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STEPS FOR BRINGING A CLAIM AGAINST A HOMEBUILDER OR CONTRACTOR

Step One—Review Your Contract and Express Warranty: The most important document in a construction defect claim, other than expert reports, is the Contract. The Contract typically sets forth: (1) what events constitute a default and the method for providing Notice of default to the Builder/Contractor; (2) whether formal Notice and an opportunity to cure the defects must be offered to the Builder/Contractor before the Homeowners can rightfully terminate the Contract; (3) the forum for bringing a claim, *i.e.*, the civil court system or binding arbitration; (4) the statute of limitations for bringing a claim; (5) the nature and type of damages waived by the Homeowners, *e.g.*, delay damages, indirect or consequential damages, and mental anguish; (6) whether the parties have the contractual right to recover attorneys' fees or have waived the right to reimbursement of attorneys' fees; (7) whether the Homeowners agreed to limit the amount of recoverable damages; (8) whether the Builder/Contractor provided an express warranty; and (9) whether the Homeowners waived claims for breach of implied warranties and/or breach of Contract in exchange for receiving an express warranty. If an express warranty has been provided, then it should be reviewed for the nature and type of claims covered under the warranty and the procedures for asserting a warranty claim. If a construction loan was obtained to fund all or some of the Project costs, then the Lender most likely had the Homeowners and the Builder/Contractor sign their construction Contract, typically referred to as a "Residential Construction Contract with Lien Transfer" or "Mechanic's Lien Contract". These Contracts typically provide the Homeowners with additional rights and therefore must be reviewed in conjunction with the Builder/Contractor's Contract.

Step Two—Assert a Warranty Claim and Attempt to Resolve the Dispute: If the Builder/Contractor provided an express warranty and if the warranty appears to cover repair of the construction defects, then follow the express procedures for asserting a claim against the warranty. It is unlikely that doing so will resolve the issue but providing the Builder/Contractor or third-party warranty company with notice of the construction defect during the warranty period, is the first necessary step to preserving a claim for breach of express warranty if the claim is denied. Homeowners will typically have 4 years from when the defect was discovered to pursue a breach of express warranty claim, unless they agreed to a lesser statute of limitations time period, *e.g.*, 2 years—which is not uncommon.

Step Three—Consult with a Construction Attorney: This step can be done before or after Step Four below. Even if the Homeowners do not intend to retain an attorney to represent them through the process, it can be very beneficial to consult with a qualified

construction attorney before, during and/or after initiating a claim against the Builder/Contractor to review and explain the relevant provisions of the Contract, analyze the claim and provide a strategy for resolving the dispute.

Step Four—Retain Experts to Inspect the Construction Defects: As stated above, 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.

Step Five—Retain a Construction Attorney to Initiate a Claim Under Chapter 27: Typically, before the Chapter 27 process is initiated, the Homeowners have already notified the Builder/Contractor of the defective conditions and have been unsuccessful in resolving the dispute on their own. As such, it is unlikely that the Homeowners will obtain a different result through the Chapter 27 process, unless they are represented by a construction attorney; although having legal representation does not guarantee a different result, it should increase the probability of obtaining a better outcome.

Step Six—Proceed with Filing a Civil Lawsuit or Binding Arbitration: If the dispute is not resolved through the Chapter 27 process, then the next step is to pursue formal litigation, *i.e.*, civil lawsuit or binding arbitration. However, initiating litigation does not mean that the case will go to trial or a final hearing. To the contrary, only approximately 3% - 5% of all construction disputes are resolved through trial or a final arbitration hearing; the remaining 97% settle at one of the many stages in the process. Typically, the goal is to gain as much leverage as possible, as early as possible, to force the Builder/Contractor to settle. The stages of litigation can be broken down generally as: (1) filing and serving the claim; (2) exchange of written evidence and information; (3) witness depositions; (4) expert depositions; (5) mediation, which can be conducted at any stage of the process, but typically not before gaining some leverage to force the Builder/Contractor to settle for more than what was offered before the claim was filed; (6) pre-trial or final hearing preparation; and (7) trial or binding final arbitration hearing. It can take anywhere from 6 months to 24 months to get to trial or a final hearing, depending upon the size and nature of the claim and scheduling.

Visit our website www.loveinribman.com to Learn More About Lovein Ribman, P.C. and Our Lawyers, or Contact Us by Calling Our Toll Free Number at (888) 368-2483 to Schedule a Consultation with a Board-Certified Construction Attorney Who Can Analyze Your Claim, Review and Discuss Your Contract Provisions and Provide a Strategy for Pursuing and Resolving Your Dispute with Your Builder/Contractor.