

# THE TEXAS LEGAL LIABILITY ADVISOR

INFORMATION TO AVOID LIABILITY

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## RESIDENTIAL CONSTRUCTION LIABILITY IN TEXAS - CURRENT STATE OF THE LAW

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### INTRODUCTION

Residential construction is one of few industries in Texas afforded special liability protection. Since the enactment of the Texas Residential Construction Liability Act<sup>1</sup> or “RCLA” in 1989, the Texas Legislature has struggled to find a proper balance between allowing consumers a fair remedy to redress defective construction while at the same time preventing windfall damages against contractors and builders under the Texas Deceptive Trade Practices Act (“DTPA”). The last major development was the Legislature’s non-renewal of the Texas Residential Construction Commission Act (“Commission Act”), a separate statute enacted in 2003 which established the Texas Residential Construction Commission along with an administrative process to govern the claim process.<sup>2</sup> Ultimately, the Commission Act proved unworkable for consumers, and now only RCLA survives as the lone Texas statute that governs residential defect



claims. However, as a result of the Texas Legislature’s failure to restore RCLA to its pre-Commission Act status as a stand alone statute following the lapse of the Commission Act, the RCLA statute is now, ironically, itself defective. This edition of the Legal Advisor provides basic information regarding the current status of residential construction liability law in Texas.

RCLA does not create a cause of action, but preempts any other law to the extent of a conflict with RCLA.<sup>3</sup> So, for example, RCLA does not prohibit the usual claims asserted in construction defect litigation such as breach of contract, breach of warranty, deceptive trade practices act violations, and negligence. Rather, it regulates the recoverable damages and defenses applicable in residential construction defect cases, and provides incentives for contractors to work with homeowners early in the dispute process. RCLA governs the elements of recoverable economic damages in construction defect cases, but that list does not include treble or mental anguish damages, which are available in

normal DTPA cases. However, RCLA's damage limitations are only available if the contractor complies with the notice and offer procedures in the statute.

### WHAT IS A RESIDENTIAL CONSTRUCTION DEFECT?

The current version of RCLA provides that it applies to any action to recover damages or other

relief from a construction defect claim, except claims for personal injury, wrongful death, or claims relating to damages to a person's goods.<sup>4</sup> But that broad statement is a little misleading when the very specific definition of "construction defect" is considered. "Construction defect" is defined in RCLA as a matter concerning the design, construction, or repair of a new residence, of an alteration or repair or addition to an existing

residence or appurtenance, *on which a person has a complaint against a contractor.*<sup>5</sup> RCLA currently defines a "contractor" as: 1) a "builder" as defined under Section 401.003 of the Commission Act, contracting with the owner for the construction, repair, or alteration to a new or existing residence or appurtenance thereto; 2) any person contracting with a purchaser for the sale of a new residence constructed by or on behalf of that person; or 3) any person contracting with an owner or developer of a condominium for the construction, alteration, or repair of a new or existing residence or appurtenance.<sup>6</sup> As can be seen, the RCLA definition of "contractor" incorporates a definition of builder as used in the sunset-repealed Commission Act, *an Act that is no longer current law.* The Commission Act defined a "builder" as any person or entity who for a fee constructs, supervises, or manages 1) the construction of a new home; 2) a material improvement to a home, other than to solely replace or repair an existing roof; or 3) an improvement to the interior of an existing home



when the cost of the work exceeds \$20,000.<sup>7</sup>

The fact that a vital legal definition in RCLA relies on a definition in another statute that is no longer current law raises the question of whether the first prong of RCLA's definition of "contractor" remains applicable. When reviewing courts are presented with questions about how a statute should be construed, the court's primary objective is to give effect to the Legislature's intent which is best expressed by the plain meaning of the actual text of the statute.<sup>8</sup>

While it was the Legislature's intent not to renew the Commission Act, it was also the Legislature's intent to have the RCLA definition of contractor include a definition as contained in the Commission Act, so arguments might be made on both sides of this issue. It seems reasonable to conclude that a reviewing court

would continue to use the definition of "contractor" that contains the definition of "builder" from the Commission Act, even though it comes from a sunset-repealed statute. If, however, a court finds that the first prong of this definition is not applicable, then RCLA may only apply to new residential construction and repairs to condominiums. If this seem like an unnecessary mess, it is. Note also that regardless of whether the first prong applies or not, condominiums are not treated the same as other residences in RCLA, and there is no apparent monetary threshold for work associated with condominiums for RCLA to apply. Whether this is intentional or not, it is just another example of the inconsistencies with the current law.

If the defendant in a particular case does not meet the statutory definition of "contractor", then an argument can be made that RCLA does not apply to that defendant, and neither do the notice or damage provisions. Because different categories of

damages are available to claimants depending on the whether negligence claims are asserted, DTPA claims asserted, and whether RCLA applies, the defense that RCLA does not apply proves invaluable to a contractor if there are no DTPA claims asserted against the contractor, but detrimental if there are DTPA claims asserted.

The term "construction defect" includes any physical damage to the residence, any appurtenance thereto, or the real property where the residence or appurtenance are affixed.<sup>9</sup> Under RCLA, however, it is not necessary that the complaint actually be one of defective construction or design. Rather, the statute only requires that the complaint against the contractor arise from a matter that concerns construction or repair of a new or existing residence.<sup>10</sup> By way of example, one court determined that a delay claim involving a residential remodel was a construction defect claim.<sup>11</sup> Under RCLA, a residence refers to any single family house, duplex, triplex, or quadruplex, or a unit in a multi-unit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system.<sup>12</sup> An "appurtenance" is defined as any structure or recreational facility that is appurtenant to a residence but is not a part of the dwelling unit.<sup>13</sup>

### TIME REQUIREMENTS AND SETTLEMENT OFFERS

In keeping with the RCLA's purpose of encouraging early analysis and settlement, a claimant is required to give the contractor notice by certified mail sixty days before filing suit, specifying in reasonable detail the complained of defects.<sup>14</sup> If proper notice is not provided but the claimant files suit, the suit can be abated until proper notice is given.<sup>15</sup> If requested by the

contractor, the claimant must provide evidence that illustrates the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect, including expert reports, photographs, and videotapes.<sup>16</sup> During the thirty-five days after the contractor receives written notice, the contractor may also make a written request for an inspection of the defects to determine the nature and cause of the defects and the repairs necessary.<sup>17</sup> Within forty-five days after the contractor receives the notice, the contractor may make a written offer of settlement to the claimant.<sup>18</sup> The settlement offer can be a monetary offer or offer to purchase the residence,<sup>19</sup> or may include either an agreement by the contractor to repair the problem described in the notice or have it repaired by an independent contractor partially or totally at the contractor's expense or at a reduced rate to the claimant.<sup>20</sup> The written offer must describe in reasonable detail the kind of repairs which will be made, and be sent by



certified mail, return receipt requested, to the claimant's attorney or the claimant's last known address.<sup>21</sup> Thereafter, the repairs are to be made within the forty-five days after the date the contractor receives written notice of acceptance of the settlement offer, unless completion is delayed by the claimant or by other events beyond the control of the contractor.<sup>22</sup> If the statute of limitations period requires

the claimant to file a lawsuit without giving the proper notice, or if the claim is made by way of counterclaim or third-party claim, then the contractor can request an inspection within seventy-five days of service of the pleadings asserting the claim and has the right to make an offer within sixty days of the service of the claim.<sup>23</sup> The court can abate an action if the claimant fails to give the appropriate notice or give the contractor a reasonable opportunity to inspect the property.<sup>24</sup> The claimant and the contractor may agree in writing to extend these time periods.<sup>25</sup>



An offer of settlement that is not accepted before the twenty-fifth day after the date the offer is received by the claimant is considered rejected.<sup>26</sup> If the matter involves damages of more than \$75,000, once a suit is filed, either party may file a motion for an early mediation of the case.<sup>27</sup> If the claimant considers the contractor's offer unreasonable, then within twenty-five days of receiving the offer, the claimant shall advise the contractor in writing and in reasonable detail the reasons why the claimant considers the offer unreasonable.<sup>28</sup> Within ten days of receiving such notice, the contractor can make a supplemental written offer of settlement in response.<sup>29</sup>



If a subcontractor is involved in causing the defect, the contractor may settle the claim directly with the claimant, and then pursue a contribution claim against the subcontractor, as long as the contractor gives prior written notice of the claim to the subcontractor.<sup>30</sup> Further, if a contractor receives notice of a defect that is creating an imminent threat to health or safety, the contractor is required to take reasonable steps to cure the defect as soon as practicable notwithstanding these deadlines.<sup>31</sup> In the event the contractor fails to do so in a reasonable time, the claimant may make the repairs and seek the reasonable cost of the repairs plus attorneys fees and costs incurred in addition to any other damages available under the Act.<sup>32</sup>

## DAMAGES CURRENTLY AVAILABLE UNDER RCLA

RCLA limits a claimant's recovery to specifically prescribed economic damages proximately caused by the construction defect.<sup>33</sup> Under RCLA, a claimant may recover the following damages proximately caused by a construction defect: 1) reasonable costs of repairs necessary to cure any construction defect; 2) reasonable and necessary costs for repair or replacement of any damaged goods in the residence; 3) reasonable and necessary engineering and consulting fees; 4) reasonable expenses of temporary housing necessary during the repair period;<sup>34</sup> 5) reduction in market value, if any, to the extent the reduction is due to structural failure; and 6) reasonable and necessary attorney's fees.<sup>35</sup> However, if it is shown that the claimant rejected a reasonable settlement offer made timely by the contractor or did not permit the contractor a reasonable opportunity to inspect or repair the defect, then the claimant may not recover any amount greater than either the fair market value of the contractor's last offer of settlement or the amount of a reasonable monetary or purchase offer, in addition to reasonable and necessary costs and attorney's fees incurred before the offer was rejected.<sup>36</sup> Conversely, if a contractor fails to make a reasonable and timely settlement offer, the limitations on damages do not apply.<sup>37</sup> Therefore, a contractor who is found to be responsible for the construction defect, but did not make a reasonable timely settlement offer or did not follow up appropriately on an offer that was accepted by the claimant, potentially faces the prospect of treble damages for violations of the Deceptive Trade Practices Act.



## CAUSATION AND DEFENSES

In addition to the limitation on recoverable damages, RCLA provides a contractor with certain defenses. Specifically, a contractor cannot be held liable for any percentage of damages caused by: 1) the negligence of a person other than the contractor, or agent, employee, or subcontractor of the contractor; 2) failure of a person other than the contractor or an agent, employee, or subcontractor of the contractor to take reasonable action to mitigate the damages, or take reasonable action to maintain the residence; 3) normal wear, tear or deterioration; 4) normal shrinkage due to drying or settlement of construction components within the tolerance of building standards; and 5) the contractor's reliance on written information relating to the residence, appurtenance, or real property on which the residence and appurtenance are affixed that was obtained from official government records, if the written information was false or inaccurate and the contractor did not know and could not reasonably have known of the falsity or inaccuracy of the information.<sup>38</sup> All damages sought to be recovered in a RCLA case must be shown to be actually caused by the construction defect.<sup>39</sup>

For homeowner's insurance carriers, there is an added caveat. The Act provides that a contractor is not responsible for the costs of repairs or any percentage of damages caused by the repairs made to a construction defect, to any assignee or person subrogated to the claimant who fails to provide the contractor with the requisite written notice and opportunity to inspect and repair prior to the repairs.<sup>40</sup> So if a homeowner makes a claim on their homeowner's insurance for damage to their house or property caused by a construction defect, and the carrier makes repairs to the home before giving the requisite notice is provided, then the carrier may be precluded from pursuing the contractor for reimbursement of the repair costs.

## WRITTEN CONTRACTS ARE ESSENTIAL

Written contracts are essential for contractors involved in residential construction. Not only is a written contract required in the event a homeowner

does not pay for the work provided and a lien is required,<sup>41</sup> but it is necessary to help a contractor reduce its own liability. RCLA mandates that residential contracts contain very specific language regarding the applicability and notice provisions of RCLA.<sup>42</sup> If a contract does not contain the required



notice, the claimant may recover from the contractor a civil penalty of \$500, in addition to any other remedy provided by RCLA.<sup>43</sup> RCLA also has special provisions governing contract language that can be agreed upon between a contractor and homeowner specifying the conditions under which a contractor may elect to repurchase the residence when presented with a construction defect.<sup>44</sup>

There are also good reasons why contractors should consider contractual provisions that explain what warranty service is provided in place of the implied warranties currently recognized under Texas law. In new home construction, Texas law recognizes two implied warranties: 1) the warranty of habitability; and 2) the warranty of good and workmanlike construction.<sup>45</sup> Texas also recognizes an implied warranty of good and workmanlike manner in the repair or modification of existing tangible goods or property.<sup>46</sup> Good and workmanlike manner is generally regarded as "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."<sup>47</sup> The warranties of good and workmanlike manner in new home construction and in repair may not be

disclaimed, but they may be superseded if the written agreement between the parties specifically describes the manner, performance, or quality of warranty services to be provided.<sup>48</sup> If the parties' agreement does not specifically provide for the quality of the service to be rendered or how such services are to be performed, then the implied warranty of good and workmanlike manner applies to the contract.<sup>49</sup> Because breach of warranty is actionable under the DTPA, it is usually advisable to avoid claims based on good and workmanlike manner by superseding the implied warranty by providing specific details in the contract about the quality of service to be provided and how such services are to be performed.

### RECOMMENDATIONS

Contractors who provide residential construction or repairs should: 1) have good written agreements with their customers; 2) respond promptly and courteously to all normal warranty service requests; 3) follow up with homeowners to make sure that normal warranty service is completed; 4) make reasonable attempts to satisfy all reasonable warranty requests; and 5) assume that RCLA applies to the claimed defect. Upon receipt of a RCLA or DTPA notice, a contractor should: 1) promptly forward the notice to your attorney so that a timely response can be made; 2) immediately determine whether any subcontractor needs to be involved in claim resolution, and if so, give them written notice of the claimed defect as soon as possible; and 3) retain all documents regarding original warranty requests, defect claim notices, inspections, communications with claimant,



settlement offers made, and repairs made. Homeowners presented with a possible construction defect, should: 1) review the written contract to see how defects are addressed; 2) document the problem through pictures and video; 3) provide timely written notices for warranty service related to the defect; 4) follow up in writing with the contractor related to the warranty service; 5) keep all documentation related to warranty service calls, nature of the defect, and damages; 6) consult an attorney for any residential defect claims that are not resolved after the warranty service has been completed.



### CONCLUSION

The current state of Texas law as to who and what RCLA applies to is confusing and unsettled. The Texas Legislature needs to clear up the ambiguities in the current RCLA statute. Until then, any contractor doing residential work should act as if RCLA applies and follow the statutory time deadlines in responding to defect claims. Regardless of whether a contractor believes a claim lacks merit or not, the failure to respond timely may preclude a contractor/builder, or its insurer, from having an adequate opportunity to take advantage of all defenses under RCLA's notice and damage limitation provisions. What may appear to be, at first blush, a minor or unmeritorious claim, can sometimes grow into a larger and more serious claim. RCLA encourages early inspection and analysis of the claimed construction defect, and communication with the claimant for the resolution of the complaint. Immediate intervention and response is not only a good business practice that can build good will, it can also be a valuable means



of limiting legal liability and litigation costs. Reasonable due care and customer responsiveness can go a long way to prevent extended liability claims.

## NOTES

<sup>1</sup>See TEX. PROP. CODE ANN. §§ 27.001-27.006 (Vernon 2007).

<sup>2</sup>The Texas Residential Construction Commission Act expired September 1, 2009, pursuant to Tex. Prop. Code Section 401.006. The Residential Construction Commission and its enabling legislation in the Commission Act were subject to the sunset laws governing administrative agencies (See TEX. GOV'T CODE Section 325.001 et seq.). Because no legislation extending the life of the agency was passed, the Commission Act was terminated by operation of law on September 1, 2009, but the RCC continued to wind up its business and was abolished for all purposes September 1, 2010.

<sup>3</sup>See TEX. PROP. CODE ANN. § 27.002(b).

<sup>4</sup>See *id.* § 27.002 (a).

<sup>5</sup>See *id.* § 27.001 (4).

<sup>6</sup>See *id.* § 27.001 (5).

<sup>7</sup>See *id.* § 401.003 (now repealed).

<sup>8</sup>*Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010).

<sup>9</sup>See *id.* § 27.001 (5).

<sup>10</sup>*Timmerman v. Dale*, 397 S.W.3d 327, 331 (Tex. App. – Dallas 2013, pet. filed).

<sup>11</sup>*Id.*

<sup>12</sup>See *id.* § 27.001 (7).

<sup>13</sup>See *id.* § 27.001 (2).

<sup>14</sup>See *id.* § 27.004 (a).

<sup>15</sup>See *id.* § 27.004 (d).

<sup>16</sup>See *id.* § 27.004 (a).

<sup>17</sup>See *id.*

<sup>18</sup>See *id.* § 27.004 (b).

<sup>19</sup>See *id.* § 27.004 (n).

<sup>20</sup>See *id.* § 27.004 (b).

<sup>21</sup>See *id.*

<sup>22</sup>See *id.*

<sup>23</sup>See *id.* § 27.004 (c).

<sup>24</sup>See *id.* § 27.004 (d).

<sup>25</sup>See *id.*

<sup>26</sup>See *id.* § 27.004 (j).

<sup>27</sup>See *id.* § 27.0041.

<sup>28</sup>See *id.* § 27.004 (b)(1).

<sup>29</sup>See *id.* § 27.004 (b)(2).

<sup>30</sup>See *id.* § 27.004 (p).

<sup>31</sup>See *id.* § 27.004 (m).

<sup>32</sup>See *id.* § 27.004 (m).

<sup>33</sup>*Timmerman*, at 331. Although, one court has opined that since § 27.004(g) restricts only economic damages, not punitive damages, a claimant in a construction defect case can recover punitive damages awarded for a contractor's knowing violation of the DTPA. *Design Tech Homes, Ltd. v. Maywald*, 2013 Tex. App. LEXIS 7251, p.\*16-17. (Tex. App. – Beaumont June 13, 2013 no pet. h.).

<sup>34</sup>While expenses for temporary housing are recoverable, lost rental value for a residence is not recoverable. *Timmerman*, at 332.

<sup>35</sup>See *id.* § 27.004 (g).

<sup>36</sup>See *id.* § 27.004 (e).

<sup>37</sup>See *id.* § 27.004 (f).

<sup>38</sup>See *id.* § 27.003.

<sup>39</sup>See *id.* § 27.006.

<sup>40</sup>See *id.* § 27.003(a)(2).

<sup>41</sup>See TEX. PROP. CODE ANN. §§ 41.001, 41.007, and 53.254.

<sup>42</sup>See *id.* § 27.007(a) for the specific language required in contracts.

<sup>43</sup>See *id.* § 27.007(b).

<sup>44</sup>See *id.* § 27.042(a).

<sup>45</sup>*Humber v. Morton*, 426 W.W.2d 554, 555 (Tex. 1968).

<sup>46</sup>*Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987).

<sup>47</sup>*Id.*

<sup>48</sup>*Gonzales v. Southwest Olshan Found. Repair Co.*, 400 S.W.3d 52, 56-57 (Tex. 2013); *Centex Homes v. Buecher*, 95 S.W.3d 266, 268 (Tex. 2002).

<sup>49</sup>*Gonzales*, at 56.



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MARK COURTOIS IS THE MANAGING PARTNER OF THE HOUSTON CIVIL TRIAL LAW FIRM OF FUNDERBURK FUNDERBURK COURTOIS, LLP. HE MAY BE CONTACTED AT 713-620-7226 OR MJCOURTOIS@FFLLP.COM.



DAVID FUNDERBURK A PARTNER OF THE HOUSTON CIVIL TRIAL LAW FIRM OF FUNDERBURK FUNDERBURK COURTOIS, LLP. HE MAY BE CONTACTED AT 713-620-7222 OR DFUNDERBURK@FFLLP.COM.

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