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LEGISLATIVE UPDATE
NRS 40 REFORM

I. INTRODUCTION

Going into 2015, the Nevada State Legislature had indicated that one of its top priorities for the 78th (2015) Session was revising NRS 40.600 *et seq.* ("Chapter 40"). As reported herein, the legislature has wasted no time in these efforts, and Assembly Bill No. 125 (the "Act") was signed into law this evening by Governor Sandoval. Given that this bill makes significant changes to the Chapter 40 process, and related statutes, we have prepared a summary of the legislation, and the implications of these revisions for handling Chapter 40 claims in the future.

In addition to significantly changing the existing provisions of Chapter 40, the Act adds additional language relating to contractual defense and indemnity provisions in subcontracts and the validity of OCIP or WRAP policies, as well as provisions for Offers of Judgment once the Chapter 40 process is initiated, and before litigation has begun. Pursuant to the Act, the revisions apply to any claim that "arises" on or after the date the legislation is enacted, February 24, 2015. It is uncertain how the courts will determine the definition of "arise", but we anticipate significant motion practice on any claims not currently in litigation, or at least in NRS 40 proceedings.

II. SUMMARY

In brief, the Act makes the following primary changes to the law with respect to construction defect claims:

- Eliminates attorneys' fees as recoverable damages under Chapter 40;
- Sets the statute at limitations for construction defect claims to 6 years without exception;
- Significantly limits the definition of a construction defect;
- Increases the requirements homeowners must meet to bring a valid claim under the Act;
- Eliminates the provision of "common defect claims" in their entirety;
- Prevents HOAs from bringing any claims not strictly involving the common areas;
- Provides for binding Offers of Judgment during the Chapter 40 process;
- Codifies and significantly limits subcontractors' contractual duty to defend and indemnify; and
- Sets forth requirements for OCIP and WRAP policies.

III. REVISIONS TO CHAPTER 40

As noted above, the Act makes sweeping revisions to the language of the current Chapter 40 statute.

A. Recoverable Damages

One of the major changes enacted involves the recoverable damages under Chapter 40. The Act eliminates the claimant's ability to recover attorney's fees entirely, and limits their ability to recover costs to those associated with construction defects that were proven by the claimant (not simply "investigation costs" as presently defined by the statute). While the Act does not limit pre-judgment interest, it does allow for Offers of Judgment to be made during the Chapter 40 process, which can serve to limit pre-judgment interest during litigation. The new section allowing for Offers of Judgment is summarized below. This change alone severely limits the recoverable damages under Chapter 40. We estimate that the elimination of attorneys' fees alone could cut plaintiff's recovery by thirty-three (33) to fifty (50) percent.

B. The Statute of Limitations and the Tolling of Same

The statute of limitations for construction defects is found in NRS 11.202 through NRS 11.206, inclusive. Current law provides for different statutes of limitations depending on the nature of the defect (patent, latent, wilful, etc.). This has always proven to be a problem in securing summary judgment based on the statutes of limitation/repose. The Act repeals NRS 11.203 through 11.206, inclusive, and sets forth one statute of limitations for all construction defect claims, which is 6 years from the date of substantial completion. In addition, the Act eliminates the provision that allows homeowners another 2 years to bring a claim if it is discovered in the final year of the limitation. This statute of limitations does not apply to actions in which the substantial completion to real property occurred before the effective date of this act. Essentially, claims for homes completed prior to February 24, 2009, with the exceptions noted below, are immediately barred as of February 24, 2015.

The exceptions to the effective date of the statute of limitations are as follows:

1. The statute of limitations does not apply to actions that accrued before the effective date of the act, and were commenced within 1 year of the act; and

2. If application of the new effective date would constitute an impairment of the Obligation under the United States Constitution or the Constitution of the State of Nevada.

Essentially, for those homes constructed prior to February 2009, and within the current statute of limitations, homeowners will have one year "sunset clause" from the effective date to bring their claims. Although all claims brought after the effective date are still subject to the new requirements under Chapter 40 as discussed herein.

In response to claimant's attempt to string out the NRS 40 process to prevent the running of the SOL/SOR, the Act also makes several revisions applicable to how the statute of limitations is tolled during the Chapter 40 process. As set forth below, claimants are required to submit claims to any homeowner's warranty provider prior to serving notice pursuant to Chapter 40. The statute of limitations is tolled from the date the claimant provides notice to their warranty provider until 30 days after they receive denial of the claim, in writing. Once the Chapter 40 process is initiated the statute of limitations is tolled until the earlier of:

1. One year after notice of the claim was given; or

2. Thirty days after mediation is concluded or waived in writing pursuant to NRS 40.680.

Under the Act, statutes of limitation and repose may be tolled for a period longer than 1 year from the date notice is given only if, in the event an action is brought after the expiration of the applicable statute of limitation or repose, the claimant demonstrates to the court that good cause exists to toll the statute of limitations or repose for a longer period.

Typically, a Chapter 40 claim can take anywhere from 1 to 3 years to complete, with the statute of limitations essentially tolled (in some prior instances and to the entire community under "common defect" notice) for the entirety of the process. As set forth above, the statute will begin to run within 1 year of a notice being served, or 30 days of completion of the Chapter 40 mediation, whichever comes first. These new requirements, coupled with a 6 year statute of limitations for all construction defect claims, will force plaintiffs' counsel to pursue their claims more diligently or run the risk of running up against the statute of limitations and losing the ability to bring the claim at all.

C. Elimination of Notice of Common Defect

The Act repeals NRS 40.6452, which previously allowed a few named homeowners to file a claim on behalf of all similarly situated homeowners in the development. Under the prior law, a contractor that was served with a Notice of Common Defect had the option of providing notice of the defect to all unnamed homeowners in the development notifying them of the claim, and advising them of their rights under the statute. In the event a contractor did not supply

notice to the unnamed homeowners, other homeowners in the community were able to bring an action against the contractor without complying with the requirements of Chapter 40.

In practice, developers and contractors were faced with a catch-22. By supplying unnamed homeowners with notice of an alleged common defect, they were essentially providing an endorsement for the solicitation letters of plaintiffs' counsel in the development, and assisting them in enrolling new clients. However, failure to supply unnamed homeowners with notice would allow them to skip the Chapter 40 process entirely and proceed directly to litigation.

These types of claims are eliminated entirely under the Act, forcing plaintiffs' counsel to provide notice on behalf of each named homeowner separately, as outlined below. This will eliminate a tactic employed by plaintiffs' counsel to increase the number of homeowners in a given claim, and prevent developers/contractors from having to give credence to claims for common defects or allow unnamed homeowners to skip the Chapter 40 process entirely.

D. Definition of Claimant

The definition of a claimant under Chapter 40 has been limited to the following:

1. An owner of a residence or appurtenance; or

2. A representative of a homeowner's association acting within the scope of the representative's duties pursuant to Chapter 116 or 117 of NRS.

The revised definition of a claimant under Chapter 40 essentially limits the claimant to individual homeowners and representatives of HOAs acting within the scope of their statutory duties. The definition of claimant no longer applies to homeowners who are not named in notice of common defect, but to whom that notice could have applied. In addition, the representative of any HOA is only considered a claimant if they are acting within their statutory duties, i.e., pursuing claims related to common areas. In the legislative digest for the Act, the legislature specifically noted that D.R. Horton, Inc. v. Eighth Judicial District Court, 125 Nev. 449 (2009), gave the HOA standing to bring claims on behalf of unit owners for defects in individual units. It is made clear in the language of the digest, and the Act itself, that the HOA only has standing to bring a defect claim with respect to the common areas of the association, ***exclusively***. This provision is extremely beneficial to builders/contractors, and will immediately result in significant dispositive motion practice and the likely dismissal of several cases now pending before the Nevada Supreme Court on the issue of standing.

E. Definition of a Construction Defect

The definition of a construction defect is now limited to defects in the design, construction, manufacture, repair or landscaping of a new residence of any alteration to an existing residence of appurtenance, which:

1. Presents an unreasonable risk of injury to a person or property; or
2. Which is not completed in a good and workmanlike manner and proximately causes physical damage to the residence, an appurtenance or the real property to which the residence or appurtenance is fixed.

This revised definition of a construction defect eliminates two broad categories of construction defects, which arguably cover the largest number of claimed defects in construction defects in Nevada. The first category eliminated is those defects which are in violation of the law, to include the building code. The second category eliminated covers those defects that were allegedly not completed within the standard of care for the industry.

With respect to the definition of a construction defect under the Act, it is important to note that, while the definition of unreasonable risk is not defined in the Act, or previous versions of the statute, under tort law an unreasonable risk is defined as a risk that caused foreseeable harm due to conduct or omission, which a reasonably prudent person would or would not have done under those circumstances. Essentially, the first definition of a construction defect sets forth the standard contemplated under the tort of negligence. If the magnitude of a risk is greater than the utility of a risk it is deemed unreasonable.

The second definition of a construction defect under the Act is twofold. To qualify as a defect under this definition, a claimant must establish that work was not completed in a good and workmanlike manner ***and*** that this poor workmanship was the proximate cause of physical damage. We believe the change alone will result in the elimination of many "technical" defects brought by plaintiffs in these cases.

F. Requirements for Chapter 40 Notice

The Act also revises the requirements for a valid notice under Chapter 40. Under the new requirements a valid notice must:

1. Include a statement that the notice is being given to satisfy the requirements of this section;

2. Identify in specific detail each defect, damage and injury to each residence of appurtenance, that is the subject of the claim, including, without limitation, the exact location of each such defect, damage, and injury;

3. Describe in reasonable detail the cause of the defects, if the cause is known, and the nature and extent that is known of the damage or injury resulting from the defects; and

4. Include a signed statement by each named homeowner of a residence or appurtenance in the notice, that each such homeowner verifies that each such defect, damage or injury specified in the notice exists in the residence or appurtenance owned by him or her. A notice sent on behalf of a homeowners' association requires that the statement must be signed under penalty of perjury by a member of the executive board or an officer of the homeowner's association.

In addition to the above changes, a representative of a homeowner's association may only send notice if they are acting within their statutory duties.

The revisions set forth above change the notice requirements from "reasonable" detail to "specific" detail, and require claimants to provide the exact locations of defects in their initial notice. This requirement will limit plaintiffs' counsel's ability to initiate actions using boiler plate notices that provide little to no detail on allegations, and make it virtually impossible to evaluate a claimant's allegations by reviewing the Chapter 40 notice, alone. In addition, named homeowners are now required to sign a statement as to the accuracy of the allegations in the notice. Pursuant to the Act, homeowners' associations are now only permitted to bring actions for defects related to common areas, and must sign the notice under penalty of perjury. There has long been an issue of standing for HOAs to bring claims on behalf of unit owners for defects within the individual units. The Nevada Supreme Court previously determined that the HOA did have standing to bring such claims. The Act specifically references this Court decision when stating, unequivocally, that HOAs can only bring claims for defects related ***exclusively*** to common areas. In practice, this will serve to limit the scope of claims brought by HOAs, and will prevent them from, essentially, forcing litigation onto individual homeowners who had no interest in pursuing claims in their own right.

G. Chapter 40 Inspection

The Act also now requires that a claimant be present at the time of the inspection to identify the exact location of each allegation in the notice. If the notice includes an expert opinion, the expert, or a representative of the expert who has knowledge of the allegation must also be present to identify the exact location of the defect. This new requirement allows for more meaningful inspections as, rather than forcing representative of the contractor or subcontractor to inspect the whole home for potential defects (find the defects themselves based on vague allegations), someone must be present to point out the specific defects contained in the notice. This additional burden alone, will significantly limit the number of homeowners who join these claims.

H. Limitations on Construction Defect Claims (Warranty)

The Act adds a new requirement for claimant's to meet prior to bringing a claim under Chapter 40. If the residence or appurtenance is covered by a warranty that is purchased by or on behalf of the claimant pursuant to NRS 690B.100 to 690B.180, inclusive, a claimant cannot send a notice pursuant to Chapter 40 unless the claimant has submitted a claim under the homeowner's warranty and that claim has been denied. A claimant may only include claims in a Chapter 40 notice for construction defects that were denied by the insurer. Previously, the statute only required that homeowners make a reasonable effort to pursue claims under their insurance. In practice, homeowners never made any effort to pursue claims covered by a warranty, making the previous requirement ineffective at best. This, too, will limit the number of claims pursued.

IV. LIMITATIONS ON ACTIONS BY THE HOMEOWNERS' ASSOCIATION

As noted briefly above, pursuant to the Act, homeowner's associations are limited to pursuing claims for defects related to common areas, only. NRS 116.3102 is specifically amended to include the following language:

> The association may not institute defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name or on behalf of itself or units' owners with respect to an action for construction defect…unless the action pertains ***exclusively*** to common elements. (Emphasis added).

The issue of HOA standing to bring claims for individual units has been a highly contested one. While the Nevada Supreme Court, in D.R. Horton, Inc. v. Eighth Judicial District Court, gave the HOA standing to bring claims on behalf of unit owners for defects in individual units, the issue has not been considered settled by those who oppose the notion that

the HOA has the standing to bring these claims. The Act specifically acknowledges the Court's decision and makes it clear that, under the law, the HOA only has standing to bring claims pertaining exclusively to common elements. Note, this provision does not apply where HOAs have provided notice on or before the effective date of this act. In addition to limiting the claims brought the HOA, this provision effectively ends the ongoing standing battle between developers/contractors and the HOA, based on the clear language of the Act.

V. CONTRACTUAL DUTY TO DEFEND AND INDEMNIFY ("ANTI-INDEMNITY")

With respect to contractual defense and indemnity provisions, the Act applies only to contracts entered into on or after the effective date of the Act, which, as noted above, is the date the Act is signed into law. Accordingly, the Act does not apply to any contracts currently in existence. For purposes of the provisions below, the controlling party, defined in the act as "a person who owns real property involved in residential construction, a contractor or any other person who is to be indemnified by a provision in a contract entered into on or after the effective date of this act for residential construction." For those contracts entered into after the effective date of the Act, the following applies:

1. Provisions requiring a subcontractor to defend and indemnify the controlling party for claims resulting from construction defect arising from the negligence of the controlling party are against public policy, and are void and unenforceable;

2. A provision is not against public policy and is not void any unenforceable to the extent it requires the subcontractors to indemnify, defend or hold armless the controlling party for claims resulting from construction defects arising out of, related to or connected to the subcontractor's scope of work, negligence, or intentional act or omission;

3. A provision is against public policy and is void and unenforceable to the extent it requires a subcontractor to defend, indemnify or otherwise hold harmless a controlling part from any cause of action resulting from construction defects arising out of or connected to that portion of the subcontractor's scope of work that has been altered or modified by another trade or the controlling party;

4. If the provision is not against public policy and is not void and unenforceable, the duty of the subcontractor to defend the controlling party arises upon presentment of notice pursuant to subsection 1 of NRS 40.646;

5. If the controlling party gives notice to the subcontractor pursuant to NRS 60.646, the claim is covered by the subcontractor's commercial general liability policy, and the controlling party is named as an additional insured:

    a. The controlling party, as an additional insured, must pursue available means of recovery for defense fees and costs under the policy before the controlling party may pursue a claim against the subcontractor;

    b. Upon final settlement of or issuance of judgment in an action involving a construction defect, if the insurer has not assumed defense of the controlling party, or the defense obligation is not otherwise resolved by settlement or final judgment, the controlling party may pursue a claim against the subcontractor for reimbursement of the portion of fees and costs incurred that can be attributable to the claims related to or connected to the subcontractor's scope of work, negligence, intentional act or omission.

Essentially, the provisions set forth above significantly limit the subcontractor's duty to defend and indemnify the controlling party to those instances where the claim arises from that specific subcontractors' scope of work. The Act specifically does, however, state that if a provision is not void and unenforceable, the duty to defend and indemnify is triggered immediately upon service of notice. Essentially, this eliminates Type 1 and Type 2 indemnity in the State of Nevada. Only general indemnity for the subcontractor's own negligence remains. Additionally, and notably, fees and costs may only be recovered from subcontractors if their insurers do not participate in the controlling party's defense (no participating AIEs), or if their policies are exhausted, and then, they can only be recovered to the extent that they are attributable to the subcontractor's scope of work, negligence, wrongful act or omission. This determination may not be capable of resolution until after trial.

Nothing in these provisions is deemed to limit the controlling party's ability to follow the requirements of Chapter 40 or file a third-party complaint if an action is commenced for claims that are related to the subcontractor's scope of work, negligence, wrongful act or omission.

VI. OFFERS OF JUDGMENT DURING THE CHAPTER 40 PROCESS

Offers of Judgment, prior to the Act, could only be made once formal litigation was initiated. The strategy behind an Offer of Judgment is twofold. Initially, it can offer homeowners an opportunity to exit the litigation prior to a final resolution. In addition, Offers of Judgment will allow for the containment of some plaintiffs' fees and costs, if a matter proceeds to trial. Reasonable Offers of Judgment can be used later in opposition to plaintiffs' counsel's

request for fees and costs. This tactic has, prior to the Act, only been available to the parties once formal litigation has been commenced.

Under the Act, an Offer of Judgment ("Offer") can be made at any time, by any party including the claimant, after a claimant has served notice pursuant to Chapter 40 and prior to commencement of a construction defect action. They may be served on multiple parties and allow a judgment to be entered without action in accordance with the Offer. A party served with an Offer shall have 10 days to accept or reject the Offer. If the Offer is accepted, either party may file the Offer with the clerk of the district court. The clerk shall enter a judgment according to the terms of the Offer. Any such judgment will be deemed a compromise settlement.

If the Offer is not accepted, it will be deemed rejected. If a party who rejects an Offer fails to obtain a more favorable judgment in a construction defect action, the court:

1. May not award the party any attorney's fees and costs;

2. May not award any interest on the judgment for a period from the date of service of the Offer to the date of entry of judgment;

3. Shall order the party to pay the taxable costs incurred by the party who made the offer; and

4. May order the party to pay the party who made the offer any of the following:

    a. A reasonable sum to cover any costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case;

    b. Any applicable interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment;

    c. Reasonable attorney's fees incurred by the party who made the Offer for the period from the date of service of the Offer to the date of entry of the judgment.

To determine if a judgment is more favorable than the rejected Offer, the Court must consider whether the Offer was inclusive or exclusive of fees and costs. If the Offer was exclusive of fees and costs, the court must compare the amount of the judgment to the Offer, without inclusion of fees and costs. If the Offer was inclusive of fees and costs, the court must consider the amount of the judgment and the amount of taxable costs that the claimant who obtained the judgment incurred before the date of service of the offer.

The Act also provides that multiple parties may make a joint Offer. In addition, an apportioned Offer may be made to two or more parties that is conditioned on acceptance by all parties. In the event all parties do not accept the Offer, the Offer is deemed rejected, and the action may proceed as to all parties. The sanctions set forth above will only apply to those parties that rejected the Offer.

In addition, the sanctions set forth above do not apply to an Offer made to multiple parties who received notice pursuant to Chapter 40, unless the same person is authorized to settle any claims against all the parties, and;

1. There is a single common theory of liability against all parties to whom the Offer is made;

2. Liability of one or more parties to whom the Offer is made is entirely derivative of the liability of the remaining parties to whom the Offer is made; or

3. The liability of all the parties to whom the Offer is made is entirely derivative of a common act or omission by another person.

The sanctions set forth above also do not apply to an Offer made to multiple claimants unless the same person is authorized to settle any claims against all the claimants, and;

1. There is a single common theory of liability claimed by all the claimants to whom the Offer is made;

2. The damages claimed by one or more of the claimants to whom the Offer is made are entirely derivative of an injury to the remaining claimants to whom the Offer is made; or

3. The damages claimed by all the claimants to whom the Offer is made are entirely derivative of an injury to another person.

The ability to issue Offers during the Chapter 40 process will have a significant impact on construction defect claims. Initially, it will provide those parties motivated to settle with a mechanism to settle and be issued a final judgment, deemed a compromise settlement, prior to litigation. This will afford those parties willing to settle in good faith a way to avoid litigation entirely. In addition, by allowing for Offers during the Chapter 40 process, the Act encourages reasonable settlements in advance of litigation, and provides sanctions for those parties that do not accept a reasonable Offer, and do not obtain a more favorable judgment at trial.

Prior to the Act, pre-judgment interest began accruing upon initial notice of a claim. As an effective Offer could not be issued outside of litigation, containment of pre-judgment interest was limited to the onset of formal litigation. Under the Act, an Offer can be issued at any time during the Chapter 40 process. Should the rejecting party fail to beat that Offer at trial, pre-judgment interest is eliminated from the date of the Offer through judgment, which will make the ability to make an Offer during the Chapter 40 process an effective tool for containing costs associated with litigation.

The ability to make an Offer to multiple parties will also facilitate the settlement process. As noted above, an Offer to multiple parties can now be contingent on the acceptance by all parties. This could make the Offer to multiple parties a useful tool for facilitating global settlements during the Chapter 40 process. In addition, it can be used as a tool to penalize those parties that typically delay settlement talks and do not participate in early settlement discussions.

In short, the Act gives the parties an effective tool for pursuing reasonable and early settlement, which will be sanctioned by the Court, during the Chapter 40 process, and provides a means to contain costs for those parties willing to make a reasonable settlement offer.

VII. CLAIMS COVERED BY OCIP OR WRAP POLICIES

The Act also includes a new section governing OCIP or WRAP policies, and sets forth guidelines that must be followed for the policies to be considered valid and entered into in good faith. The Act codifies the information that must be disclosed by the controlling party, and notes how those disclosure requirements can be satisfied. In addition, the above disclosures may be based on information available at the time of the disclosures and are not inaccurate or in bad faith merely because the disclosures do no accurately reflect the actual number of units covered or the amount of insurance available. Disclosures are considered to be presumptively made in good faith when: (1) the disclosure is the same as contained in the application for the policy; and (2) the disclosure was obtained from the insurer or broker. These presumptions may only be overcome by showing that the insurer, broker or controlling party misrepresented the facts that are required in the disclosures, as set forth above.

A copy of the insurance policy must be provided to any participant upon written request. If the policy is not available at the time of the request, a copy of the insurance binder or declaration of coverage may be provided instead. Any party receiving a copy of the insurance policy shall not disclose it to third parties other than the participant's insurance broker or attorney unless required by law. The participant's insurance broker or attorney may not disclose the policy to a third party unless required by law.

If a controlling party does not disclose the total amount or method of calculation of the premium credit or compensation to the participant before the time the participant submits the bid, the participant is not legally bound by the bid unless that participant has the right to increase the bid up to the amount equal to the difference between the amount the participant included, if any, for insurance in the original bid and the amount of the actual bid credit required by the controlling party. Note, this provision is inapplicable if the controlling party does not require the subcontractor to offset the original bid amount with a deduction for the policy program

The subcontractor's monetary obligation for enrollment in the policy ceases upon the satisfaction of the agreed contribution percentage, which may have been paid as a lump sum or on a pro rata basis throughout the performance of the work. In the event of a claim, the amount a subcontractor is required to pay as a self-insured retention or deductible cannot exceed the amount the subcontractor would have otherwise paid as a self-insured retention or deductible under a commercial general liability policy or comparable insurance in force during the relevant period for that particular subcontractor within the market at the time the subcontract is entered into. At this time, we are unsure how this could actually be determined or how the provisions of this section will play out. We do believe it is imperative to be cognizant of them when entering into subcontracts in WRAP situations.

The language set forth above governing OCIP and WRAP policies is new language, and does not change any existing language. It merely sets forth the requirements a controlling party must meet to obtain an enforceable OCIP or WRAP policy.

IX. CONCLUSION

As noted above, the changes summarized herein amount to a drastic change in the statute governing construction defects in Nevada. The changes set forth above will have the following impact on construction defect claims in Nevada:

- The elimination of plaintiffs' counsels' ability to collect fees and costs as a part of Chapter 40 damages which we anticipate will decrease the cost of construction defect claims by as much as fifty (50) percent;

- The new statute of limitations shortens the window of time in which a homeowner may bring a construction defect claim, and eliminates the need to analyze the type of claim in order to determine the applicable statute;

- The new definition of a construction defect essentially limits defects to negligent construction presenting a risk of injury to the property, or poor workmanship that leads to damage to the building or property;

- Claimants are limited to individual homeowners, and HOAs pursuing claims for common areas (no more standing arguments);

- To be valid, a Chapter 40 Notice must describe the alleged defect in specific detail, and provide the exact location of same;

- In order to bring a claim, a homeowner must first have submitted their claim to the appropriate insurance/warranty program and been denied, and then can only pursue claims for those construction defect allegations that were denied by their provider;

- A subcontractor's duty to defend is triggered immediately upon notice of a claim, although they are only responsible to defend and indemnify to the extent defects were cause by their own negligence; and

- Parties may now issue binding Offers of Judgment during the Chapter 40 process to facilitate settlement, and seek to contain fees and costs associated with litigation.

As a result of the Act, plaintiffs' counsel will no longer be able to provide boilerplate notices, and, essentially, go through the motions of Chapter 40 in order to get to litigation. They will be required to provide substantive information of their claims at the outset, and will no longer be able to use the provisions of Chapter 40 to collect large judgments, padding their own accounts in the process. The changes in the Act provide more certainty to developers and subcontractors, and provide more structure to the process which will serve to make the Chapter 40 process a more effective means of avoiding or shortening litigation, rather than serving as simply a "hoop" to jump through to get to litigation.

Obviously, this summary is generic in nature. To the extent you have specific questions as to how these revisions will impact you or your insureds, please do not hesitate to contact us.

Very truly yours,

David S. Lee