

Condominium Association Construction Defect Litigation – Issues that Arise and New Pre-suit Requirements in Texas



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Condo Construction Continues to Rise in Major Texas Cities

← The Independent (tallest residential building west of Mississippi) recently broke ground in Austin earlier this month.



← The Windrose
Tower at Legacy
West

Demand for Condos Continues to Rise Nationwide

- Millennials' top competition for condos might be their parents.
- Roughly 10,000 baby boomers are retiring each day; half of those who plan to move will downsize when they do.



Are Construction Defect Lawsuits Causing a Nationwide Condo Crisis?

- Many argue that as lawsuits increased, construction defect litigation reform is necessary, as insurers are raising construction liability insurance rates, causing developers and builders to stop building condos;
- Others argue that reform would limit legitimate claims, and that condo buying is on decline due to higher fees, credit scores, high home prices, unemployment rates and lower marriages rates.

Are Construction Defect Lawsuits Causing a Nationwide Condo Crisis?

- Approximately half of all states have enacted “right to repair” or “right to notice” legislation requiring condo associations to give prior notice and/or the right to cure to developers and builders prior to filing a condo construction defect suit.

Texas Uniform Condominium Act HB 1455

- House Bill 1455 recently signed into law requiring condo associations to complete pre-suit requirements prior to filing lawsuit.
- Found in Section 82.119 and 82.120 of the Texas Property Code.
- Took effect Sept. 1, 2015

Construction Defect Claims Involving Condos

- Construction defects can present complicated issues for builders, developers, owners and insurance carriers.
- Because of size, damages can add up quickly.
- Association's involvement in suit complicates the matter.

Texas Uniform Condominium Act

- Texas Property Code § 82.001, et seq.
- TUCA governs the creation, operation, alteration, termination and management of new condo projects created after Jan. 1, 1994.
- Outlines rules and regulations for residential condominiums, including their creation, sale and governance
- Provides legal framework to allow subdivision of real property into individual estates with appurtenant common elements that are owned in undivided interests by owners of the condo units.

Common Elements

- General common elements
 - Portions of the project that are not units of limited common elements
 - Each unit owner owns some designated percentage of the common elements, not the condo association
- Limited common elements
 - Portions of a project that can be exclusively used by one or more of the unit owners, but less than all the unit owners

Texas Uniform Condominium Act

- TUCA requires the condo developer to create an Association to represent the interests of the unit owners
 - Association membership consists of all the unit owners
- A Board of directors acts on behalf of the Association
 - The Board must act in all instances on behalf of the Association if, in the good-faith judgment of the Board, the action is reasonable
- Associations typically use a property management company to handle the day-to-day operations, including routine maintenance

Texas Uniform Condominium Act- Condo Association's Authority to Initiate Litigation

- Association has the power to “institute, defend, intervene in, settle, or compromise litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.”
 - Tex. Prop. Code § 82.102(a)(4)

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A Condo Association (with 8 or more units)
must (Sec. 82.119):



1. Obtain an inspection and written report from a licensed professional engineer identifying defects, describing the current physical condition, and describing any modifications undertaken by the Association or homeowner; and

Texas Uniform Condominium Act HB 1455

A Condo Association (with 8 or more units)
must (Sec. 82.119):

2. Obtain approval from unit owners holding 50% of the total votes in the Association at a meeting called in accordance with Association's declarations or bylaws.



Texas Uniform Condominium Act HB 1455



Before the first requirement (Obtain an inspection and written report from engineer identifying defects) →

Provide Notice to Developer/Contractor/Architect
→ At least 10 days prior to the engineer's inspection, the Association **MUST** provide written notice to each party subject to the claim, allowing them to attend the inspection.

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Before Second Requirement (obtain approval from unit owners holding 50% of the total votes in the Association)→

1) Developer/Contractor/Architect Gets 90 Days to Inspect and Correct - The Association MUST provide copies of the engineer's report to each party who may be subject to the claims and allow them 90 days to inspect and correct any condition identified in the report.

Texas Uniform Condominium Act

HB 1455



Before Second Requirement (obtain approval from unit owners holding 50% of the total votes in the Association)→

2. 30 Days Notice to Unit Owners -- At least 30 days before conducting meeting, condo association MUST provide:

- written notice of meeting to all unit owners;
- description of claim;
- engineering report;
- cost of repair of the construction defect and attorneys' fees to be incurred in prosecuting claim;
- Previously steps taken to resolve claim;
- Statement that initiating suit will affect market value or ability to refinance.

Texas Uniform Condominium Act

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Before Second Requirement (obtain approval from unit owners holding 50% of the total votes in the Association)→

2. **30 Days Notice to Unit Owners** – 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).

Texas Uniform Condominium Act

HB 1455 - Benefits to Owners

Texas Affiliation of Affordable Housing Providers urged support of this bill:

- Increase construction of more affordable and lower income condos;
- Protects unit owners from resale and refinance limitations due to unknown cases involving their property;
- Ensures that condo unit owners are provided with adequate information to make an informed decision that affects their private property rights;
- Requires proper notice to an owner and owner approval prior to board initiating a claim.

Texas Uniform Condominium Act HB 1455

Possible Negative Impact

- Limit an association's ability to pursue legitimate construction defect claims;
- Increase upfront costs to an association for pursuing a claim;
- Restricts homeowner's access to expert advice and obtaining full legal representation;
- Takes away homeowner's rights to direct repairs to their property.

Texas Uniform Condominium Act

HB 1455

What about the Statute of Limitations?

- The Act includes a tolling provision for any condo association that initiates the Act's procedures during the final year of the applicable limitations period. Sec. 82.119(h).
- Tolloed until the first anniversary of the date that the association initiated the Act's procedures.

Texas Uniform Condominium Act HB 1455

The Act takes effect Sept. 1, 2015 and applies only to a suit filed or arbitration proceeding initiated on or after this date.

Texas Uniform Condominium Act

HB 1455

- Under Section 82.120-
- Allows a condo declaration to include a binding arbitration provision for construction defect claims and will limit the ability of the unit owners to amend the declaration to modify mandatory arbitration requirement for claims based upon acts that occurred prior to amendment.

Texas Uniform Condominium Act HB 1455

What about the Residential Construction Liability Act (which already protects builders by requiring pre-suit notice, opportunity to cure, defenses, and damage limitations)?

- Opponents claim RCLA already protects builders.
- Supporters argue HB 1455 provides protections for developers and their design professionals, who do not fall under RCLA.

Texas Uniform Condominium Act - HB 1455 -Questions Remain

- Are there any limitations allowing the developer/builder to make repairs?
 - What if offer of repair is unreasonable?
 - What if repairs cannot be completed in 90 days?
- What about subrogating insurers pursuing claims?

Lawsuits for Construction Defect Involving Condos - Other Issues

Stanford Development Corp. v. Stanford Condo Owners Assoc., 285 S.W.3d 45 (Tex. App.-Houston [14th Dist.] 2009):

- Whether condo association that brings suit on behalf of owners against developer is bound by arbitration agreement in owner's earnest money contract with developer?
- Court said yes!
- Court said subsequent purchasers are also bound by arbitration provision!

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For any questions, please call or email.

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