



CONSTRUCTION DEFECT STATUTES: Legislative Approaches from 34 States

Curtis W. Martin, Partner
Peckar & Abramson, P.C.
Houston, Texas

BROAD VARIETY OF STATUTORY APPROACHES

- **34 states represented**
- **Most residential**
 - Some condo statutes
- **Some actually create warranties – favor homeowner**
- **Some create notice and opportunity to cure**
- **Some recent legislative changes**

CONDO STATUTES

- **Who votes?**
 - What %
- **What information to homeowners?**

NATIONAL STATUTES CREATING WARRANTIES

- **Common structure**
 - One year: all defects
 - Two years: Electr., Plumbing, HVAC
 - Ten years: structural
- **Exclusions**

NOTICE AND OPPORTUNITY TO CURE STATUTES

- **Typical attributes:**
 - Notice required before suit
 - Meant to encourage notice / dialog
- **But there is wide variance in enactment**

NATIONAL NOTICE AND CURE STATUTES

- **Encourage Dialog**
- **Penalties / Incentives?**
- **Defining Recoverable Damages**

WHAT NOTICE OF DEFECT IS REQUIRED?

- **South Dakota:**
 - “Written Notice describing the ... defects”
- **South Carolina:** More Detail
- **Florida:** Location
- **Nevada:** Verification!

DEFINING RECOVERABLE DAMAGES

- **Some States define – or limit – recoverable damages**

WHEN IS NOTICE REQUIRED?

- **Before Suit Filed**

OTHER ISSUES:

- **What Documents to be exchanged?**
- **Are any defects excluded?**

RIGHT TO INSPECT

- **Is there a right to inspect?**
- **How triggered / requested?**
- **What kind of inspection?**

POST INSPECTION

- **Most States: Detailed Process Back & Forth**
- **A Few States: No Process**
- **Oregon:**
 - Builder provide written report of inspection;
 - Builder also, for each defect:
 - Acknowledge existence;
 - Describe different defect; or
 - Deny existence.

RIGHT TO CURE?

EXCLUSIONS/AFFIRMATIVE DEFENSES

- **Failure to Maintain/Mitigate**
- **Normal Wear and Tear**
- **Acts/Omissions of Others**
- **Act of Nature**
- **Change/Alteration**

PENALTIES FOR FAILURE TO FOLLOW PROCEDURE?

ATTORNEYS FEES

- **Prevailing Party Attorneys fees?**
 - Discretionary

CURRENT TEXAS LAW

- **Residential: Notice and Opportunity to Cure**
- **Condominiums: Notice and Opportunity to Cure**
- **Commercial: No Legislation**

TX: HB 1455 – LIMITS ON CONDO SUITS

- **Before suit, Condo HOA must:**
 - Obtain inspection by P.E.
 - Giving defendants notice and opp'ty to attend
 - Obtain P.E. report on defects, furnish to defendants
 - Give defendants 90 days to inspect and cure
 - Meeting of unit owners
 - With notice
 - Must have majority of owners vote to sue.
- **Can't retroactively amend to remove arbitration**

TEXAS – RESIDENTIAL CONSTRUCTION LIABILITY ACT

- **Notice and Opportunity to Inspect**
 - Notice of defect required 60 days before suit
 - If asked, claimant to supply evidence
 - Contractor given opportunity to repair
- **Offer of Settlement**

TEXAS – RCLA (cont'd.)

- **If claimant doesn't accept "reasonable offer" or prevents repairs**
 - Recovery limited to offer
 - No att'y. fees after offer
- **Provision to compel mediation**
- **Right to repurchase home for original purchase price**

OPTIONS

- **Mimic the Condo Bill**
- **Mimic RCLA**
- **New Statute**

PRIORITIES

- **First Tier**
 - Notice
 - Opportunity inspect and cure
- **Second Tier**
 - Limitation on damages
 - Timing of Notice

PRIORITIES (Cont'd.)

- **Third Tier**

- Specify affirmative defenses
- Penalties
 - For failure to follow procedure
 - For rejecting reasonable settlement offer
- Mandated information exchange
- Insurance
 - Notice of defect triggers coverage
 - Credit for amounts Owner receives from policy

PRIORITIES

	Issue	Condo Bill?	RCLA?
1	Notice	Yes – P.E.	Yes
1	Opp'ty to Inspect / Cure	Yes	Yes
2	Limitation on Damages	No	No
2	Timing Of Notice	No (Before Suit)	No (Before Suit)
3	Specify Affirmative Defenses	No	No
3	Penalties	No	Yes – for failure to accept offer
3	Mandated Info. Exchanges	No	No
3	Insurance Issues	No	No

DISCUSSION

Curt Martin
Peckar & Abramson, P.C.
Houston, Texas
281-953-7702
cmartin@pecklaw.com