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Texas Property Code Chapter 27—(the “RCLA”)

Within no less than 60 days prior to filing a lawsuit or initiating binding arbitration against a Builder or Contractor to recover damages arising out of defective workmanship, Homeowners must first satisfy the mandatory requirements set forth in Chapter 27 of the Texas Property Code. Chapter 27, also referred to as the Residential Construction Liability Act (“RCLA”) was enacted in 1987, and has been amended five times since, to include the most recent amendments which came into effect on September 1, 2023. Chapter 27 was enacted to promote settlement discussions between Homeowners and Builders/Contractors, and to provide the parties with one last opportunity to resolve their dispute before initiating formal litigation. This is an important step in the claim process and as such, either consulting with or engaging a qualified construction attorney to assist is advisable if the size of the claim warrants. Chapter 27 applies to both new home construction and residential remodel Projects, and defects relating to every component of the main structure, and detached structures, driveways, sidewalks, pools, landscaping, outdoor living features, and fences. A new home Contract or remodel Contract is required to contain a Notice in at least 10 bold font print generally outlining the steps for asserting a claim against a Builder/Contractor under Chapter 27. Failure to include this notice in the Contract subjects the Builder/Contractor to a civil penalty of \$500.00.

A Builder/Contractor is liable to a Homeowner for any damages proximately caused by a construction defect that result in: (1) actual physical damage to the residence; (2) an actual failure or lack of capability of a building component to perform its intended function or purpose; or (3) a verifiable danger to the safety of the occupants of the residence. Chapter 27 expressly defines “construction defect” as “a deficiency in the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or appurtenance (*e.g.*, detached structure, retaining wall, pool, outdoor living area, fence or recreational area) to a residence.”

In addition to being a mandatory process for asserting a claim for defective workmanship against a Builder/Contractor, Chapter 27 also limits the nature and type of damages Homeowners can recover from a Builder/Contractor for damages arising from a construction defect to: (1) the reasonable cost to repair the construction defect; (2) the reasonable cost to repair or replace any damaged personal property caused by the construction defect; (3) reasonable and necessary engineering and consulting fees if and only if the Contract allows reimbursement for these costs; (4) reasonable expense for temporary housing during the repairs if the house cannot reasonably be occupied during the repairs; (5) the reduction in current market value, if any, valued after the construction defects have been repaired if the defects are structural in nature; (6) reimbursement of

reasonable attorneys' fees and litigation costs if supported by the contract or a statute; and (7) reimbursement of reasonable and necessary arbitration filing fees and arbitrator fees. Consequently, if another statute or cause of action allows for the potential recovery of additional damages not listed above, *e.g.*, mental anguish, delay damages, or treble damages, then Chapter 27 bars the recovery of those damages if they arise out of or are in any way related to the construction defects.

If the cost to correct the construction defects is greater than \$7,500.00, the Court may, upon the filing of a motion, compel the parties to mediate the dispute at the outset of litigation.

Steps for Asserting a Chapter 27 Claim

Step One—Initiate the Claim: A Chapter 27 claim is initiated by the Homeowners (typically by and through their attorney) by preparing and sending a formal Notice to the Builder/Contractor by certified mail, which identifies in reasonable detail the known construction defects. If available, the Notice must include any supporting evidence which depicts the “nature and cause of the defects” and the “nature and extent of repairs necessary to remedy the defects”, to include any expert inspection reports, repair estimates, photographs, and video or audio recordings. Before initiating a Chapter 27 claim, it is advisable for the Homeowner to retain one or more qualified forensic experts who can inspect the construction defects and prepare an inspection report which identifies the nature and cause of the defects, any relevant code violations, the correct method for correcting the defects, and the cost of repair. By doing so, the Homeowners will be: (1) better educated about the severity and nature of the construction defects; (2) understand the proper method to correct the defects so they know whether the Builder/Contractor’s proposed offer and method for correcting the defects is reasonable; (3) the cost to correct the defects so they can evaluate the reasonableness of a Builder/Contractor’s money offer and whether it makes economic sense to retain an attorney to pursue the claim; and (4) to demonstrate to the Builder/Contractor the strength and validity of the claim. However, Homeowners should not allow the process of obtaining an inspection report delay the initiation of the claim, in that a Builder/Contractor is not liable for damages caused by a Homeowners’ fail to mitigate damages caused by the defects or by failing to provide timely notice of the defects.

Step Two—Builder/Contractor’s Right to Inspect: Upon receipt of the Notice, the Builder/Contractor has 35 days to coordinate and conduct up to three (3) formal inspections to test and document the alleged defective work. The Homeowner has the right to have its own construction experts and attorney present at the inspections, if desired. Typically, no more than one inspection takes place because of the time and costs involved; however, if the defects are extensive in nature and if multiple trades are involved, then more than one inspection may be necessary and reasonable to properly evaluate the claim. Not all Builders/Contractors perform inspections, especially if they have already done so prior to the Notice being served but have the right to inspect if requested. Homeowners should not repair any of the defective work until the inspections have been conducted and/or the 35-day deadline to inspect has passed. If the Homeowners refuse to allow the Builder/Contractor an opportunity to inspect the defects, then the Homeowners may potentially waive their right to recover damages against the Builder/Contractor if they pursue formal litigation.

Step Three—Builder/Contractor’s Offer: Within no later than 60 days from when the Builder/Contractor receives the Notice (Step One above), the Builder/Contractor *may* make a written offer of settlement to the Homeowner. The Builder/Contractor is not required to make an offer. The offer may include an agreement by the Builder/Contractor to: (1) repair the defects; (2) have the defects repaired by an independent contractor at the Builder/Contractor’s expense; or (3) pay a sum of money to resolve the dispute. If an offer is not made within the 60-day deadline and no extension has been granted, then the process ends and the Homeowners can initiate formal litigation. If an offer is made, then the process proceeds to Step four below.

Step Four—Respond to Builder/Contractor’s Offer: If the Builder/Contractor makes a written offer of which the Homeowners deem reasonable, then the offer should be accepted in writing and memorialized through a Settlement Agreement. If the offer involves either the Builder/Contractor or one of its independent contractors making the repairs, then most repairs should be completed within 60 days or less depending upon the nature and extent of the repairs. If the settlement includes a payment of money to the Homeowners, payment is typically made within 15 – 30 days from execution of the Agreement.

If the Homeowners deem the offer to be unreasonable, then the Homeowners have 25 days to reply to the Builder/Contractor’s offer in writing, sent by certified mail, specifically identifying why the offer is unreasonable and reasserting or modifying the original demand. If the Homeowners fail to respond to the offer, then it is automatically deemed rejected. If the Homeowners reject a “reasonable offer” (later to be determined by a judge, jury, or arbitrator if the Homeowners pursue a formal claim), then the Homeowners’ potential recovery through a lawsuit and/or arbitration will be limited to the original offer and the Homeowners will not be allowed to recover reimbursement of attorneys’ fees incurred after the offer was rejected. Most Homeowners do not want the Builder/Contractor to repair the defects because of the Builder/Contractor’s prior conduct and by the time the dispute reaches the Chapter 27 process, the relationship has typically deteriorated beyond repair. If the Homeowners can demonstrate that allowing the Builder/Contractor to repair the defects would be unreasonable, then rejecting a Builder/Contractor’s offer to repair might be deemed reasonable by the trier-of-fact.

Step Five—Builder/Contractor’s Counteroffer: Upon receipt of the Homeowners’ response to the Builder/Contractor’s original offer, the Builder/Contractor may respond back within 10 days with a new offer, but is not required to. If a new offer is made and deemed to be reasonable, then the Homeowners can accept the offer and memorialize the terms in a Settlement Agreement as discussed above. If the offer is still unreasonable, then the Homeowners are not required to respond and the RCLA process is deemed concluded. The Homeowners may now proceed with formal litigation—filing a lawsuit or binding arbitration if required under the original Contract.

The Chapter 27 Demand is a very important step in the claim process and should be prepared by an experienced construction attorney. Most Notices can be prepared within four - five hours, including review of all relevant supporting documents. The amount of time involved thereafter will depend upon the nature and size of the claim and the negotiation process.