

# Update on the Texas Residential Construction Liability Act

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# RCLA

- Chapter 27 of the Texas Property Code (a.k.a. Residential Construction Liability Act)
- It does not create a cause of action, but provides framework for homeowners bringing claims against their builder.
- What Does It Do?
  - Sets out Notice Provisions.
  - Provides Defenses to Builder.
  - Limits and Controls Damages.
- Purpose – to encourage settlement



# Is The Claim Governed by the RCLA?



- Applies to “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.”

# Is The Claim Governed by the RCLA?

- What is a **Construction Defect**?
  - “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.”
- Broadly defined – it just has to “concern” the construction of a new or existing residence.

# Is The Claim Governed by the RCLA?

- What is a **Residence**?
  - Real Property and improvements for a:
    - Single Family Residence
    - Duplex, triplex or quadplex
    - Condominium (both unit and common elements)

## Does the RCLA Apply?

– Delay of constructing a residence?

- Timmerman v. Dale, 397 S.W.3d 327 (Tex. App.— Dallas 2013)

– Overcharging for incorrect windows and incorrect hanging of door?

- In re Classic Openings, Inc., 318 S.W.3d 428, 429 (Tex. App. 2010)

# Is The Claim Governed by the RCLA?

- What is a **Residence**?
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    - Single Family Residence
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## RCLA – Notice Procedures

- 27.004(a) – Prior to filing suit or arbitration, homeowner must give contractor **60 days** written notice, via certified mail, return receipt requested, of his or her complaints to the contractor.
- If notice is not given, Builder can abate case.



## RCLA – Notice Procedures

- Contractor may request, in writing, an inspection within **35 days** of receiving the notice letter.
- Purpose of this is “to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect.” Tex. Prop. Code 27.004(a).
- Homeowner then must give the contractor a “reasonable opportunity” to inspect the property.

# RCLA – Notice Procedures

- *EXCEPTIONS MAY EXIST* →
- *Hernandez v. Lautensack*, 201 S.W.3d 771 (Tex. App.-Fort Worth 2007)
  - Court found even though jury found no reasonable opportunity to inspect and make opportunity to repair, the RCLA's intent was satisfied when contractor had previous opportunities to inspect.

## RCLA – Notice Provisions

- Contractor has **45 days** from the date notice was given to it to make a written offer of settlement.
  - May include either an agreement to repair or to have repaired by an independent contractor
  - Shall describe in reasonable detail the kind of repairs which will be made
  - If accepted, must be completed within 45 days unless delayed by claimant or events beyond contractors' control.

## RCLA – Notice Provisions

- Homeowner must reject in writing or accept within **25 days**, if neither, deemed rejected.
- Advisable to reject in writing, explaining in detail reasons for rejection.
- Advisable to write letter with a view to it being read before jury, judge or arbitrator.



# RCLA – Notice Provisions



- If Homeowner Rejects the Offer, Contractor Can Supplement Offer **within 10 days**.
- Homeowner can still file suit after the initial rejection occurs.
- But trier of fact would look to the supplemental offer to determine reasonableness.

## RCLA – Abide by the Timelines

- You can get a jury question as to the reasonableness of the offer.
- But you have to abide by the timelines within the RCLA to be able to submit jury question.
- If you agree to extend deadlines under RCLA, do so in writing!

# Other “Notice” Considerations

## What if Suit Is filed and Homeowner Finds Further Defects?

- *In Re Anderson Constr. Co.*, 338 S.W.3d 190 (Tex. App.—Beaumont 2011).
  - Court noted that act is unclear about how litigants should handle defects discovered after a suit has been filed.
  - Found no legislative intent to prohibit a party from amending pleadings to add new claims.
  - Found that the trial court is required to abate an action for amended claims if the homeowner fails to give the contractor a reasonable opportunity to inspect the property.

## Other “Notice” Considerations

- Do not have to give notice under RCLA if you are facing a statute of limitations or if claim is a counterclaim.
- But – Petition, Demand, or Counterclaim must set forth in reasonable detail each construction defect subject to complaint.
- RCLA time period for inspection is extended to 75 days after service of suit.



## Damages Allowed Under RCLA

- Reasonable Cost to Repair Construction Defect
- Reasonable and Necessary Cost for Replacement/Repair of Damaged Goods
- Reasonable and Necessary Engineering and Consulting Fees
- Reasonable and Necessary Temporary Housing Expenses during repair period
- Reduction in current market value after defect is repaired if defect is a structural failure
- Reasonable and necessary attorneys' fees

## Damages Do Not Include

- moving and storage costs
- boarding for pets or livestock
- loss of income from the interruption of a homeowner's home business during periods of temporary housing due to repairs
- mental anguish

## Damages Under RCLA

- Must prove the damages sought are reasonable and necessary!
- Plaintiff must show more than nature of injuries – must show the character and need for services rendered, and the amounts charged for the repairs.

## Damages Under RCLA

- *CS Custom Homes LLV v. Stafford*, 2015 WL 5684080 (Tex. App.—San Antonio, Sept. 23, 2015, Austin).
  - Homeowner failed to establish at trial that fees paid to structural engineer were reasonable!

# What if Homeowner Rejects a Reasonable Offer?

- Tex. Prop. Code 27.004(e) – Homeowner Cannot Recover More Than →
  - Fair market value of contractor's last offer of settlement; OR
  - Amount of reasonable monetary settlement or purchase offer made.

AND

- Can only recover amount of reasonable and necessary costs and attorneys' fees incurred before offer was rejected

# What if Builder Makes Unreasonable Offer or No Offer at All?

- Texas Property Code 27.004(f)
  - If a contractor fails to make a reasonable offer under Subsection (b), the limitations on damages provided for in Subsection (e) shall not apply.

# What if Builder Makes Unreasonable Offer or No Offer at All?

- *Smith v. Overby* (Tex. App.—San Antonio, Aug. 24, 2016)
  - If Contractor fails to make a reasonable offer, the contractor loses the benefit of the limitation on attorneys' fees set out in section 27.004(e)(2).

# What if Builder Makes Unreasonable Offer or No Offer at All?



- *Perry Homes v. Alwattari* (Tex. 2000)
  - Texas Supreme Court held under former language of RCLA, if builder failed to make a reasonable settlement offer, limitations on damages for homeowner were gone and available defenses to the builder were lost!
- *Horak v. Newman* (Tex. App. – Austin, July 2009)
  - Even under the most recent amendments to the RCLA, court found that when a contractor fails to make a reasonable settlement offer, limitations of statute as to both type and amount of damages are inapplicable.



# Is the offer reasonable?

## – *Fonteknot v. Kimball Hill Homes Texas, Inc.*

- Homeowner claimed over 230 hours were expended in pursuing lawsuit
- Builder presented evidence, which homeowner didn't dispute, that reasonable value of necessary repairs was \$2,615
- Builder offered homeowner \$4,000 in damages and \$2,000 for attorneys' fees prior to settlement

## – *Perry Homes v. Alwattari*

- For four years builder made repairs, but plaintiffs demanded more
- Builder offered to make repairs if plaintiffs paid 40 percent of the cost up front with a promise of future reimbursement

# Is the offer reasonable?

## – *Hernandez v. Lautensack*

- Contractor attempted to repair a roof several times, that continued to leak
- Contractor told homeowner that leak was due to hail damage and offered to replace roof for \$9,100 in labor charges if homeowner provided new slate tiles at cost of \$25,000

## – *Roubain v. Marino Home Builders, Inc.*

- Framer constructed defective garage which caused the walls to bow
- Homeowner demanded new garage, plus \$125,000 in stigma damages
- Homeowner took issue with settlement offer which included a requirement for assignment of \$80,000 in insurance proceeds, plus builder, who did original defect work, would be performing repairs

A faint, light-colored architectural drawing of a two-story house with a gabled roof, multiple windows, and a central entrance, serving as a background for the text.

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