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Subrogation Alert: New Texas Statute Affecting Condominium Construction Defect Claims

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Before filing a lawsuit or initiating an arbitration proceeding pertaining to a construction defect, a condominium association in Texas with eight or more units must now comply with the newly added Section 82.119 to Chapter 82 of the Texas Property Code. This is in addition to compliance with the Texas Residential Construction Liability Act (RCLA) and any preconditions included in the condominium association's declarations.

Section 82.119 requires affected associations to have a licensed professional engineer inspect the units and common elements in question and prepare a written report that (1) identifies the specific units or common elements, (2) describes the present physical condition of the units or common elements, and (3) describes any modifications, maintenance, or repairs to the units or common elements performed by the unit owners or the association.

At least 10 days before the engineer's inspection, the association must provide written notice of the inspection to each party subject to a claim. The notice must (1) identify the engineer, (2) identify the specific units or common elements to be inspected, and (3) include the date and time the inspection will occur. Each party subject to a claim has a right to have representatives attend the inspection. As soon as the engineer's report is complete, the association is required to provide the report to each party subject to a claim. Each party subject to a claim then has at least 90 days to inspect and correct any condition identified in the report.

After completion of the engineer's report and the minimum 90-day inspection/correction period, the association must provide each unit owner with written notice of the date, time, and location of a meeting to be held, at which approval to file suit or initiate arbitration must be obtained from unit owners holding more than 50% of the total votes allocated under the declarations. The meeting notice must also include:

α. a description of the nature of the claim, the relief sought, the anticipated duration of prosecuting the claim, and the likelihood of success;
β. a copy of the engineer's report;
γ. a copy of the contract or proposed contract between the association and the attorney selected by the board to assert or provide assistance with the claim;
δ. a description of the attorney's 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;
ε. a summary of the steps previously taken by the association to resolve the claim;
ζ. a statement that initiating the a lawsuit or arbitration proceeding to resolve a claim may affect the market value, marketability, or refinancing of a unit while the claim is prosecuted; and
η. a description of the manner in which the association proposes to fund the cost of prosecuting the claim.

The meeting notice cannot be prepared or signed by the attorney who represents or will represent the association in the claim or by anyone employed by or affiliated with the attorney or the attorney's law firm.

The effects of this new legislation, which was sponsored by two real estate developers, remains to be determined, but it will likely decrease the lawsuit risk for condominium developers, limit an association's ability to pursue construction defect claims, and increase the upfront costs to an association pursuing such claims.

Section 82.119's effect on an insurer subrogated to the rights of an association also remains to be determined. Arguably, a subrogated insurer should not be required to comply with the procedures set forth in Section 82.119 because the statute does not specifically address subrogated insurers. However, the safer practice would be to at least comply with the engineer inspection and notice requirements. If the association/subrogor decides to pursue a claim for its deductible interest or other uninsured loss, the association would certainly have to comply with all of the required procedures.

In any event, a subrogated insurer with a claim against the builder of a condominium should comply with the written notice and opportunity to inspect and offer to repair required by Section 27.004 of the RCLA before any repairs are performed; otherwise, the builder will not be liable for the cost of any repairs.