Texas Residential Construction Claims After the TRCC

Seventh Annual Construction Symposium
City Place Conference Center
Dallas, TX

January 27, 2012

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TEXAS RESIDENTIAL CONSTRUCTION CLAIMS: AFTER THE TRCC

I. INTRODUCTION

As the sun has set on the Texas Residential Construction Commission ("TRCC"), a new day has begun for Texas homeowners and builders. As of September 1, 2009, the TRCC and the Texas Residential Construction Commission Act ("TRCCA") was abolished, leaving many questions for homeowners, home builders and anyone involved in residential construction defect disputes.

Texans should be use to adapting to changes when it comes to the method of pursing and resolving residential construction defect disputes. For the last forty years perhaps no area of Texas construction law has seen as many changes. In this time span, Texas has seen the birth of the Texas Deceptive Trade Practices Act ("DTPA") and the Residential Construction Liability Act ("RCLA"), and the rise, and fall, of the TRCCA.

With the death of the TRCC, those involved in residential construction claims are faced with the arduous task of understanding Texas' return to the realm of the RCLA. During the TRCCA's lifespan, the legislature intentionally included a number of TRCCA provisions into the RCLA by reference. Thus, the termination of the TRCC will result in a number of unintended consequences that will need to be addressed as the new world of residential claims unfolds. Further, several key provisions in the TRCCA are conspicuously absent from the RCLA. This article will discuss the evolution of the laws governing residential construction defect disputes, and the new framework for residential construction litigation after the sunset of the TRCC.

II. HISTORY OF RESIDENTIAL CONSTRUCTION DEFECT LITIGATION

Prior to 1968, construction defect claims involving Texas homeowners were typically brought under the common-law theories of breach of contract, negligence, fraud, and breach of express warranties. The damages available to injured homeowners were the traditional damages available to plaintiffs in other types of cases involving these same causes of action.

Then, in 1968, the Texas Supreme Court established two independent implied warranties – good workmanship and habitability – that applied to homebuilders.[1] The new implied warranties not only required residential contractors to build homes that were suitable for habitation, but to also build homes to industry standards. The Court in *Humber v. Morton* acknowledged the superior knowledge and power of the homebuilders in new home transactions, and public policy required the two warranties due to disparate bargaining positions between the parties. However, in 1973, the foundation of residential construction claims fundamentally changed with the enactment of the Texas Deceptive Trade Practices Act ("DTPA").

A. DTPA – A Starting Ground to Residential Construction Claims

The DTPA[2] has been the primary remedy for resolving residential construction claims, as well as other consumer claims, since its inception in 1973. Homeowners discovered that the DTPA allowed a cause of action to be maintained for false, misleading and deceptive acts or practices under the DTPA's "laundry list."[3] While the DTPA did not create any warranties, it allowed consumers to bring causes of action for breach of implied or express warranties, including the implied warranties that a new home would be constructed in a good and workmanlike manner and that it would be suitable for habitation.[4]

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[1] *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).
[2] Tex. Bus. & Com. Code § 17.01 *et seq.*
[3] *Id.* § 17.46(b).
[4] *See Humber*, 426 S.W.3d 554 (Court dismissed the doctrine of caveat emptor and held that there were warranties implied in law, including implied warranty in performing work in a good and workmanlike manner); *Evans v. Stiles*, 689 S.W.2d 399 (Tex. 1985) (clarifying the implied warranty of good and workmanlike construction is distinct from the implied warranty of habitability); *Melody Homes Mfg. Co. v.*

The DTPA is very attractive to homeowners because it gives plaintiffs the ability to recover treble damages and attorney's fees.[5] However, there were many critics of the DTPA's use in residential construction disputes, including homebuilders who claimed it impeded the reasonable resolution of residential construction defect claims.[6] These alleged unreasonable results were manifested in *Brighton Homes, Inc. v. McAdams*.[7] In *Brighton Homes*, the homeowners alleged that they had foundation problems and sued their builders under the DTPA. The homeowners had purchased their residence new for $30,000 and the foundation problems were repairable. The homeowners were successful and the recoverable damages under the DTPA allowed them a judgment for $202,000, plus interest and court costs. This is an example of the type of results that outraged homebuilders and sparked debate for the passage of the more builder-friendly RCLA.

B. The RCLA's Reign

In 1989 the Texas Legislature enacted the RCLA to "provide a fair and appropriate balance to the resolution of construction disputes between a residential contractor and owner."[8] The RCLA amended the Texas Property Code and was designed to address characteristic problems that arose when a homeowner asserted claims against a homebuilder under the DTPA. The RCLA read as builder-friendly in the sense that it outlines specific and identifiable procedural prerequisites homeowners have to follow before bringing suit. However, the RCLA does not create a cause of action in and of itself.[9] This was one of the biggest misconceptions until the Texas Legislature clarified it in 1999. Thus, plaintiffs must still assert a cause or causes of action, i.e. the DTPA and other common law or statutory causes of action, in order to state a claim. The RCLA modified the pursuit of these causes of action by requiring the homeowner to provide notice to the builder prior to filing suit and then give the builder an opportunity to inspect and repair the property.[10] It became the first statutory exemption from the DTPA, providing 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."[11]

After the RCLA's enactment in 1989 and before the enactment of the TRCC, the Texas Legislature amended the Act four times - 1993, 1995, 1999, and 2001 - with each amendment favoring the homebuilding industry more than the previous.[12] For example, the 1993 RCLA amendment made more defenses available to contractors while explicitly limiting consumers' recoverable damages for construction defects.[13] The 1995 amendment included a provision that allowed contractors to abate consumers' suits when consumers did not give contractors the required notice and opportunity to cure.[14] In 1999, the amendments included mediation requirements and provisions for sanctions in cases where the court determined that a suit was

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Barnes, 741 S.W.2d 349 (Tex. 1987) (Court broadened the scope of the implied warranties to service transactions in order to cover repair services performed on existing homes).

[5] Tex. Bus. & Com. Code § 17.50.

[6] *See* Scott Summy & John D. Sloan, Jr., *Texas Residential Construction Liability Act: Framework for Change*, 27 Tex. Tech. L. Rev. 1, 4-5, n. 6012 (1996) (quoting Robert Bush in a Tape of the Hearings on Texas Senate Bill 1012, The Residential Construction Liability Act, Before the Senate Committee on Jurisprudence, 71st Leg. R.S. Tape 2, Side 1, April 4, 1989).

[7] 737 S.W.2d 340 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

[8] Summy & Sloan, *supra* note 6 at 1, n. 10.

[9] *See* Tex. Prop. Code § 27.005.

[10] *Id*. § 27.004.

[11] *Id* § 27.002.

[12] J. Christopher Creel & Christopher Griesel, *RCLA Redux: Construction Defect Litigation After the TRCC's Sunset*¸ Construction Law Journal, at 6 (Fall 2009) (stating that it was also subsequently amended in 2003, 2005, and 2007).

[13] Cory F. Wehmeyer, *When Good Homes Go Bad: A Critical Analysis of Texas Homeowner Remedies and the TRCCA*, 38 Tex. Tech. L. Rev. 155 (Fall 2005) (*citing* Stephen G. Cochran, *Consumer Rights and Remedies*, in 27 Texas Practice Series, Texas Consumer Law Handbook § 3.41 and n. 41 (3d ed. 2002)).

[14] *Id*. (*citing* Cochran, § 3.41, n. 28).

frivolous.[15] The 2001 amendments were less noteworthy, but set the stage for the drastic changes that came in the 2003 legislative session.[16]

C. Evolution of Common Law Warranties

In addition to these legislative changes, between the DTPA's inception in 1973 and the introduction of the RCLA in 1989, there were several notable judicial decisions that impacted the application of common law warranties in residential construction litigation. For example, in *G-W-L, Inc. v. Robichaux*,[17] the Texas Supreme Court evaluated whether contractors could validly provide express warranties as a means of replacing the implied warranties, even though the express warranties provided much less protection. The Court held that buyers should protect themselves by reading the contract before signing them.

Then in *Melody Home Manufacturing Co. v. Barnes*, the Texas Supreme Court broadened the scope of the implied warranties to service transactions in order to cover repair services performed on existing homes.[18] The Court held that the implied warranties could not be waived or disclaimed by contract and overruled *Robichaux* to the extent that it conflicted with the Court's opinion.[19]

Even after these cases, Texas courts still did not adequately distinguish between the warranty of habitability and the warranty of workmanship. Then, in *Centex v. Buecher*[20], the Texas Supreme Court defined these warranties differently. The implied warranty of good workmanship requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances.[21] The implied warranty of habitability, on the other hand, requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation.[22] In other words, this implied warranty only protects new home buyers from conditions that are so defective that the property is unsuitable for its intended use as a home.[23] In *Centex*, the Court held that the implied warranty of habitability can be waived only to the extent that defects are adequately disclosed.[24] However, the implied warranty of good and workmanlike construction can be waived using a standard form contract.[25] In essence, the implied warranty of good and workmanlike construction existed as a "gap-filler," unless the contract for construction of a new home specified the level of builder proficiency or conduct.[26]

Centex highlighted the need for consistent performance standards to measure the builder's conduct and the owner's expectations.[27] In 2003, perhaps in a response to these issues, as well as criticisms from some corners that the dispute resolution system was still too cumbersome, the legislature made its third major change in the resolution of construction defect litigation – the creation of the Texas Residential Construction Commission.[28]

D. Enactment of the Texas Residential Construction Commission

While the 2003 Legislative Session brought some modifications to the RCLA, it also brought about House Bill 730, which included the TRCC. The RCLA was still the comprehensive law governing such claims, but it necessarily incorporates the TRCCA and the TRCC. The TRCC was established to review and pass judgment on residential construction claims. Some of the main components of the TRCC was to set up a nine-member commission to oversee the regulation of residential builders,[29] register builders and homes, and make this information available to the public.[30] They were further

[15] *Id*. (*citing* Cochran, § 3.41).
[16] *Id*.
[17] 643 S.W.2d 392 (1982).
[18] 741 S.W.2d at 353.
[19] *Id*. at 355.
[20] 95 S.W.3d 266 (Tex. 2002).
[21] *Id*. at 273.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 274-75.
[25] *Id*.
[26] *Id*.
[27] Creel & Griesel, *supra* note 12 at 7.
[28] *Id*.
[29] Tex. Prop. Code. §§ 406.001 *et seq.*
[30] *Id*. § 416.001 *et seq.*

charged with adopting a statutory warranty scheme and a set of uniform performance standards that would apply to all new homes,[31] creating a formal dispute resolution process,[32] and providing a system of transferring cases from the TRCC to arbitration or litigation under the terms of the RCLA.[33]

One of the important aspects of the TRCCA was its mandated limited statutory warranty and building and performance standards. These became the only warranties that ran with residential construction in Texas.[34] This provision was important because it effectively overruled *Centex* by imposing statutory performance standards (which replaced the implied warranty of good and workmanlike performance) and enacting a statutory warranty of habitability. The warranties applied to construction that commenced on or after June 1, 2005.[35] Any residential construction that began prior to June 1, 2005 was governed by warranties and building and performance standards applicable to construction before that date.[36] However, express warranties between a buyer and a builder were always enforceable.[37]

Another important aspect of the TRCCA was the formalized method of dispute resolution (a.k.a. "SIRP"), which consisted of inspections and administrative review, which was to evaluate and resolve construction defect claims. SIRP had to be utilized prior to any legal action for damages or other relief arising from an alleged construction defect.[38] Prior to filing a request for SIRP, the homeowner had to give the builder 30 days written notice of the claimed defect and allow the builder access to the home.[39] If the defect was not resolved, and the homeowner filed a request for SIRP, the TRCC then appointed a third-party inspector to do an investigation.[40] The builder or homeowner could appeal the inspector's report, and appeals were then referred to a three-person panel of state inspectors.[41]

The homeowner had to comply with all requisite provisions of the SIRP in order to recover damages or other relief for residential construction defects. If after going through the SIRP process the dispute was not resolved, the homeowner could file a lawsuit or demand arbitration seeking damages for the alleged construction defects.[42]

III. SUNSET FOR THE TRCC

From its inception, the TRCC has received criticism for its inability to effectively oversee builders and protect Texas homeowners from poor quality construction. Although the Legislature made significant changes to the Act and its Commission, consumer criticism continued as the "sunset" date approached. In August 2008, the staff of the Sunset Commission made an initial recommendation to "abolish the TRCC and repeal the TRCCA."[43] The Sunset Commission's Final Report noted that its Staff found that the TRCC is "fundamentally flawed and does more harm than good."[44]

The Sunset Commission later substituted its staff's recommendations, and instead recommended that the agency be continued, but that it be reviewed in four years, rather than the usual twelve years.[45] The Sunset Commission proposed a number of other changes to help address issues and complaints. However, during the 81st legislative session the TRCC was allowed to be sunseted.

After the TRCC was sunseted, this left concerns and continues to raise issues with how the TRCC will wind up its affairs. Pursuant to

[31] *Id*. § 430.001 *et seq*.
[32] *Id*. Subtitle D, Title 16.
[33] *Id*. Subtitles D & E, Title 16.
[34] *Id*. § 430.006.
[35] 10 Tex. Admin. Code § 304.1(b).
[36] *See* Tex. Prop. Code § 430.006; 10 Tex. Admin. Code § 304.19(b); *Centex*, 95 S.W.3d at 268.
[37] Tex. Prop. Code § 430.006(3).
[38] *Id*. § 426.005.
[39] *Id*. § 428.001.
[40] *Id*. § 428.003.
[41] *Id*. § 429.001.
[42] *Id*. § 426.005.
[43] Sunset Advisory Commission Final Report (July 2009), at http://www.sunset.state.tx.us/81.htm (last accessed January 22, 2010).
[44] *Id*.
[45] *Id*.

Texas Government Code 325.017, the TRCC will continue its existence until September 1, 2010. In order to ensure it can wind up its business by this date, the TRCC stopped accepting new business, such as builder registrations, renewal registrations, and inspections requests, as of August 31, 2009.

IV. RCLA'S EXCLUSIVE RETURN – WHAT NOW?

Residential construction defect disputes are now exclusively governed again by the RCLA. However, returning to pre-TRCC law is not as easy as it may sound. The TRCC's demise has left many issues to be addressed. For example, by the end of the 2007 legislative cycle, the RCLA contained 21 cross-references to the TRCCA or Title 16.[46] Now that the TRCCA has died, these cross-referenced sections leave many questions on how the statute will be interpreted.

Additionally, shortly before the TRCC was enacted, two of the largest concerns were the need for consistent performance standards and for a better dispute resolution system. The TRCC attempted to address these concerns with the enactment of statutory minimum residential construction performance standards and warranties and the state sponsored inspection and dispute resolution process. However, both of these features are conspicuously absent from the RCLA.

Thus, until the legislature can work out complications and until the law can be re-established, these issues should be analyzed for anyone who routinely deals with residential construction projects and/or claims in order to protect one's interests.

A. Who does the RCLA apply to?

The first question to address is who the RCLA now applies to. The RCLA is more expansive in its definition of "contractor" than the TRCCA in its definition of "builder." Unfortunately, RCLA's definition is one of the cross-referenced sections discussed above, which opens the door for different interpretations of who the RCLA will apply to. Under the RCLA, the definition of "contractor" includes those who are also a "builder" under the TRCCA.[47] Yet persons who did not qualify as a "builder" under the TRCCA could still be a contractor under the RCLA. Under Section 27.001(5), "contractor" means the following:

1) a builder, as defined by Section 401.003, contracting with an owner for the construction or repair of a new residence, for the repair or alteration of or an addition to an existing residence, or for the construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence;

2) any person contracting with a purchaser for the sale of a new residence constructed by or on behalf of the person; or

3) a person contracting with an owner or the developer of a condominium for the construction of a new residence, for an alteration of or an addition to an existing residence, of for the construction, sale, alteration, addition or repair of an appurtenance to a new or existing residence; . . .

Under the TRCCA, a "'builder' means any person who, for a fixed price, commission, fee, wage or other compensation, sells, constructs, or supervises or manages the construction of, or contracts for the construction of or the supervision or management of the construction of:

1) a new home;

2) a material improvement to a home, other than an improvement solely to replace or repair a roof of an existing home; or

[46] Creel & Griesel, *supra* note 12 at 8.

[47] Tex. Prop. Code § 27.001(5).

3) an improvement to the interior of an existing home when the cost of the work exceeds $10,000.[48]

As of September 1, 2009, there are no "builders" as defined by the TRCCA. Thus, how Section 27.001(5)(i) will be interpreted is uncertain. One way it can be read is to strike this subsection entirely, as it no longer exists. Or, it can be generally read as a "person" or "entity," instead of "builder, as defined by Section 401.003."

Hopefully the legislature will address this issue in the future. But until it does, anyone can challenge the applicability of the RCLA to a person or entity that only performs an alteration of or repair, addition, or improvement to an existing home, or an appurtenance to a home. If a plaintiff's lawyer successfully challenges its applicability, then the DTPA could apply, and the limitations on damages under the RCLA may no longer be applicable, and the homeowner would no longer have to face an offer to inspect or repair. Further, a homeowner would only have to give notice under the DTPA, and not under the RCLA.

B. Warranties

As previously stated, in 2005 the TRCC promulgated statutory minimum residential performance standards and warranties. The statutory warranties expressly superseded all implied warranties by excluding the warranty of good workmanship and incorporating the warranty of habitability.[49] But the death of the TRCCA leaves many questions as to what happens to these statutory warranties that were promulgated by the Commission. This issue is at the top of the list of "frequently asked questions" on the TRCC's website[50], and the TRCC has provided some guidance on how it intends to handle statutory warranties. The statutory warranties will remain in effect and will still be required for any residential construction contracts signed on or before September 1, 2009.

The question will be what sort of implied warranties, if any, are applicable after August 31, 2009. Of course express warranties between a buyer and a builder are always enforceable. However, it is unknown whether courts will continue to find that the statutory warranties and commission-adopted performance standards will continue until August 31, 2010. Further, after August 31, 2010, will the old implied warranties come back into play? These questions remain unanswered. The TRCC appears to be taking the position that the statutory warranties will apply even after the agency concludes its business on August 31, 2010 for homes that were built during the existence of the commission.[51] However, the TRCC's position on the issue is of course not necessarily going to govern, and there is likely to be a good bit of debate in the coming months and years over the scope of warranties in residential construction.

Some argue that the pre-TRCC, *Centex Homes v. Buecher* law will be resurrected.[52] Before the enactment of the TRCCA, *Centex Homes*, as discussed previously, was the leading case on implied warranties in residential construction defect disputes. *Centex* was decided only shortly before the enactment of TRCCA. In *Centex*, the Court held that the implied warranty of habitability can be waived only to the extent that defects are adequately disclosed, which is somewhat similar to the mandate under the TRCCA.[53] However, under *Centex*, the implied warranty of good and workmanlike construction could be waived using a standard form contract. In *Centex*, the "good and workmanlike manner" served as a "gap-filler" in the absence of requisite detail.

Unfortunately, there is little case law interpreting what "gaps" in construction

[48] *Id*. § 401.003.
[49] *Id*. § 430.001-.002.
[50] Texas Residential Construction Commission, Revised FAQs (August 18, 2009), at http://www.trcc.state.tx.us/Publications/NewsReleases/09_20_09_Sunset_FAQs.asp (January 21, 2010).
[51] *Id*.
[52] Tm R. Sherry & Justin McKinley, *The Sunsetting of the TRCCA*, Dallas Bar Association Headnotes, (January 2010).
[53] 95 S.W.3d 266 (Tex. 2002).

contracts might require judicial supplementation. In *Richardson v. Duperier*, the Houston Fourteenth Court of Appeals determined whether the builders' contract expressly disclaimed the warranty of good workmanship.[54] In the fourth numbered paragraph of the "General Conditions" found on the back of the parties' contract, it stated the following:

> [Legacy] warrants its products against failure due to defective workmanship or materials for a period of one year from completion date. [Legacy] does not warrant products which are not manufactured by [Legacy] except to the extent of the warranty [Legacy] may actually receive from the manufacturer. [Legacy's] liability shall be limited to the written warranties specified herein.

The front page of the contract, just below the signature lines, stated "[s]ee reverse side for conditions of contract."

In *Richardson*, the homeowner attempted to distinguish *Centex* by pointing out that the express warranty at issue in that case was set out in all capital letters and was initialed by the purchaser, while the express warranty in his contract was boilerplate language on the back side of the contract. The court disagreed and held that the builder was entitled to summary judgment on the homeowners' claim for breach of the implied warranty of good and workmanlike construction because the express warranty in the parties' contract superseded any implied warranty.

Thus, this decision based upon *Centex* does not appear to be too different from the TRCCA's mandate. With the demise of the TRCC, however, we may see a shift towards a more homeowner-friendly application of *Centex*. Builders should be aware that, under *Centex,* to the extent its express warranties fail to fully displace the former statutory warranties, any attempted waiver of these common-law implied warranties may not work. Further, since it is uncertain whether courts will decide that the TRCCA provisions will still be in effect until August 31, 2010, the TRCC recommended that the safest course of action is for the parties to agree to written warranties and performance standards that are at least as stringent as the statutory warranties and commission-adopted performance standards until August 31, 2010.[55]

C. Dispute Resolution

One of the biggest changes with the death of the TRCCA is the elimination of the state-sponsored inspection and dispute resolution process. Homeowners with residential construction defect disputes are now allowed to bypass initial dispute resolution procedures and take their complaints directly into the legal system.

If there is no statutorily mandated dispute resolution process, parties, in particular builders, should look for opportunities to resolve disputes short of costly litigation or arbitration. An individual's house is typically their largest financial investment. When disputes arise, homeowners are often emotional and frustrated with repeated, unsuccessful attempts by the builder to address their complaints. This mounting frustration and emotion does not foster amicable resolution to these disputes. Thus, it is important for builders to include certain provisions in their contracts if they wish to avoid construction defect litigation.

There are several ways to accomplish this. First, the parties could include a provision wherein all disputes are initially referred to a third party (such as an architect or engineer) for input. Additionally, the contract can require mediation before formal dispute resolution or before filing suit. The parties could also stipulate to arbitration, removing the possibility of having to litigate construction defect claims in traditional courts.

However, builders must be aware that if they would like the parties to proceed with certain dispute resolution procedures prior to filing suit, the provisions would obviously have to be part of an underlying contract to be enforceable.

[54] 2005 Tex. App. LEXIS 2746 (Tex. App.—Houston [14th Dist.], April 12, 2005, no pet.).

[55] *Supra*, n. 51.

Builders should also be familiar with and use the statutory offer of settlement procedure found in the RCLA, which limits a builder's potential liability if compliance is established.

D. RCLA's Notice and Offers of Settlement Provision – Limitations on Damages

Under the RCLA's Notice and Offer of Settlement provision, a homeowner must give a contractor at least 60 days before filing suit "written notice . . . to the contractor . . . specifying in reasonable detail the construction defects that are the subject of the complaint"[56] If the homeowner fails to comply with this provision, the suit is automatically abated 10 days after the motion to abate is filed.[57]

However, if the homeowner gives proper notice, then the contractor has 35 days to inspect the property[58], and 45 days to make a written offer of settlement or repairs.[59] The homeowner then has 25 days to respond with reasons why the offer is unreasonable[60], and the contractor has 10 days to propose a counteroffer.[61] If the homeowner rejects a "reasonable" offer made or does not allow the contractor to inspect or repair the defect pursuant to an accepted offer of settlement, the homeowner's damages it is entitled to recover will be limited to the fair market value of the contractor's last offer of settlement, or the amount of a reasonable monetary settlement or purchase offer.[62] Further, the homeowner may recover only the amount of reasonable and necessary costs and attorneys' fees incurred before the offer was rejected.[63]

1. What is a "Reasonable Settlement Offer"?

The homeowner damages are limited, as stated above, if he or she rejects a "reasonable" offer made or does not allow the contractor to inspect or repair the defect pursuant to an accepted offer of settlement.[64] The RCLA does not provide a definition or set of parameters for what constitutes a "reasonable offer." Instead, it states that the "trier of fact shall determine the reasonableness of a final offer of settlement made under this section."[65] Due to TRCC's governance over the resolution of cases, as well as the likelihood of settlement before the cases ever reach an appellate court, there is very little case law interpreting what is "reasonable" under the RCLA. In fact, many of the cases that discuss the "reasonableness" of an offer were decided prior to the RCLA's amendments. In any event, the reported decisions may provide some insight as to how a contractor's settlement offer is analyzed.

a. **Unreasonable Offers**

In *Perry Homes v. Alwattari*, within a year of plaintiff's purchasing their home, the house showed signs of structural damage due to shifting in the foundation. [66] For four years the builder voluntarily performed cosmetic repairs on the house. Plaintiffs demanded more substantial repairs, and the builder offered to make the repairs if plaintiffs paid 40 percent of the cost up front with a promise of future reimbursement. The court found that evidence supported the jury's finding that builder failed to make a reasonable offer to plaintiffs.

In another example, *Hernandez v. Lautensack*, a contractor attempted to repair a roof several times, which leaked like a sieve after the work was complete.[67] The contractor told the homeowner that the leaks were the result of hail damage and offered to replace the roof for $ 9,100 in labor charges if the homeowner provided new slate tiles at a cost of $ 25,000. The roofer claimed that the homeowner failed to serve the requisite presuit notice because he proceeded with hiring another contractor to repair the roof. The court held that the fact that the homeowner replaced the roof before he sent the notice letter did not preclude recovery

[56] Tex. Prop. Code § 27.004(a).
[57] *Id*. § 27.004(d).
[58] *Id*. § 27.004(a).
[59] *Id*. § 27.004(b).
[60] *Id*. § 27.004(b)(1).
[61] *Id*. § 27.004(b)(2).
[62] *Id*. § 27.004(e).
[63] *Id*.
[64] *Id*.
[65] *Id*. § 27.004(j).
[66] 33 S.W.3d 376 (Tex. App.—Fort Worth 2000, pet. denied).
[67] 201 S.W.3d 771 (Tex. App.—Fort Worth 2006, pet. denied).

because there was undisputed evidence that the roofer inspected the roof many times when he attempted to repair leaks before it was replaced. The jury found that the repair offer was unreasonable.

b. **Reasonable Offers**

In *Fontenot v. Kimball Hill Homes Texas, Inc.*,[68] the builder was able to limit the homeowner's damages by making a reasonable repair offer. The homeowner claimed over 230 hours had been expended in the suit. But the homeowner failed to contest the builder's evidence that the reasonable value of necessary repairs was $2,615 and that it offered homeowners $4,000 in damages and $2,000 to reimburse attorney's fees prior to the reject of the settlement offer.

In another example, *Roubein v. Marino Home Builders, Inc.*,[69] the court found that it was reasonable for the framer to offer to replace a defective garage it constructed, even thought it did not offer to pay stigma damages claimed by the homeowners. The homeowner demanded that the builder replace an entire garage and pay $125,000 in stigma damages. The homeowner argued that the builder's settlement offer included a requirement for the assignment of $80,000 in insurance proceeds, and took issue with the fact that the builder that had constructed the defective garage would be involved in the repairs.

2. Damages Available

The RCLA limits damages that are recoverable in any Residential Construction Defect Claim. The only damages available are economic damages and the statute sets out a specific "menu" of available economic damages. Section 27.004(g) provides as follows:

> (g) except as provided by subsection (e), in an action subject to this chapter the claimant may recover only the following economic damages proximately caused by a construction defect:
>
> (1) reasonable costs of repairs necessary to cure any construction defect;
>
> (2) reasonable and necessary costs 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.

This statute limits the damages available to these economic damages. It obviously does not include any so-called soft damages like mental anguish and other emotional damages. It also does not include treble damages or any other form of enhanced damages that might be available under the DTPA or in connection with any other claims, including claims for fraud. It arguably does not even include all economic damages such as costs for moving and storage, lost income for the interruption of a homeowner's home business, pet or livestock boarding, or other types of damages that could fall within the category of "economic" damages.

While homeowners' clearly suffer consequences by failing to accept a reasonable offer, what happens to builders if their offer is unreasonable or if they fail to make an offer at all? According to the RCLA, there appears to be only limited consequence if the builder makes no RCLA settlement offer or an unreasonable

[68] No. 14-03-00347-CV, Tex. App. LEXIS 1208 (Tex. App.—Houston [14th Dist.] Feb. 10, 2004, no pet.).

[69] No. 13-01-711-CV, 2002 Tex. App. LEXIS 5656 (Tex. App.—Corpus Christi, Aug. 1, 2002, no pet.).

offer. Making a reasonable offer simply further limits the damages recoverable to the amount of the offer and attorney's fees and engineering fees incurred to the date of the offer. In 2003, the RCLA was amended to state the following in §27.004(f):

> (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.

This obviously requires a review of §27.004(e). It states:

> (e) If a claimant rejects a reasonable offer made under Subsection (b) or does not permit the contractor or independent contractor a reasonable opportunity to inspect or repair the defect pursuant to an accepted offer of settlement, the claimant:
>
> 1. may not recover an amount in excess of:
>
> a. the fair market value of the contractor's last offer of settlement under Subsection (b); or
>
> b. the amount of a reasonable monetary settlement or purchase offer made under Subsection (n); and
>
> 2. may recover only the amount of reasonable and necessary costs and attorney's fees as prescribed by Rule 1.04, Texas Disciplinary Rules of Professional Conduct, incurred before the offer was rejected or considered rejected.

Thus, the only consequence for making an unreasonable offer or for failing to make any offer at all under the RCLA appears to be that the additional limitations on damages set forth in §27.004(e) do not apply. This builder-friendly amendment may have been enacted to negate the *Perry Homes v. Alwattari* case.[70] In *Alwattari*, the Texas Supreme Court held that under the former language of the RCLA, if the builder failed to make a reasonable settlement offer, all of the limitations on damages under the RCLA for the homeowner were gone and available defenses to the builder were lost.

However, builders may not want to be too confident in interpreting this provision in their favor. In July 2009, the Austin Court of Appeals issued a decision that seems to hold that even under the most recent amendments to the RCLA, when a contractor fails to make a reasonable settlement offer, the limitations under the statute as to both the type and amount of damages are inapplicable.[71] In *Horak*, an unpublished opinion out of the Austin Court of Appeals, the court found that because the builder did not make a settlement offer the RCLA limitations on damages did not apply to the homeowners' claim. Interestingly, the court cited the latest amended statute and stated that "[a]lthough we recognize that the parties' dispute was subject to our prior law, the amendments do not affect our analysis of the issues before us." The court then goes on to cite to *Alwattari*, noting that "when a contractor fails to make reasonable settlement offer, limitations of statue as to both type and amount of damages are inapplicable."

Horak seems to misinterpret the latest amended statute, and there have been no further decisions analyzing this holding. It could be argued that this case represents a shift towards a more homeowner-friendly analysis of the RCLA and case law. More likely, *Horak* is an aberration. In any event, it emphasizes the need for a builder to make every effort to make a reasonable settlement offer. Thus, once a builder receives notice of an alleged defect, they should promptly investigate the alleged construction defect to make a determination of the value of repairs needed, if any, and notify

[70] *Supra*, n. 66.

[71] *Horak v. Newman*, 2009 Tex. App. LEXIS 5629 (Tex. App.—Austin, July 21, 2009, no pet. h.).

their counsel as to the proper handling of the notice under the RCLA. While builders may argue that by offering to make repairs admits liability, it can limit the homeowner's damages, in particular costly attorneys' fees suffered by the homeowner.

Likewise, for homeowners, they should consider obtaining their own inspector to provide another opinion as to the repairs and investigate the defects. Homeowners should further be cautious of any offer that requires them to reimburse the builder for needed repairs.

V. CONCLUSION

Once again, residential construction defect litigation is experiencing change. As the sun has set on the TRCC, the future of residential construction defect disputes remains uncertain. Anyone involved in residential construction defect disputes should not only be knowledgeable as to what these changes may bring for the future, but should also evaluate their current state of practice when it comes to preventing and handling these disputes. While the lack of clearly defined law creates uncertainty, it may also provide opportunities to address many of the issues with residential construction defect litigation to help parties achieve the desired result – economical and efficient resolution.