

**THE TEXAS RESIDENTIAL  
CONSTRUCTION LIABILITY ACT:  
AN OVERVIEW**

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May 20, 2004  
Houston, Texas

## I. INTRODUCTION

In the 1980's the construction industry in Texas sensed that it was under attack. Homeowners and plaintiffs lawyers were making frequent use of the Deceptive Trade Practices Act, Tex. Bus. & Comm. Code § 17.41 *et seq.* (“DTPA”) to satisfy claims arising out of construction defects. In response, the construction industry launched a well organized lobbying campaign. Among other things, the builders wanted an opportunity to cure any alleged defects before litigation, and they wanted to be free of the DTPA’s treble damages. As Texas State Senator John Montford (the bill’s original sponsor) stated during one legislative hearing, “[t]he present Deceptive Trade Practices Act does not allow the builder to inspect or attempt to repair alleged construction defects even though the losses of both the builder and the owner can often be minimized if the builder is allowed to promptly inspect and repair the damage.”

In 1989, the homebuilders won and the Texas Legislature enacted RCLA. As with most statutes, RCLA created more questions than it answered. Surprisingly, however, in the first eight years after RCLA’s enactment, only one RCLA opinion was published and trial courts were making a variety of inconsistent rulings.<sup>1</sup> Then, beginning around 1997 and continuing through 2003, the Courts of Appeals issued a number of significant decisions interpreting RCLA.<sup>2</sup> For the first time, practitioners and homebuilders alike began to acquire some clarity concerning the application of

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<sup>1</sup>The first case was *Trimble v. Itz*, 898 S.W.2d 370 (Tex. App. - San Antonio 1995, writ denied).

<sup>2</sup>See e.g., *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121 (Tex. App. - San Antonio 1997, writ denied), *In re Kimball Hill Homes Texas, Inc.*, 969 S.W.2d 522 (Tex. App. - Houston [14<sup>th</sup>] Dist. 1998), and *Perry Homes v. Alwattari*, 33 S.W.3d 376 (Tex. App. - Ft. Worth 2000, pet. denied).

RCLA in litigation. That was, of course, until September 1, 2003, when the Legislature's most recent amendments to RCLA took effect, along with the completely new Texas Residential Construction Commission Act, Tex. Prop. Code § 401.001, *et seq.* ("TRCCA").

At this stage, it is impossible to predict how courts will apply existing RCLA precedent to the new amendments and the TRCCA. However, it is probably a safe bet that it will take another six or seven years before many of the questions we have today will be answered. Whether a practitioner and his or her client come out on the winning side of that question will depend to a large extent on how familiar they are with the basic RCLA requirements and the new Amendments.

## II. APPLICATION OF RCLA

Section 27.002 sets forth the scope of RCLA as follows: "[t]his chapter applies to (1) any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods; and (2) any subsequent purchaser of a residence who files a claim against a contractor." Thus, the first question that arises is - what constitutes a "construct defect" under RCLA? In Section 27.001(4), "construction defect" is defined as the meaning assigned by Section 401.004 of the TRCCA, for an action to which the TRCCA applies<sup>3</sup>, but for any other action it is defined as:

a matter concerning the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor. The term may

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<sup>3</sup>Section 401.004(a) of the TRCCA defines "construction defect" as: "the failure of the design, construction, or repair of a home, an alteration of or a repair, addition, or improvement to an existing home, or an appurtenance to a home to meet the applicable warranty and building and performance standards during the applicable warranty period; and any physical damage to the home, an appurtenance to the home, or real property on which the home or appurtenance is affixed that is proximately caused by that failure."

include any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.

It is clear that RCLA applies in cases where a residential homeowner has sustained damages resulting from a “construction defect.”<sup>4</sup> However, it is still not completely clear whether RCLA applies in cases where a residential homeowner has a claim against a contractor but the damages arise from what could be a non-construction related component. For instance, a homeowner might have a claim against a contractor for selecting a faulty site (resulting in excess soil erosion or water damage). In such a case, one might argue that the damages result from negligent site selection and not a construction defect.

**A. Relationship with the DTPA**

RCLA does not create a cause of action in and of itself. *See* Tex. Prop. Code § 27.005. Plaintiffs must still use the DTPA and other common law causes of action in order to state a claim. However, Section 27.002(b) states that “[t]o the extent of conflict between this chapter and any other law, including the Deceptive Trade Practices-Consumer Protection Act . . . or a common law cause of action, this chapter prevails.” Thus, RCLA became the first statutory exemption from the DTPA.

Generally speaking, RCLA should only conflict with the DTPA and common law causes of action if a contractor complies with its duty to timely respond to pre-suit notice.<sup>5</sup> The only RCLA provisions that constitute an actual conflict with the DTPA are: (1) Section 27.003(a)(1) which

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<sup>4</sup>It is also important to remember that RCLA only applies to residential construction. It does not apply to commercial projects.

<sup>5</sup>*See* RCLA Section 27.004(f)

provides five specific defenses not enumerated under the DTPA; (2) Section 27.004(e) which limits the damages of a claimant who unreasonably rejects an offer to the cost of repairs, plus attorneys' fees prior to the rejection; (3) Section 27.004(g) which limits categories of damages that homeowners may recover when the homeowner and contractor both comply with Section 27.004(a) and (b). As a result, if a contractor timely complies with Section 27.004(b), these provisions will trump conflicting provisions in the DTPA. Thus, it cannot be over-emphasized, if a contractor hopes to avail itself of the benefits contained in RCLA, it must first comply with its pre-suit RCLA obligations.<sup>6</sup>

## **B. Notice Requirements**

Since the effective date of the TRCCA, a homeowner does not have to provide separate RCLA notice if he or she has already completed the TRCCA dispute resolution process. For claims not subjected to the TRCCA dispute resolution process, the standard RCLA notice provisions apply.<sup>7</sup>

According to Section 27.004(a), at least 60 days before a homeowner files suit against a contractor to recover damages or other relief arising from a construction defect, he must provide notice of the claim to the contractor by certified mail, return receipt requested, at the builder's last known address (assuming the claim is not subject to the new TRCCA). The notice must also specify

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<sup>6</sup>RCLA also imposes a higher causation standard than that required under the DTPA. While the DTPA only requires proof of "producing cause," RCLA Section 27.006 requires proof of "proximate cause," which of course requires evidence that the damages were foreseeable.

<sup>7</sup>As a practical matter, the scope of the RCCA is so broad that there will be very few disputes between homeowners and builders that are not subject to the RCCA. For example, looking at the RCCA exceptions, one such dispute that might be subject to RCLA and not the RCCA is a claim for an interior remodeling project that costs less than \$20,000.00.

“in reasonable detail the construction defects that are the subject of the complaint.”<sup>8</sup> It should be remembered that RCLA notice does not substitute for notice under the DTPA. As a matter of practice, it is usually a good idea to include language in a RCLA notice letter that will also satisfy the notice requirements under the DTPA.

If requested by the builder, the homeowner must also “provide . . . any evidence that depicts 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, if that evidence would be discoverable under Rule 192 of the Texas Rules of Civil Procedure.”<sup>9</sup> After the builder receives notice of a homeowner’s claim, it has 35 days to inspect the property that is the subject of the dispute in order “to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect.”<sup>10</sup> The builder is also permitted to document the alleged defects through photographs and videotape.

Section 27.004(c) states that if compliance with the RCLA notice provision is “impracticable” because the statute of limitations will expire during the notice period, then compliance is not required. However, the petition must specify in “reasonable detail” each construction defect that is the subject of the dispute. The contractor then has 75 days after service in which to request an opportunity to inspect the property and the action may be abated during this time period.

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<sup>8</sup>Tex. Prop. Code, Section 27.004(a).

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

Prior to the 2003 amendments, if a plaintiff failed to comply with the RCLA notice provisions for a reason other than an impending statute of limitations deadline, the courts generally held that the appropriate remedy was abatement. Now, however, Section 27.004(c) provides that the court must dismiss the action.

### **C. Offers of Settlement**

If the builder plans on making an offer of settlement to the homeowner (assuming the TRCCA does not apply), it must do so within 45 days of receiving the homeowner's notice letter. The offer must be sent by certified mail to the homeowner or the homeowner's attorney.<sup>11</sup> The settlement offer may include: (1) a proposal for the builder to repair the defect identified in the notice; (2) a proposal to have an independent contractor repair the identified defect, partially or totally, at the builder's expense or at a reduced rate; and/or (3) a monetary settlement offer. If the contractor offers to undertake the repairs, the offer must describe "in reasonable detail the kind of repairs which will be made."<sup>12</sup>

Prior to the recent amendments, a builder only had one opportunity to make a "reasonable offer of settlement," or it risked losing the defensive protections afforded by RCLA. Now, the builder has the ability to make a supplemental offer. If the homeowner does not believe that the builder's offer is reasonable, the homeowner must, within 25 days of receipt of the offer, "advise the builder in writing and in reasonable detail the reasons why the offer is unreasonable."<sup>13</sup> Then, not

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<sup>11</sup>Tex. Prop. Code, Section 27.004(b).

<sup>12</sup>*Id.*

<sup>13</sup>Tex. Prop. Code, Section 27.004(b)(1) and (2).

later than 10 days after the builder receives the homeowner's rejection, it may make a supplemental written offer of settlement.<sup>14</sup>

Under Section 27.004(j), if the builder's final settlement offer is not accepted, the builder may file an affidavit certifying that its offer was rejected by the homeowner. The trier of fact will then decide whether the offer was reasonable for the purpose of determining compliance with Section 27.004(b). If the builder's settlement offer is accepted, and it includes an agreement to make repairs, then those repairs must be completed within 45 days after the builder receives notice that its offer has been accepted by homeowner (unless completion is delayed by the homeowner or by other events beyond the control of the contractor).<sup>15</sup> Section 27.004(h) also gives the homeowner and builder the right to extend any of these deadlines by agreement.

Section 27.0042 also allows for a builder to offer to repurchase the home, "if the reasonable cost of repairs necessary to repair a construction defect that is the responsibility of the contractor exceeds an agreed percentage of the current fair market value of the residence, as determined without reference to the construction defects . . . ." Pursuant to Section 27.0042(d), an offer to repurchase the home is considered reasonable, "absent clear and convincing evidence to the contrary." However, a builder may not elect this remedy if: (1) the home is more than five years old at the time the action is initiated; or (2) the contractor makes such an election later than the 15th day after the date of a final, unappealable determination under the TRCCA (if applicable to the dispute).<sup>16</sup>

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<sup>14</sup>*Id.*

<sup>15</sup>*See* Tex. Prop. Code, Section 27.004(b).

<sup>16</sup>Tex. Prop. Code, Section 27.0042(b).

Notwithstanding the aforementioned notice requirements, if a construction defect “is creating an imminent threat to the health or safety of the inhabitants of the residence,” then the contractor must, after receiving notice, “take reasonable steps to cure the defect as soon as practicable.” If the contractor fails to cure the defects in a reasonable time, “the owner of the residence may have the defect cured and may recover from the contractor the reasonable cost of the repairs plus attorney’s fees and costs in addition to any other damages recoverable under any law not inconsistent with the provisions of this chapter.”<sup>17</sup>

### **III. RCLA DEFENSES**

Section 27.003(a) provides that a contractor shall not be held liable for any percentage of damages caused by: (1) negligence of a person other than the contractor or an 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 mitigate damages or 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; or (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.

Additionally, pursuant to Section 27.003(a)(2), if an assignee of the claimant or a person

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<sup>17</sup>Tex. Prop. Code, Section 27.004(m).

subrogated to the claimant's rights fails to provide the contractor with written notice and an opportunity to inspect and repair, before performing any repairs itself, then the contractor is not liable for the cost of such repairs. While RCLA specifically identifies these defenses, it also states in Section 27.003(b) that it does not limit or bar any other defenses that may be available for construction related claims.

#### **IV. RCLA LIMITS ON THE RECOVERY OF DAMAGES**

Originally, RCLA only had on limitation on damages. If the homeowner rejected the contractor's reasonable offer of settlement, his damages were capped at the reasonable cost of repairs, plus attorneys' fees incurred by the homeowner up to the time the offer was made. If the builder did not make an offer, or if it was determined that the builder's offer was unreasonable, then the builder lost the protection offered by the damages cap.

The 2003 Amendments essentially eliminate this long-standing *quid pro quo*, because all builders (even those who deal with demands in bad-faith) will now have the damages recoverable against them limited to the list of economic damages identified in Section 27.004(g). Those damages are as follows: (1) the reasonable cost of repairs necessary to cure any construction defect; (2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence; (3) reasonable and necessary engineering and consulting fees; (4) the reasonable expenses of temporary housing reasonably necessary during the repair period; (5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure;

and (6) reasonable and necessary attorney's fees.<sup>18</sup>

## **V. EFFECTIVE DATE OF THE NEW RCLA PROVISIONS**

The amendments to Sections 27.002, 27.003, and 27.004 apply only to causes of action that accrue on or after September 1, 2003. Causes of action that accrue before September 1, 2003 are governed by the pre-existing law, and such law is continued in effect for that purpose. Section 27.0042 and the changes to Section 27.007(a) apply only with respect to contracts between contractors and homeowners entered into on or after September 1, 2003. Contracts entered into before September 1, 2003 will be governed by the pre-existing law.

## **VI. CONCLUSION**

The purchase of a home is one of the largest investments made by an individual or family. Not only does it involve a considerable investment of money, it also involves a significant emotional investment by the owner. At the same time, the construction of a home represents a substantial investment for those builders who operate with integrity. Their reputation and their livelihood ride on each and every home they build. For all of these reasons and more, it is important that parties to these transactions be provided with a quick, efficient, and cost-effective mechanism for resolving any disputes that might arise between them. Whether the long-term effect of the 2003 RCLA Amendments will accomplish these goals remains to be seen. In the short-term, however, we can be fairly certain of one thing. The 2003 RCLA Amendments will undoubtedly lead to a greater deal of uncertainty and litigation among all interested parties.

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<sup>18</sup>Tex. Prop. Code, Section 27.004(g).