tolled until the first anniversary of the date that the association initiated the Act's procedures. (Id.) Third, the Act's provisions take effect September 1, 2015, and its pre-suit procedures apply only to suits filed or arbitration proceedings commenced on or after that effective date.

In addition to the pre-suit procedures discussed earlier in this article, the Act amends the Texas Uniform Condominium Act by permitting binding arbitration for certain claims. Under the Act, a condominium declaration may require a construction defect or design claim to be resolved by binding arbitration, and the declaration may also set forth the process for resolving the claim. (Tex. Prop. Code § 82.120(a)). Moreover, an amendment to the declaration that modifies or removes an arbitration requirement may not be applied retroactively. (Tex. Prop. Code § 82.120(b)). >

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SUMMARY CHECKLIST AND CONCLUSION

Whether representing a condominium association or a construction professional, counsel should be aware of the following preconditions to pursuing a construction defect or design claim according to the Act:

- Schedule an inspection of the property by a licensed professional engineer
- Provide timely notice of the inspection to the parties implicated by the defect or design claim
- Obtain a written third-party report from the licensed professional engineer and provide the report to each unit owner and each party subject to a claim
- Allow the construction professional at least 90 days after the completion of the third-party report to inspect and correct any condition identified in the report
- Provide timely notice of any meeting of unit owners at which there will be a vote on whether or not to pursue a construction defect claim; and
- Obtain necessary approval from unit owners prior to filing suit or initiating arbitration proceedings.

In sum, the Act reflects the Texas state legislature's intent to provide adequate information to both unit owners and construction professionals

before these parties are involved in costly and time-consuming litigation and affected by the uncertainty inherent in such disputes. The Act's inspection, notice and voting regulations that are prerequisites to filing suit will ensure that the involved parties make informed decisions when it comes to prosecuting and defending construction defect claims. The Act's "big picture" impact: By improving and increasing information provided to parties involved in construction defect disputes—particularly condominium unit owners—Texas effectively has advanced efforts to provide affordable housing, a move that promises to help, not hinder, the Lone Star State's construction industry.

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