

The Residential Construction Liability Act

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And the **New Residential Construction Commission**

I. INTRODUCTION

The Residential Construction Liability Act¹ (“RCLA”) was enacted by the Texas Legislature in 1989 for the stated purpose of restoring “a fair and appropriate balance to the resolution of residential construction disputes between contractors and owners.” Homebuilders and home warranty companies argued that contractors should have an opportunity to cure construction defects before being subjected to the monetary settlement provisions of the Texas Deceptive Trade Practices – Consumer Protection Act² (“DTPA”). By limiting a homeowner’s damages in certain, specific circumstances, the RCLA was intended to encourage the resolution of construction disputes and to protect and reward responsive contractors who timely fixed their mistakes.

Conceptually, the RCLA made sense. Homes are a large and emotional purchase for most consumers, so encouraging homeowners and contractors to fix the home rather than engage in protracted litigation is a laudable goal. When the RCLA was enacted in 1989, consumer advocates embraced the concept of an “opportunity to cure,” so long as homeowners still had the protections of the DTPA when builders did not make reasonable attempts to fix the home and settle the claim.

Nevertheless, despite the avowed purpose of builder lobbyists to foster “balance” in the resolution of construction disputes, such builder lobbyists and advocates have, at nearly every legislative session since the RCLA was passed, attempted to redesign it to further restrict homeowner rights. The laudatory words of the RCLA’s proponents belie their intent to create blatant special interest legislation that would protect good and bad builders alike.

In the 2003 Legislature, the builders finally realized the fruits of their well-funded lobbying efforts. Despite the fact that homeowners with serious construction defect claims against their builders already faced nearly impossible odds of ever being made whole, a new and labyrinthine set of procedures was enacted to all but bar the courthouse door to aggrieved homeowners. Although the RCLA is still the statute that governs the remedies available in residential construction defect disputes, homeowners with complaints against a “contractor” will now be required to submit their claim to the newly formed Texas Residential Construction Commission (“TRCC” or “Commission”) before triggering the builder’s



right to cure. The homeowner's obligation to make his claim before the Commission is a prerequisite to filing a lawsuit or even a claim in arbitration. Section II of this article will discuss the new Texas Residential Construction Commission.

With one minor exception, there were no published opinions on the RCLA for the first eight years after it was enacted.³ However, in 1997-98 three courts of appeals issued opinions interpreting significant portions of the RCLA. The first was the much-anticipated decision in *O'Donnell v. Roger Bullivant of Texas, Inc.*⁴ The second was the controversial opinion in *Bruce v. Jim Walters Homes, Inc.*⁵ The third was the opinion in *In re Kimball Hill Homes Texas, Inc.*⁶ Despite these first opinions, there remained numerous unanswered questions, and trial courts continued to make contradictory rulings on the application of the RCLA. Since these decisions, other significant decisions have been issued that have helped clarify this practice area, including *Sanders v. Construction Equity, Inc.*,⁷ and what many practitioners consider to be the most important case issued to date: *Perry Homes v. Alwattari*.⁸ Although these cases still govern causes of action that accrued prior to September 1, 2003, it remains to be seen how these cases will be applied when the new law takes effect.

The continuing lack of predictability in the courts, now coupled with a dense and confusing new set of state-mandated procedures, ensures that residential construction disputes will remain complex and costly for both contractors and homeowners. The specific provisions of the RCLA and many of the open questions are examined below in Section III. The most important court decisions are discussed at length in Section IV.

II. THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT

A. Scope of the TRCCA

The Texas Residential Construction Commission Act⁹ ("TRCCA" or "Act"), is an ambitious piece of legislation that covers almost every aspect of residential construction. In general, the TRCCA creates a commission (the TRCC) to oversee the residential construction industry and carry out the following acts:

- Manage a mandatory pre-suit, state-sponsored inspection and "dispute resolution" process for claims between a homeowner and contractor. The process is a prerequisite to filing a lawsuit or demand for arbitration;
- Establish warranty and building performance standards applicable to all new home construction;
- Maintain a public website with information about the role of the Commission, the warranty standards and the dispute resolution process;
- Maintain records of complaints against homebuilders;
- Establish and maintain mandatory registration procedures for builders;
- Establish eligibility requirements for certification as a residential construction arbitrator;
- Impose administrative penalties on registered builders and certified arbitrators who violate TRCC rules;
- Establish procedures for the registration of each new home with the Commission;
- Establish eligibility requirements for and employ state inspectors;

- Appoint a mold reduction task force;
- Appoint a task force to develop residential design recommendations that encourage rain harvesting and water recycling;
- Approve third-party warranty companies;
- Appoint a residential construction arbitration task force;
- Establish rules for the filing of arbitration awards with the Commission; and
- Collect fees – lots of fees.

B. Subtitle D: State-Sponsored Inspection and Dispute Resolution Process

Although the above list shows the incredible scope of the TRCCA, for persons involved in residential construction defect claims, there are two important aspects of the Act that bear closer examination: the "dispute resolution" process and the creation of warranty and building standards.

1. THE RELATIONSHIP OF THE TRCCA TO THE RCLA

As the RCLA was a set of procedures that homeowners had to go through before filing a lawsuit under the DTPA, the TRCCA is a set of procedures that most (but not all) homeowners will have to go through before proceeding with the opportunity to cure provisions of the RCLA. As explained more fully below, not all RCLA claims will be subject to the TRCCA because the RCLA's scope is more expansive than that of the TRCCA.

When the TRCCA applies, section 426.005 provides that homeowners must submit claims against their builders to the "dispute resolution" process before initiating an action for damages or other relief arising from an alleged construction defect.

2. THE "DISPUTE RESOLUTION" PROCESS

"Dispute resolution" is surrounded by quotation marks in this article and with good reason: the Commission does not resolve disputes between homeowners and contractors. It does, however, establish a process that now applies to nearly every dispute between a homeowner and a contractor. As such, it resembles administrative exhaustion, with one key exception – the Commission does not have the power to issue rulings.

a) What kind of disputes are governed by the TRCC?

The substance of the "dispute resolution" process is set out in Subtitle D of the TRCCA, a full twenty-five sections into the Act. This subtitle applies to a dispute between a "builder" and a "homeowner" if the dispute arises out of an alleged "construction defect."¹⁰ While seemingly straightforward, the terms "builder," "homeowner," and "construction defect" are defined terms that, when put together, create an ambiguous meaning that is likely to confuse both homeowners and builders.

The definition of a "builder" is found in section 401.003, and it differs from that of a "contractor" found in the RCLA. Like the RCLA, a "builder" under the TRCCA includes new homebuilders, most remodelers, and home warranty companies that insure all or part of a builder's liability for construction defects. Unlike the RCLA, claims against roofers, licensed contractors (e.g., plumbers and electricians) who contract directly with an owner, and interior-only remodelers whose work costs less than \$20,000 are not included.

The definition of a “homeowner” is found in section 401.002 and it too differs from the RCLA. Under the TRCCA, a “homeowner” is an owner, or subrogee of an owner, of a single-family house or duplex. In the RCLA, “homeowner” is not a defined term, but it does state that the RCLA applies not just to owners of single-family homes or duplexes but also to owners of triplexes, quadruplexes and condominiums.

The definition of a “construction defect” is found in section 401.004 and is, once again, different from the RCLA. In this case, however, the RCLA was amended to incorporate the TRCCA definition for all RCLA claims to which the TRCCA applies, and leaves in tact the previous definition for “all other claims” to which the RCLA applies that the TRCCA does not. The TRCCA defines a “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.”¹¹ In contrast, the RCLA’s more expansive definition of a construction defect is “...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.”¹² These differences are bound to create confusion.

b) *What residential construction disputes are exempt from the TRCCA?*

The TRCCA “dispute resolution” process does not apply to a claim *solely* for personal injury, survival, wrongful death, or damage to goods. A homeowner is likewise not required to submit a claim to the TRCCA if the dispute arises out fraud in real estate,¹³ a builder’s wrongful abandonment of an improvement project before completion, or the misapplication of construction trust funds.^{14, 15}

Additionally, the TRCCA does not apply to construction defect claims where a defect or damages arise wholly or partly from:

- the negligence of a person other than the builder or an agent, employee, subcontractor, or supplier of the builder;
- the failure of a person other than the builder or an agent, employee, subcontractor, or supplier of the builder to take reasonable action to mitigate any damages that arise from a defect or take reasonable action to maintain the home;
- normal wear, tear, or deterioration; or
- normal shrinkage due to drying or settlement of construction components within the tolerance of building and performance standards.¹⁶

The effect of the language creating these exemptions appears to say that if one of the above situations applies, *even in part*, the claim is not subject to Commission control. This is different than a similar provision in the RCLA where the claim is not exempt, but rather the existence of any of the above conditions results in a percentage reduction of the contractor’s liability.

Finally, the TRCCA also does not apply to a home that is:

- built by the individual who owns the home, alone or with the assistance of the individual’s employees or independent contractors and used by the individual as the individual’s primary residence for at least one year after the completion or substantial completion of the construction of the home; or
- to a homeowner or to a homeowner’s real estate broker, agent, or property manager who supervises or arranges for the construction of an improvement to a home owned by the homeowner.¹⁷

c) *Filing a claim with the TRCC*

Prior to filing a claim with the Commission, the homeowner must give the builder thirty days written notice of each construction defect the homeowner claims to exist.¹⁸ After notice is provided, the builder must be given a reasonable opportunity to inspect the home or have the builder’s designated consultants inspect the home.¹⁹ Unlike the requirements in the RCLA, the builder is not required or even encouraged to respond to the homeowner’s notice letter.

Following the expiration of thirty days from the date the notice was “provided” (it is not clear whether “provided” means sent or received), either party may submit a request to the Commission for “state-sponsored inspection and dispute resolution.”²⁰ The request and all attachments must be sent by certified mail to the other party and shall:

- specify in reasonable detail each alleged construction defect that is a subject of the request;
- state the amount of any known out-of-pocket expenses and engineering or consulting fees incurred by the homeowner in connection with each alleged construction defect;
- include any evidence that depicts the nature and cause of each alleged construction defect and the nature and extent of repairs necessary to remedy the construction defect, including, if available, expert reports, photographs, and videotapes, if that evidence would be discoverable under Rule 192, Texas Rules of Civil Procedure;
- be accompanied by any fees required by the Commission, *including the builder’s fee to register the home if the transfer of title from the builder to the homeowner occurred prior to January 1, 2004*; and
- state the name of any person who has, on behalf of the requestor, inspected the home in connection with an alleged construction defect.²¹

Despite already having the opportunity to do so after receipt of the homeowner’s notice letter, the builder has a



second, seemingly unlimited right of inspection and documentation while a claim is pending before the Commission. If the homeowner delays the inspection for more than five days after receipt of the builder's written inspection request, the time frames under the TRCCA are extended by one day for each day the inspection is delayed.²² It is unclear why the builder should get yet another opportunity to inspect at this stage of the process and it seems patently unfair that the homeowner (who may have a legitimate conflict) should be required to accommodate the builder's request within five days.

Despite the time and expense incurred by the homeowner in the state-sponsored “dispute resolution” process, the resulting inspector’s recommendation has no binding effect.

Another inequity in the Act is that a person who submits a request for state-sponsored inspection and dispute resolution must disclose in the request the name of any person who, before the request is submitted, inspected the home on behalf of the requestor in connection with the construction defect alleged in the request.²³ If the requestor fails to do so, the requestor may not designate the person as an expert or use materials prepared by that person in the state-sponsored inspection and dispute resolution process arising out of the request or in *any action arising out of the construction defect that is the subject of the request*. This provision will likely act as a technical “gotcha” for homeowners who do not understand the nuances of designating experts in arbitration or trial. If this provision was created in the interest of full disclosure, then why are there no corresponding provisions for builders to provide the names of their experts and the results of their inspections?

d) *Construction defects affecting health and safety*

A builder who receives written notice of a request relating to a construction defect that creates an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable.²⁴ If the builder fails to cure the defect in a reasonable time, the homeowner may have the defect cured and recover from the builder the reasonable cost of the cure plus reasonable attorney's fees and expenses associated with curing the defect in addition to any other damages not inconsistent with the subtitle.²⁵

e) *The state sponsored inspection process*

On or before the fifteenth day after the date the Commission receives a request, the Commission shall appoint the next available third-party inspector from the applicable lists of third-party inspectors maintained by the Commission.²⁶ The Commission shall establish rules and regulations that allow the homeowner and the builder to each have the right to strike the appointment of a third-party inspector one time for each request submitted.²⁷

If the dispute involves a structural matter in the home, the Commission shall appoint an approved engineer to be the third-party inspector.²⁸ The third-party inspector shall inspect the home not later than the thirtieth day after the date the request is submitted.²⁹

Interestingly, the Act is silent on several key aspects of the “dispute resolution” process including:

- how the inspection will take place;
- whether the parties are to be in attendance;
- if the non-structural inspection can be done without a site visit (i.e., on the basis of submissions only);
- to what degree an inspector has discretion to order potentially expensive testing or to engage other professionals;
- what happens when an inspector encounters matters outside the scope of his expertise;
- whether the inspectors can conduct interviews of the parties' fact and expert witnesses; and
- to what extent the inspectors can communicate directly with the parties.

Presumably, we will learn more about the details of the process once it is established by the Commission.

f) *Timing and content of the inspector’s recommendation*

If the dispute involves workmanship and materials in the home of a nonstructural matter, the third-party inspector shall issue a recommendation not later than the fifteenth day after the date the third-party inspector receives the appointment from the Commission.³⁰ If the dispute involves a “structural” matter, the engineer/inspector shall issue a recommendation not later than the sixtieth day after the date the engineer/inspector receives the assignment from the Commission.³¹ With regard to structural matters only, the Act further provides for additional time if requested by the third-party inspector or a party to the dispute.³²

The third-party inspector's recommendation must address only the construction defect, based on the applicable warranty and building and performance standards, and must designate a method or manner of repair, if any.³³ The third-party inspector's recommendation may not include payment of any monetary consideration with the exception that, if the inspector finds for the party who submitted the request, the Commission may order the other party to reimburse all or part of the fees and inspection expenses paid by the requestor.³⁴

g) *Appealing the inspector’s recommendation*

A homeowner or builder may appeal a third-party inspector's recommendation on or before the fifteenth day after the date the recommendation is issued.³⁵ If a homeowner or builder appeals a third-party inspector's recommendation, the executive director shall appoint three state inspectors to a panel to review the recommendation.³⁶ If the recommendation involves a dispute regarding a structural failure, one of the state inspectors on the panel must be a licensed professional engineer.³⁷ The panel shall:

- review the recommendation without a hearing unless a hearing is otherwise required by the rules adopted by the Commission;
- approve, reject, or modify the recommendation of the third-party inspector or remand the dispute for further action by the third-party inspector; and
- issue written findings of fact and a ruling on the appeal not later than the thirtieth day after the date the notice of appeal is filed with the Commission.³⁸

The recommendation becomes final and non-appealable forty-five days after the panel issues its finding on the appeal.³⁹

h) Effect of the inspector's recommendation on subsequent actions

Despite the time and expense incurred by the homeowner in the state-sponsored "dispute resolution" process, the resulting inspector's recommendation has no binding effect. Thus, a homeowner who receives a recommendation by the Commission must now proceed to litigation or arbitration to again prove their claim and seek relief.

This is not to say that the recommendation by the inspector carries no weight at all. Quite the contrary, in any action involving a construction defect brought after a recommendation by a third-party inspector, or ruling by a panel of state inspectors, on the existence of the construction defect or its appropriate repair, *the recommendation or ruling shall constitute a rebuttable presumption of the existence or nonexistence of a construction defect or the reasonable manner of repair* of the construction defect.⁴⁰ A party seeking to dispute, vacate, or overcome that presumption must establish, by a preponderance of the evidence, that the recommendation or ruling is inconsistent with the applicable warranty and building and performance standards. A recommendation or ruling under this subtitle is not admissible in an action between any other parties.

i) What happens after the recommendation is issued?

After the inspector's recommendation becomes final and non-appealable, the builder has fifteen days to make an RCLA tender. If the builder does not make an offer or if the homeowner rejects the builder's offer, then the homeowner must file a lawsuit or arbitration claim prior to the expiration of the statute of limitations, or within forty-five days from the date of the date the inspector issued the TRCC recommendation, whichever is later.⁴¹ If the recommendation was appealed, the time to bring suit is calculated from the date the Commission issues its ruling on the appeal. If the homeowner went through the TRCC process, he is not required to comply with the notice provisions of section 27.004(a) of the RCLA.

If the homeowner proceeds with filing an action, any claim for personal injuries, damages to personal goods, or consequential damages or other relief arising out of an alleged construction defect must be included, despite the fact that these items were exempt from the TRCC "dispute resolution" process.

j) Timing and Limitations

The state-sponsored inspection and dispute resolution process must be requested on or before the second anniversary of the date of discovery of the conditions claimed to be evidence of the construction defect, but not later than the thirtieth day after the date the applicable warranty period expires.⁴² Because the warranty for workmanship and materials is only one year, the TRCCA undermines the discovery rule and shortens the statute of limitations for these claims to thirteen months. This provision limits consumer rights as never before and is a mockery of legal precedent that has long recognized that construction defects are often latent.

Claims under the TRCCA are also subject to the ten-

year statute of repose. In addition to the limitations issues raised in the preceding paragraph, the request must be submitted to the Commission on or before the tenth anniversary of the date of the initial transfer of title from the builder to the initial owner of the home or the improvement that is the subject of the dispute or, if there is not a closing, the date on which the contract for construction of the improvement was entered into.⁴³

The filing of a TRCC request tolls the limitations period in any action between the homeowner and the builder, arising out of the subject of the request, until the forty-fifth day after the date a final, non-appealable recommendation is issued under the title in response to the request.⁴⁴ An action must be filed on or before the expiration of any applicable statute of limitations, or by the forty-fifth day after the date the third-party inspector issues the inspector's recommendation, whichever is later. If the recommendation is appealed, an action must be filed on or before the expiration of any applicable statute of limitations, or by the forty-fifth day after the date the Commission issues its ruling on the appeal, whichever is later. The section does not apply to an action that is initiated by a person subrogated to the rights of a claimant if payment was made pursuant to a claim made under an insurance policy.

3) WARRANTY AND BUILDING PERFORMANCE STANDARDS

a) The warranty of habitability

Despite extensive case law applying the warranty of habitability, the Texas Legislature decided in its wisdom that it could define the term better than our courts during the 2003 legislative session. Section 401.002 of the TRCCA does just that:

"Warranty of habitability" means a builder's obligation to construct a home or home improvement that is in compliance with the limited statutory warranties and building and performance standards adopted by the Commission under Section 430.001 and that is safe, sanitary, and fit for humans to inhabit.

The construction of each new home or home improvement shall include the "warranty of habitability," as now defined by the TRCCA.⁴⁵ For a construction defect to be actionable as a breach of the warranty of habitability, the defect must have a direct adverse effect on the habitable areas of the home and must not have been discoverable by a reasonable prudent inspection or examination of the home or home improvement within the applicable warranty periods adopted by the Commission.⁴⁶

By injecting the requirement that the construction defect must not have been discoverable, the Legislature took a giant leap backward for consumer protection and safe housing. Put simply, a builder should not be allowed under any circumstances to walk off with a consumer's life savings for a home that is not habitable. When the issue is one of basic habitability of a home, the onus should not be on the consumer to discover the defect while the builder, who is in a better position to discover the defect, lies behind the log.

b) Statutory warranties

While the TRCCA creates general guidelines for the statutory warranties, we will have to wait for the

Commission to define the substance of these warranties. One of the key issues will be to what degree the Commission adopts rigid, technical standards versus “performance standards” that better reflect consumer expectations. This issue was discussed at length during legislative hearings on the TRCCA, and proponents of the bill stated that the Commission would adopt performance standards to prevent potentially unfair results that occur when standards are overly technical. Again, this remains to be seen.

Until the Commission adopts specific standards, the “applicable building and performance standards” are defined as any express warranty provided in writing by the builder or, if there is no express warranty, the usual and customary residential construction practices in effect at the time of the construction.⁴⁷

Once the Commission adopts the building and performance standards, those warranties supersede all implied warranties.⁴⁸ The only warranties that exist for residential construction or residential improvements are warranties created by this chapter, by other statutes

expressly referring to residential construction or residential improvements, or by any express, written warranty acknowledged by the homeowner and the builder.

A contract between a builder and a homeowner may not waive the limited statutory warranties and building and

performance standards or the warranty of habitability.⁴⁹ Nothing in the TRCCA prohibits a builder and a homeowner from contracting for more stringent warranties and building standards than are provided under this chapter.

c) *Effect of TRCCA warranties on subsequent legal actions*

After the issuance of written findings of fact and a ruling on an appeal under Chapter 429, a homeowner may bring a cause of action against a builder or third-party warranty company for breach of a limited statutory warranty adopted by the Commission under the subtitle.⁵⁰ In an action brought under the subtitle, the homeowner may recover only those damages provided by section 27.004.

Breach of a limited statutory warranty adopted by the Commission or breach of the statutory warranty of habitability shall not, by itself, constitute a violation of the DTPA.⁵¹

C. The TRCC and Arbitration

Prior to the enactment of the TRCCA, the RCLA was only a prerequisite to filing a lawsuit. The TRCCA and the RCLA now explicitly discuss arbitration, and the language of the RCLA has been modified to change references from filing “suit” to filing an “action.”⁵² Nevertheless, filing an arbitration claim does not toll the statute of limitations, and the homeowner is often

forced to file a lawsuit to preserve their claims.

The TRCCA includes three substantive changes to arbitration. The first is venue: arbitration of a dispute involving a construction defect shall be conducted in the county in which the home alleged to contain the defect is located.⁵³

The second change is to amend the Texas General Arbitration Act to include “manifest disregard for Texas law” as grounds for vacating an arbitration award.⁵⁴

The third change is to provide a system for recording arbitration awards. If a petition to confirm an arbitration award is filed in a court of competent jurisdiction in this state, the petitioner shall also, not later than the thirtieth day after the date an award is made in a residential construction arbitration, file with the Commission a summary of the arbitration award that includes:

- the names of the parties to the dispute;
- the name of each party’s attorney, if any;
- the name of the arbitrator who conducted the arbitration;
- the name of the arbitration services provider who administered the arbitration, if any;
- the fee charged to conduct the arbitration;
- a general statement of each issue in dispute;
- the arbitrator’s determination, including the party that prevailed in each issue in dispute, and the amount of any monetary award; and
- the date of the arbitrator’s award.⁵⁵

Any agreement prohibiting the disclosure of the information above is unenforceable.⁵⁶

In addition to substantive changes, the TRCC will also certify residential construction defect arbitrators.⁵⁷ Certification is not mandatory for an arbitrator to hear a construction defect dispute.

D. When Do the New Laws take effect?

Good question! Despite section after section on the creation of commissions, task forces, construction standards, and new ways to collect fees, the TRCCA lacks basic direction on when the Commission will begin reviewing construction defect claims. The timeline for implementation of each phase of the Act is as follows:

- September 1, 2003: Effective date of the TRCCA, the amendments to the RCLA and the amendment to the Texas General Arbitration Act.
- December 1, 2003: Deadline for the governor to appoint commissioners to the TRCC.
- January 1, 2004: Commission begins collecting registration fees on the construction of each new home.
- March 1, 2004: Deadline for the Commission to begin requiring registration of builders, certification of arbitrators, and completion of training for Commission members.

As you can see from the above timeline, the law creating the mandatory “dispute resolution” process takes effect September 1, 2003, but the governor is not obligated to appoint commissioners until three months later, on December 1, 2003. After the commissioners are appointed, and before any claims can be processed, the commissioners will need to establish rules and create forms for filing complaints, hire inspectors, establish procedures for assigning claims and managing claims, and create the warranty and building standards the inspectors will use to evaluate complaints – all while being trained to sit on a state-wide commission. What



happens to construction defect claims in the meantime is unclear.

III. THE RESIDENTIAL CONSTRUCTION LIABILITY ACT

A. Application of the RCLAA. Application of the RCLA

1. SCOPE

Section 27.002 of the RCLA defines the scope of Act: “This chapter 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.”⁵⁸ The 2003 amendment expands the scope of the RCLA to include “other relief,” such as declaratory and injunctive actions.

For purposes of the Act, a “construction defect” is defined as the meaning assigned by the TRCCA for claims governed by that statute and for all other claims.⁵⁹

It is “...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 [construction defect] may include any physical damage to the residence, any appurtenance, or the real property on which the residence or appurtenance are affixed proximately caused by a construction defect.”⁶⁰

Note that the definition of a “construction defect” under the RCLA is broader than the plain and ordinary meaning of that term.

For the Act to apply, the damages a homeowner has sustained must “result from” a “construction defect.” It is unclear whether the RCLA’s scope standard is the same as or more broad than the “proximately caused by the construction defect” standard required for recovery.⁶¹ What is clear is that damages to a residence caused entirely by a non-construction related source (tornadoes, lightning, falling objects), and for which there is no complaint against the contractor, would not fall under the RCLA.

Less clear is what happens when property damages result from non-construction related sources, but the homeowner does have a claim against a “contractor.” Such cases might include improper site selection, or development that causes water intrusion or soil erosion to the extent the residence sustains damages. In addition to suing the developer, who is not a “contractor” under the RCLA’s definition, the homeowner may also sue the builder for his breach of contract, breach of warranty, or misrepresentations. In such cases, an argument can be made that the Act would not apply at all because the property damages resulted from poor site selection or improper development and not from the defective construction in the home.

Also note that the RCLA does not apply to commercial, residential structures such as apartment complexes; instead, it only applies to the construction or remodeling of “the real property and improvements for a single-family house, duplex, triplex, or quadraplex, or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system.”⁶²

2. RELATIONSHIP OF THE RCLA TO THE DTPA

The interplay of the RCLA with regard to the DTPA is stated in section 27.002 of the Texas Property Code: “To the extent of conflict between this chapter and any other law, including the Deceptive Trade Practices – Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or a common law cause of action, this chapter prevails.” As such, the RCLA represented the first statutory exemption from the DTPA not contained within the DTPA itself.

The meaning of section 27.002(b) was for years the subject of considerable debate. Contractors argued that, because the RCLA limits the type and amount of damages a consumer may recover, and the DTPA does not, the RCLA “conflicts” in all instances and therefore, “pre-empts” the DTPA. Courts who embraced this reasoning (and many did) struck the homeowner’s DTPA cause of action and forced the plaintiff to replead “under the RCLA.” The same argument was made by the builders for all other causes of action – breach of contract, breach of warranty, negligence, and even fraud. In sum, the builders claimed that the RCLA was the sole cause of action for disputes concerning the design, construction, or repair of a home.⁶³

Homeowners disagreed. Drawing from both the language of the statute and the legislative history of the RCLA, homeowners argued that the RCLA could not “pre-empt” the DTPA and other statutory causes of action because the RCLA does not create a cause of action. According to the original proponents and legislative sponsors of the RCLA:

“...Section 27.005 expressly rejects any possibility that chapter 27 creates an implied warranty or extends limitations periods. . . . Because chapter 27 does not create a cause of action, there was no need to include a limitations provision in this chapter.”

Contrast the RCLA to the truly “pre-emptive” language in the Texas Smoke Detector Act.⁶⁴ In *Epps v. Ayer*, the court held that the rights and remedies under the Texas Smoke Detector Act pre-empt recovery under the DTPA.⁶⁵ Central to the court’s inquiry was the language of the statute: “The duties of a landlord and the remedies of a tenant under this subchapter are in lieu of the common law, other statutory law, and local ordinances regarding a residential landlord’s duty to install, inspect, or repair a smoke detector in a dwelling unit.”⁶⁶ Unlike the highlighted and specifically pre-emptive language of the Texas Smoke Detector Act, the RCLA only “prevails” over other statutory forms of recovery “to the extent of conflict” with provisions of the RCLA.⁶⁷ Thus, the RCLA is not an absolute bar to claims under other acts.

In order for the phrase, “to the extent of conflict” to be given effect, the Act must contemplate that, under certain circumstances, the RCLA would not conflict and prevail over other laws. If, by enacting the RCLA, the Legislature had intended to exclude all other forms of redress, then the phrase would simply read, “this Act prevails over all other laws.”

The RCLA conflicts with common law and the DTPA only if the contractor has complied with its duty to properly respond to pre-suit notice. In such a case, only the following provisions actually conflict with an action at common law or the DTPA: (1) section 27.003(a)(1), which provides five specific defenses not available under the DTPA; (2) section 27.004(e), which limits the damages of a claimant under certain circumstances (depending on which version of the Act applies); and (3) section 27.004(g), which limits the categories of damages that homeowners may recover.

When a contractor has complied with section 27.004(b),

the above provisions will control over contrary provisions at common law or the DTPA. Nevertheless, *the causes of action at common law and the DTPA are still the mechanism by which the claimant asserts his claim.* These causes of action are only affected to the extent of conflict with the RCLA.

The application of the preemption provision depends on which version of the RCLA applies. For example, under the pre-2003 version of the RCLA, assume that a claimant unreasonably rejects a contractor's timely and reasonable offer to repair his residence and files suit claiming DTPA violations. The case will proceed as a typical DTPA claim except that, if the defendant pleads and obtains a finding that he made a timely and reasonable offer of repair, the claimant will be required to plead and prove the reasonableness of his rejection. If the jury finds the rejection was unreasonable, the court will limit the claimant's DTPA damages to the cost of repair, attorney's fees, and costs prior to the rejection of the offer.⁶⁸

The outcome is different under the new RCLA. If a homeowner rejects a contractor's offer of repair, *or does not permit the contractor an opportunity to inspect the defect*, the jury will only be asked if the contractor's offer was reasonable. If the jury or arbitrator finds the rejected offer was reasonable, the claimant's DTPA damages are limited to the fair market value of the contractor's last offer of settlement, attorney's fees, and costs prior to the rejection of the offer.⁶⁹

Thus, far from a new or independent cause of action, the RCLA is a set of pre-suit procedures engrafted upon the DTPA and common law to promote non-litigated resolutions to residential construction claims. This is precisely the interpretation of the RCLA adopted by the *O'Donnell*, *Alwattari* and *Sanders* courts (discussed below).

Perhaps the best argument for homeowners that the Legislature intended for the RCLA to work hand-in-hand with the DTPA was found in the 1995 amendments to the DTPA. During the 1995 legislative session, section 17.49 of the DTPA was amended to include several new subsections, including the following:

- (g) Nothing in this subchapter shall apply to a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving a total consideration by the consumer of more than \$500,000, *other than a cause of action involving a consumer's residence.*⁷⁰

Not only does the exclusion of residences from the DTPA transaction cap manifest the special importance of this particular consumer purchase, it recognizes that causes of action involving a consumer's residence, such as those subject to the RCLA, may still be brought under the DTPA.

The issue was finally resolved once and for all by the 1999 amendments to the RCLA. Section 27.005 of the Act provides: "This Chapter does not create a cause of action or derivative liability or extend a limitations period."

3. PARTIES

Initially, the RCLA limited its application to claims made against "contractors," who were defined as:

...a person contracting with an owner for the construction or sale of a new residence constructed by that person or of an alteration of or addition to an existing residence, re-pair of a new or existing residence, or construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence.⁷¹

Under this definition, all builders of new residences are not "contractors" unless they contracted directly with a homeowner for construction, sale, remodeling or repair of the residence.

In 1993, the definition of "contractor" was expanded to include any properly registered "risk retention group" which insures all or any part of a contractor's liability for the cost to repair a residential construction defect. Although it was clear that entities such as National Home Insurance Company ("NHIC") or Western Pacific Insurance Company ("WPIC") qualified as "contractors" when they were properly registered as risk retention groups under Article 21.54 of the Texas Insurance Code, it was open to debate whether the companies that administer these entities, Home Buyers Warranty ("HBW") and Residential Warranty Corporation/HOME of Texas, Inc. ("RWC/HOME"), could be classified as "contractors" as well. This matter was clarified in the 2003 legislative session by adding warranty administrators to the definition of "contractor" in the TRCCA. The RCLA incorporates the TRCCA definition of contractors.⁷²

Notwithstanding the above, there are a number of persons in a typical home purchase transaction for whom the RCLA clearly has no application. Because they do not contract for the "design, construction or repair" of a new or used residence, real estate developers, agents, brokers, and residential inspectors are not subject to the protections of the RCLA. In most cases, subcontractors, architects, and engineers are also exempt from the RCLA. While these individuals participate in the "design, construction or repair" of residences, they do not typically contract directly with "an owner." As a result, claims against subcontractors and design professionals who do not contract directly with the owner, and who are not "an owner, officer, director, shareholder, partner, or employee of the contractor," should not be governed by the RCLA.⁷³

B. Notice of Defects

1. CONTENT OF THE NOTICE LETTER

After the enactment of the TRCCA, a homeowner no longer has to give RCLA notice if he has already gone through the TRCC dispute resolution process. For claims not subject to the TRCCA, the old RCLA provisions remain in effect.

Section 27.004 delineates the procedures by which a claim is initiated under the RCLA. A claimant seeking damages from a contractor in accordance with the RCLA must first provide sixty days written notice before commencing with any litigation.⁷⁴ In this respect, the notice provision of the RCLA is quite different from that of the DTPA. Notice under the DTPA is required prior to asserting a statutory *cause of action* for deceptive trade practices. No notice is required to file suit for the same conduct under another legal theory such as common law breach of warranty or negligence. In contrast, notice under the RCLA is triggered not by the choice of legal theory, but by the subject matter of the complaint. Under the RCLA, gone is the practice by many attorneys of filing suit for common law causes of action prior to giving notice, and then amending the cause of action with DTPA allegations after the notice period has run.

The written notice must specify in "reasonable detail" the construction defects which are the source of the complaint, and must be sent by certified mail, return receipt requested, to the contractor's last known address.⁷⁵ Although the RCLA does not even generally define the components of "reasonable notice," the author believes that the sufficiency of the detail contained in the notice letter should be examined by courts

in light of the relative sophistication and construction knowledge of the parties.

In most cases, homeowners contact an attorney only after their efforts to work things out with a builder have failed. If any correspondence has been exchanged between the builder and the homeowner, it should be examined meticulously to determine whether the RCLA has been triggered, and, if so, whether the contractor issued a timely and appropriate response.

In situations where an attorney is charged with drafting the RCLA notice letter, one recommended method for meeting the Act's "reasonable detail" standard would be to attach an investigative report and/or plan of repair generated by a qualified contractor, residential inspector, or professional engineer. In doing so, the homeowner creates a certain standard of performance for the contractor that could prove helpful to the claimant in at least two respects. First, the engineer's report could be used as a "yardstick" to measure the adequacy of the contractor's offer of repair. Second, if the contractor actually performs repairs, and the homeowner believes the repairs to be inadequate, the claimant will be more likely to prevail on the issue of the contractor's failure to perform in a good and workmanlike manner if the claimant can show that he provided the contractor expert assistance on the proper method to cure the defect(s) in question.

One should also be mindful that the RCLA notice letter does not supplant the notice required by the DTPA. Accordingly, it may be a good practice to routinely include the necessary elements of a DTPA letter along with the notice of defects under the RCLA if the case is developed sufficiently to quantify damages. If you subscribe to this practice, however, be mindful of the situation that arose in *O'Donnell v. Roger Bullivant of Texas, Inc.*⁷⁶ In that case, the DTPA portion of the O'Donnell's notice letter stated that a response was due within sixty days.⁷⁷ The court of appeals used this language to find that the O'Donnell's notice letter constituted a written agreement by the O'Donnells to extend the RCLA response period from forty-five days to sixty days.⁷⁸

2. ACTUAL DELIVERY SHOULD NOT BE REQUIRED

We have argued for years that the RCLA does not require actual delivery of the notice letter. To our knowledge, there are still no cases on this issue.

In *Hines v. Hash*, the Supreme Court did not address the holding of the court of appeals that *actual delivery* of the notice letter is required in a DTPA case.⁷⁹ There is an important distinction between the DTPA and the RCLA, however, which suggests that actual delivery of the notice letter is not required by the RCLA: the statute mandates how the notice is to be sent, i.e. by "certified mail, return receipt requested." No other form of delivery is mentioned. There is no legal way to force the receipt of certified mail. Consequently, if actual delivery was required, a recalcitrant builder could prevent a homeowner from ever complying with the statute by simply ignoring notices from the postal service. Clearly, that result does not reflect the intent of the original proponents of the RCLA to restore a fair and appropriate balance to the resolution of residential construction disputes.

3. NOTICE, ABATEMENT AND THE RUNNING OF LIMITATIONS

Under the RCLA, if the statute of limitations were to expire during the notice period, then pre-filing notice and application to the Commission is not required.⁸⁰ The contents

of the petition, however, must "specify in reasonable detail each construction defect that is the subject of the complaint." After the contractor is served, the builder (or the warranty insurance company) has seventy-five days within which to request an opportunity to inspect the property and fifteen days after the TRCCA recommendation is issued to make a reasonable offer of settlement. If the dispute is one that would be subject to the TRCC, then, simultaneous with the filing of a lawsuit or arbitration claim, the homeowner must file their claim with the TRCC.

In 1995, new subsections 27.004(d) and (e) were added to the RCLA to address the issue of failure to give pre-suit notice in circumstances other than to prevent the running of limitations. The provisions that were enacted tracked case law and similar changes to the DTPA that held abatement was the appropriate remedy for failure to give proper notice.

In 2003, the Legislature changed the abatement provisions of subsection 27.004(d) to provide that a court or arbitration tribunal shall dismiss an action governed by the RCLA if (1) subsection (c) does not apply, and after a hearing, the court or arbitration tribunal finds that the contractor is entitled to dismissal because (1) the claimant failed to comply with the requirements of the TRCCA, if applicable, (2) the claimant failed to provide notice, (3) the claimant failed to give the contractor a reasonable opportunity to inspect the property as required by subsection (a), or (4) the claimant failed to follow the procedures specified by subsection (b).

The RCLA is unclear as to when a motion to dismiss must be filed. Therefore, the issue is open to varying results among trial courts.

4. COPY OF NOTICE LETTER SHOULD BE SENT TO WARRANTY/INSURANCE COMPANY

As noted above, both the builder and the warranty/insurance company are included within the definition of "contractor."⁸¹ For this reason, a copy of the notice letter should be sent, by certified mail, return receipt requested, to the warranty/insurance company at the same time that it is sent to the builder. Although the issue has not been litigated, a failure to provide notice to the warranty/insurance company should be expected to have the same consequences as a lawsuit filed against the company should no notice be given to the builder before a lawsuit was filed. However, a compelling argument can be made that a warranty/insurance company that (1) responds on behalf of the builder; (2) steps into the builder's place during settlement negotiations; or (3) makes repairs, should be deemed to have adequate notice under the Act or, at the very least, should be equitably estopped from denying such notice.

C. Contractor's Offer of SettlementC. Contractor's Offer of Settlement

1. CONTRACTOR'S OPPORTUNITY TO INSPECT DEFECTS.

In claims to which TRCCA applies, the contractor's opportunity to inspect falls during the TRCC "dispute resolution" process. There is not an additional inspection opportunity under the RCLA.

For claims outside the TRCCA, the contractor must request an inspection during the thirty-five day period after which the contractor receives a claimant's notice under the Act. The contractor may make a *written request* to inspect the property in order to determine (1) the nature and cause

of the defect and (2) the nature and extent of the repairs necessary to remedy the defect.⁸² If the contractor makes a written request, the homeowner must give the contractor a “reasonable opportunity” to conduct the inspection. During the inspection, a contractor is allowed to “take reasonable steps to document the defect.” Presumably, this means that a contractor can measure, photograph, videotape, or draw whatever it is that he or she sees.

The statute is silent with respect to some of the problems that one can expect to encounter when a contractor asks to inspect the property. For example, furniture, floor coverings, and appliances may have to be moved to allow access to areas that need to be examined. It seems logical that any expense involved in moving and replacing such items should be borne by the contractor.

A second problem that may be encountered is not so easily resolved: what if a destructive test or examination must be performed to determine the cause of the defect? The statute only requires a “reasonable opportunity to inspect.”⁸³ An attorney representing the homeowner should obtain from the builder, or the builder’s attorney, a very clear picture of exactly what type of inspection is contemplated so a decision can be made as to whether the requested inspection is reasonable. In such cases, the parties might set out in writing the scope of tests to be performed and any necessary cleanup or repairs required to return the home to its previous condition.

A third problem results when, by the time the inspection is scheduled pursuant to the RCLA, a homeowner has already suffered months of inconvenience from providing a contractor or subcontractor access to their home. When informed that a contractor must be allowed an opportunity to inspect and potentially repair defects, the typical homeowner response

If the repairs are so extensive as to make the house uninhabitable, the contractor’s offer should include an offer to pay alternative living expenses, including housing, meals, and storage.

may range from feelings of inconvenience to serious opposition to permitting liberal access to their home to the person whom they believe caused the construction defects. Plaintiff and defense counsel should be aware that feelings of “violation” on the part of the homeowner are not uncommon during the RCLA required inspection, and care should be taken to ensure that this process does not become needlessly contentious. In situations where there is considerable “bad blood” between the homeowner and contractor, one suggestion is for *both* counsel to attend the inspection to ensure that these feelings do not impede the contractor’s ability to perform a reasonable inspection and/or further polarize the parties.

From the defense standpoint, a contractor who faces potential liability for a construction defect should *always* take the opportunity to inspect and document the claimed defect in the event that litigation may be forthcoming. Not only is this documentation an excellent discovery tool, but a contractor who fails or refuses to inspect may appear unconcerned or unresponsive toward the homeowner’s damages should the matter end up being litigated. Moreover, if the homeowner’s complaint is supported by an engineering or other expert report, or if the scope of the defect is beyond

the contractor’s expertise, the contractor should strongly consider hiring his own expert to perform the inspection and/or to evaluate the expert report provided by the homeowner.

2. WRITTEN OFFER OF SETTLEMENT

For claims to which the TRCCA applies, section 27.004(b) provides that the contractor can make a written offer of settlement under the RCLA within fifteen days after the date of a final non-appealable recommendation from the TRCC. If the TRCCA does not apply, the contractor will have forty-five days from the notice to make a written offer of settlement to which the contractor may (1) agree to perform the necessary repairs; (2) agree to hire an independent contractor to perform the work at the contractor’s expense; or (3) make a monetary settlement offer.⁸⁴

The offer to repair must specify “in reasonable detail” the repairs that will be made.⁸⁵ If the construction defect constitutes “structural failure” to a load bearing element of the home, a reasonable offer of settlement should include, along with a description of the repair work to be performed, compensation for the loss of market value of the home, even after repairs are completed, resulting from the home having once had major structural defects. If the repairs are so extensive as to make the house uninhabitable, the contractor’s offer should include an offer to pay alternative living expenses, including housing, meals, and storage. Finally, in all cases where the homeowner has sought legal representation in the preparation of a RCLA demand letter, the settlement offer should include compensation for reasonable and necessary attorney’s fees and costs associated with such representation.⁸⁶

All repairs must be completed within forty-five days after the contractor is notified that the homeowner has accepted the settlement offer, unless the homeowner delays the work or other events beyond the control of the contractor cause such delay.⁸⁷ No change in the time periods set forth in the statute are allowed unless there is an agreement in writing.

The requirement that repairs be *completed* within forty-five days raises interesting questions in foundation defect cases wherein contractors frequently offer to make certain drainage modifications that require six to eight months to determine whether the foundation will stabilize before proposing further repairs. Unless the homeowner agrees *in writing* to allow a delay of several months before permanent repairs are initiated, it appears that this “wait and see” approach would violate the express language of the Act.

Notwithstanding the foregoing procedural requirements, section 27.004(m) provides that a contractor who receives notice under the Act of a construction defect “creating an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable” in order to be afforded the Act’s protection. In cases where the contractor fails to take necessary remedial action, a claimant may have the defect repaired and may recover the cost of such repair, reasonable attorney’s fees, alternate living expenses, stigma, and costs.

Our experience has shown that *effective* use of experts during the pre-suit settlement period established by the RCLA can go a long way toward resolution of the dispute. To get the most out of pre-suit negotiations, both parties should consider retaining experts who carry a degree of credibility to the opposing side. Too often, attorneys for both sides will call out the same experts who will give the same over- or under-stated valuation of the damages and liability. While this strategy may work in situations where the parties expect and understand that these “wind-up” evaluations are only a

starting point for discussion, the nature of the RCLA as a “one shot deal” for notice and settlement makes this strategy unwise. The practitioner faced with a claim subject to the RCLA must remember that, should the claimant reject the settlement offer, the trier of fact will review the letter containing the offer for “reasonableness.”⁸⁸ Because the outcome of the “reasonableness” inquiry will materially affect the type and amount of damages that can be awarded, both sides are benefited by putting their best foot forward during the pre-suit negotiations process.

The use of “wind-up” experts may also be a source of future liability for the attorney who employs such experts. Because the expert’s opinion will ultimately be the driving force behind the nature of the settlement offer, and the acceptance or rejection thereof, selection of “wind-up” experts may create unreasonable expectations on the part of clients. A client who makes or rejects an offer on the basis of such unreasonable expectations may later blame his attorney when the jury determines that the offer or rejection was unreasonable.

Finally, the RCLA notice letter does not supplant the notice required by the DTPA. Accordingly, even though the response to the notice letter might be sufficient under the RCLA, if the elements of a DTPA notice letter also are included, or if a separate DTPA notice letter is received, then the DTPA notice must be answered in the manner required by the DTPA.

3. CONDITIONAL SALE TO BUILDER

The new section 27.0042 allows a contractor to opt for repurchase of the home under certain circumstances. Section 27.0042 provides that a written agreement between a contractor and a homeowner may provide that 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, then, in an action subject to this chapter, the contractor may elect, as an alternative to the damages specified in section 27.004(h), to purchase the residence from the homeowner who purchased it.

A contractor may not elect to purchase the residence if (1) the residence is more than five years old at the time an action is initiated or (2) the contractor makes such an election later than the fifteenth day after the date of a final, unappealable determination of a dispute under the TRCCA, if applicable.⁸⁹ If a contractor elects to purchase the residence, the contractor shall pay the original purchase price of the residence, closing costs incurred by the homeowner, and the costs associated with transferring title to the contractor.⁹⁰ The homeowner may recover:

- reasonable and necessary attorney’s and expert fees as identified in section 27.004(h)(4);
- reimbursement for permanent improvements the owner made to the residence after the date the owner purchased the residence from the builder; and
- reasonable costs to move from the residence.⁹¹

Conditioned on the payment of the purchase price, the homeowner shall tender a special warranty deed to the contractor, free of all liens and claims to liens as of the date the title is transferred to the contractor, and without damage caused by the homeowner.⁹² An offer to purchase a claimant’s home that complies with the section is

considered “reasonable,” absent clear and convincing evidence to the contrary.⁹³

4. CONSEQUENCES OF FAILING TO MAKE A REASONABLE OFFER

Each year, tens of thousands of Texans will purchase new homes or remodel existing homes. When the Legislature passed the RCLA, it was intended to give contractors special protections against Texas consumers – but *only* if the contractors took advantage of the statute’s pre-suit settlement opportunity.

After 2003, contractors will have no incentive to make reasonable offers because contractors who do not avail themselves of the settlement opportunities in the Act are still one of the most protected service providers in the state. Liability for a contractor who does not make a reasonable offer of repair is still limited to the four types of damages specified in section 27.004(h).

5. IMPOSSIBILITY OF PERFORMANCE

The RCLA is silent as to what happens when the performance of repairs is made impossible or impracticable by the circumstances of the case. This situation arises when a downstream buyer sues the seller for serious construction defects in the home. The seller, in turn, sues the contractor who was hired to perform the work upon which the buyer’s complaint is based. Although the seller would have an obligation under the RCLA to provide the contractor with notice and an opportunity to cure, this opportunity is made impossible by the fact that the seller no longer owns the home.

Even more complicated is what happens when the home is completely destroyed. In *Trimble v. Itz*, the alleged construction defect was the improper installation of wiring that led to the destruction of the home by fire.⁹⁴ Although not discussed in the appeal, Itz, the electrical subcontractor, requested an opportunity to repair the electrical defects in accordance with the RCLA. However, because the home was destroyed, Itz’s request was impossible.⁹⁵

There are no answers to what happens when performance under the RCLA is made impossible by the circumstances of a particular case. This, and other issues mentioned herein, merely serve to highlight the need for serious revisions to the language of the RCLA.

D. Response to Settlement Offer

1. ACCEPTANCE OF REPAIR OFFER

When a homeowner receives a written offer of repair from a builder, the offer must be accepted within twenty-five days or it will be deemed rejected.⁹⁶ Although a written response accepting the offer is not required, it certainly is advisable in order to avoid a claim, by a contractor who fails to make repairs, that the offer was never accepted.

Repairs under the Act must be completed within forty-five days after the contractor receives written notice of acceptance of the offer.⁹⁷ To avoid liability for damages, attorney’s fees and other costs arising from the defect, the contractor must perform such repairs as are sufficient to cure the defect(s) in question and the repairs must be performed in a good and workmanlike manner.⁹⁸ As provided for in the Act, contractors should take the opportunity to reasonably document and inspect all remedial work performed in connection with any complaint under the RCLA.

A contractor who fails to initiate accepted repairs is not entitled to have the damages against him limited in type by the RCLA.⁹⁹

If the TRCCA applies, and the contractor's offer to repair is accepted by the claimant, the contractor, on completion of the repairs and at the contractor's expense, shall engage the third-party inspector who provided the recommendation regarding the construction defect involved in the claim to inspect the repairs and determine whether the residence, as repaired, complies with the applicable limited statutory warranty and building and performance standards adopted by the Commission.¹⁰⁰ The contractor is entitled to a reasonable period, not to exceed fifteen days, to address minor cosmetic items that are necessary to fully complete the repairs. The determination of the third-party inspector regarding whether the repairs comply with the applicable limited statutory warranty and building and performance standards adopted by the Commission establishes a rebuttable presumption on that issue. A party seeking to dispute, vacate, or overcome that presumption must establish by clear and convincing evidence that the determination is inconsistent with the applicable limited statutory warranty and building and performance standards.

One issue that has arisen in the RCLA cases is whether the homeowner is required to execute a release before the contractor makes repairs pursuant to the RCLA. The answer should be an unequivocal "No!" Nothing in the Act requires a release.

2. REJECTION OF SETTLEMENT OFFER

The purpose of requiring the contractor to provide reasonable details about the proposed repairs is to afford the homeowner an opportunity to determine, presumably with expert assistance, whether the repairs will be sufficient to cure the defect. Just as it would generally be unreasonable for a homeowner to reject an offer of repair sight unseen, it would certainly be reasonable for a homeowner to reject a repair offer if there are sound reasons to believe that the repairs proposed will not cure the defect.

If there is an irreconcilable dispute between a contractor and a homeowner concerning what constitutes a proper repair as opposed to a "patch job," the question will ultimately be decided by the trier of fact.¹⁰¹ Therefore, should it be necessary to reject a settlement offer, a letter should be written and delivered to the contractor specifying reasonable and defensible reasons for the rejection. If the offer is rejected, an affidavit certifying rejection of the settlement offer may be filed with the court. As noted above, the trier of fact will ultimately decide whether the rejection was reasonable. Therefore, it is advisable to make a clear and provable record on the reasons for the rejection.

A homeowner who is considering rejection of a settlement offer faces substantial risk that the offer may later be deemed "reasonable," and his damages will thus be limited to the cost of repair plus reasonable and necessary attorney's fees and costs incurred *prior* to the rejection. Given the considerable attorney's fees and costs a homeowner will typically incur by the time he reaches trial, the determination by a jury that the original settlement offer was reasonable can have devastating consequences for both the claimant and his attorney. Attorneys who take residential construction defect cases on contingency should be acutely aware of this risk and plan their fee agreements accordingly.

E. Limitations on Liability and Damages

1. AFFIRMATIVE DEFENSES

Section 27.003 of the RCLA provides five affirmative defenses to an action for damages arising from a construction defect:

a. *No liability for negligence of others*

Section 27.003(a)(1)(A) bars recovery from the contractor for damages caused by the "negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor." This provision only relieves the

a. *No liability for negligence of others*

Contractor of liability for any negligence committed by an architect, engineer, or other person who is not hired by the contractor, as well as the contributory negligence of the homeowner.

Negligence and deceptive trade practices are independent grounds of recovery. Therefore, section 27.003(a)(1)(A) should not preclude a homeowner from recovering damages, otherwise recoverable from a contractor, caused by a deceptive trade practice of a third party.

b. *Mitigation of damages defense*

Section 27.003(a)(1)(B) provides a mitigation-of-damages defense to the contractor. It relieves the contractor of liability for damages caused by the "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."¹⁰² Thus, unlike the DTPA, the Act explicitly requires the homeowner to mitigate his damages.

One might ask how a homeowner is to mitigate his damages if he is supposed to give the contractor the notice and opportunity to cure required by section 27.004? Does the duty to mitigate arise upon discovery of the "construction defect" or upon the contractor's failure to repair the defect? Does the homeowner who waits for the contractor to make repairs pursuant to section 27.004 risk the peril of confronting a failure to mitigate damages defense under section 27.003(a)(1)(B)? Although the issue has not been addressed by the courts, one can speculate that the courts would construe the phrase "reasonable action" in section 27.003(a)(1)(B) to mean reasonable action in view of the requirements of section 27.004.

c. *Two exceptions for damages within industry tolerances*

In sections 27.003(a)(1)(C) and (D), the Legislature provided the construction industry with defenses based on undefined terms which may effect a claimant's ability to assess liability for certain types of damages against a contractor. These subsections relieve contractors of liability for damages caused by "normal wear, tear, or deterioration" or by "normal shrinkage due to drying or settlement of construction components within the tolerance of building standards."¹⁰³ The terms "normal" and "building standards" are not defined. Presumably, evidence of industry standards would be sufficient to prove whether the deterioration or shrinkage was abnormal. The "building standards" referred to in subdivision (D) could be city, county, state, or industry standards. Suffice it to say that the courts will be forced to define these terms and phrases when construction defect cases are submitted to a jury.

d. *Reliance on government records*

Section 27.003(a)(1)(E) provides a defense to contractors who rely on written information obtained from government records, unless the contractor knows the information is inaccurate.

2. COMMON LAW DEFENSES STILL APPLY

Finally, section 27.003(b) states:

Except as provided herein, this chapter does not limit or bar any other defense or defensive matter or other cause of action applicable to an action to recover damages resulting from a construction defect.

Thus, it appears that while a homeowner's damages are severely limited by the RCLA, a contractor's defenses are not.

3. DAMAGES RECOVERABLE UNDER THE RCLA

Besides defenses to liability, the second, major benefit provided by the RCLA to builders and their warranty insurance companies is the limitations on damages in all construction defect cases that are covered by the Act. Prior to the 2003 amendments, builders and warranty insurance companies could forfeit the RCLA protection if they failed to comply with its terms. The 2003 amendments essentially eliminated the penalty for contractors. As a result, even bad builders will have the damages against them limited to the following "menu" of economic damages set forth in section 27.004(g): (1) reasonable cost of repairs necessary to cure the defect; (2) 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) reasonable expenses of temporary housing reasonably necessary during the repair period; (5) the reduction in current market value, if any, to the extent the defect is due to structural failure; and (6) reasonable and necessary attorney's fees.

F. Procedural Matters

1. STATUTE OF LIMITATIONS CONCERNS

Because the RCLA does not create a cause of action, suits for damages resulting from a construction defect are governed by the statute of limitations applicable to the causes of action stated in the pleadings.

2. COUNTERCLAIMS

No pre-filing notice is required when a construction defect claim is asserted as a counterclaim in a lawsuit filed by the contractor. The contents of the counterclaim are governed by the requirements of section 27.004(c), which provides that the petition must specify "in reasonable detail each construction defect that is the subject of the complaint."

3. CAUSATION

The last significant change injected into residential construction litigation by the RCLA concerns the causation question that must be answered by the trier of fact. Under the DTPA, the fact finder must determine that the wrongful conduct was a "producing cause" of actual damages.¹⁰⁴ Under the RCLA, however, the causation question is based on "proximate cause," which, of course, requires evidence that the damages were foreseeable.¹⁰⁵

4. EFFECTIVE DATE OF NEW RCLA PROVISIONS

The changes to sections 27.002, 27.003, and 27.004 apply only to a cause of action that accrues on or after September 1, 2003. A cause of action that accrues before September 1, 2003 is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

New section 27.0042 and the changes to section 27.007(a) apply only to a contract between a contractor and a homeowner that is entered into on or after September 1, 2003. With respect to a contract that is entered into before September 1, 2003, the law in effect immediately before the effective date applies, and that law is continued in effect for that purpose.

IV. RCLA CASE LAW

A. *O'Donnell v. Roger Bullivant of Texas, Inc.*

The first appellate decision interpreting major portions of the RCLA, *O'Donnell v. Roger Bullivant of Texas, Inc.*, was originally delivered on October 31, 1996 ("*O'Donnell I*").¹⁰⁶ The court then withdrew that opinion and substituted a new opinion dated February 13, 1997 ("*O'Donnell II*"). The result reached in *O'Donnell I* and *O'Donnell II* was the same (i.e., the case was reversed and remanded for a new trial). However, *O'Donnell II* further clarifies that the RCLA does not limit a claimant's damages in cases where the contractor has failed to make a reasonable offer.

The O'Donnells purchased their home in 1976 for \$44,500. In 1988, after many updates and renovations, the O'Donnells' home began experiencing foundation problems. In May of 1989, the O'Donnells contracted with Roger Bullivant of Texas to perform foundation repairs. The repairs failed to correct the problems with the home's foundation and Bullivant performed additional foundation work in 1991 and 1992. When the foundation problems persisted, the O'Donnells contacted a structural engineer who determined that the repairs by Bullivant had aggravated the once correctable conditions. The O'Donnells sent notice to Bullivant, who responded by offering further repairs. Believing the repairs to be inadequate to address the foundation problems in their home, the O'Donnells filed suit alleging deceptive trade practices and other common law causes of action. Bullivant moved for summary judgment asserting that the suit was governed by the RCLA and that under the RCLA, the O'Donnells' damages were capped at the purchase price of their home. Bullivant tendered the purchase amount of \$44,500 into the registry of the court and the trial court granted summary judgment in favor of Bullivant.

In a case of first impression on the application of major



portions of the RCLA, the Fort Worth Court of Appeals looked to the *uncontroverted affidavits* of Mr. O'Donnell and his engineer, Kenneth Bitting, which stated that the repairs offered by Bullivant in response to Plaintiffs' notice would not fix the problems created by Bullivant's work. Because the court found the uncontroverted affidavits of O'Donnell and Bitting to be "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted," the court found *as a matter of law* that Bullivant failed to make a reasonable offer.¹⁰⁷

The court then turned to section 27.004(e) of the 1993 version of the RCLA (renumbered as section 27.004(g) in the 1995 version of the RCLA) which states: "If a contractor fails to make a reasonable offer under this Section . . . the limitations on damages and defenses to liability provided for in this Section shall not apply." The court first identifies three "limitations on damages" in section 27.004: subsections (d), (f), and (g) (now codified as subsections (f), (h) and (i)). The court then states that subsections (d) and (f) limit the *types* of damages claimant may seek and subsection (g) limits the *amount*. Because the damages cap is clearly a limitation on damages within section 27.004, the court held that the cap does not apply to limit the O'Donnell's damages to the purchase price of their home.

Although the facts of *O'Donnell* only required the court to address the damages cap in subsection (g) in reaching its opinion, the dicta in *O'Donnell II* supports the argument that the effect of a contractor's failure to make a reasonable offer is that *none* of the limitations on damages contained in section 27.004 (specifically subsections (d), (f), and (g)) would apply. This analysis best suits the underlying purposes of the Act: (1) it encourages and rewards contractors who make reasonable attempts to cure their construction defects; (2) it allows contractors the defenses of section 27.004(f) when a reasonable offer is unreasonably rejected by the claimant; and (3) it does not unfairly limit the damages of a homeowner who receives an unreasonable offer of settlement or no offer at all.

Some builder advocates insist that the *O'Donnell* court's decision has "rendered moot" the limited damages provision (or "menu") contained in section 27.004(h) of the RCLA. This position is silly. It ignores the very real factual circumstance that a contractor may make a timely and reasonable offer of repair that the homeowner reasonably rejects. Frequently, in residential construction cases, reasonable minds can – and do – differ. In those instances, section 27.004(h) applies to limit the homeowner's damages and "reward" the contractor's reasonable offer.

B. Bruce v. Jim Walters Homes, Inc.

In *Bruce v. Jim Walters Homes, Inc.*, the Bruces purchased the "Presidential," a top-of-the-line home built by Jim Walters Homes ("JWH").¹⁰⁸ The contract called for JWH to build the Bruces' home on a site owned by the Bruces. The plans called for JWH to place the house on steel-reinforced footings and to leave nine feet of clearance in the unfinished first floor. JWH was to finish out the second floor of the home in order that the Bruces could live in the second floor while they performed their own finish-out on the first floor.

After moving into their new home, the Bruces discovered that the first floor had been built without the required nine-foot clearance. The dimensions were so off that, once allowances were made for the placement of HVAC ductwork, the ceilings were only six feet, eight inches high. In addition to their diminutive first floor, the Bruces soon observed cracks and material separations indicative of foundation problems. After some investigation, it was discovered that JWH had failed

to place the home on footings, as required by the plans, and that the concrete underlying the home was not reinforced with rebar.

The Bruces brought suit against JWH for fraud, breach of contract, breach of warranty, and negligence. In addition, the homeowners filed suit for damages under the RCLA. The trial court granted summary judgment to JWH on all but the RCLA claim.

The San Antonio Court of Appeals affirmed the trial court's striking of the non-RCLA claims but reversed and remanded on the fraud cause of action. The court first acknowledged that the RCLA was enacted "to promote settlement between homeowners and contractors and to afford contractors the opportunity to repair their work in the face of dissatisfaction . . . [T]his purpose contemplates actual defects in construction, not willful misrepresentation regarding the construction, which can certainly exist independent of a construction defect." The court then compared "an action under the RCLA" to an action under fraud in order to determine whether the two "actions" conflict. The court identified the following areas in which fraud and the RCLA do not conflict:

- The wrong sought to be addressed in a fraud action is the misrepresentation itself. In an RCLA "action," the wrong sought to be addressed is the construction defect; and
- The remedies "available" under the RCLA are those proximately caused by a construction defect. The remedies available under fraud are exemplary damages and those actual damages caused by the misrepresentation.

Because the RCLA only prevails over any cause of action "to the extent of conflict" with Chapter 27, the court reasoned that, since fraud and the RCLA could be harmonized, the Plaintiffs could recover under both theories.

What the San Antonio Court of Appeals does not address (because the Plaintiffs did not plead it) is how their analysis of misrepresentations under a fraud theory is applied to other causes of action such as the DTPA or negligent misrepresentations. Like fraud, the DTPA and any other cause of action is trumped by the RCLA *only to the extent of conflict*.¹⁰⁹ Further, like fraud, under the DTPA and negligent misrepresentation causes of action, the wrong sought to be addressed is the misrepresentation itself. As for damages, the remedies under the DTPA include additional damages for intentional conduct and economic damages caused by the misrepresentation. While the damages obtained in a suit pursuant to the DTPA may overlap or exceed those available under the RCLA, how is this any different than a claimant obtaining actual and exemplary damages under a fraud theory?

Although the argument that the RCLA does not or should not preempt a cause of action for fraud has merit, the court of appeals' analysis centers on a flawed premise: that the RCLA is an independent cause of action. The fact that the RCLA is *not* a separate and distinct cause of action is well-rooted in the legislative history of the Act as well as in the wording of the Act itself.

In October of 1997, the Texas Supreme Court denied writ on *Bruce*. Nevertheless, the weight of the writ history should be viewed in light of the fact that only JWH raised any points on appeal. Because the issue of whether the RCLA completely preempts causes of action other than fraud was not before the court, it remains to be seen whether this analysis would prevail in jurisdictions outside of San Antonio.¹¹⁰

C. *In re Kimball Hill Homes Texas, Inc.*

In *In re Kimball Hill Homes Texas, Inc.*, Houston's 14th District Court of Appeals confirmed that denial of a motion to abate under the RCLA was appropriate for review by mandamus.¹¹¹ *Kimball* involved a lawsuit by several hundred homeowners in the Houston area against Kimball Hill Homes Texas, Inc., Kimball Hill, Inc., jointly referred to in the opinion as "Kimball Hill," and Houston Lighting and Power. The homeowners alleged that Kimball Hill misrepresented the quality, craftsmanship, and energy efficiency of their homes, and that their homes were constructed with substandard workmanship, poor quality materials, and virtually no craftsmanship. The homeowners did not give Kimball Hill pre-suit notice pursuant to the RCLA. In their first amended petition, the homeowners asserted causes of action for conspiracy, common law fraud, statutory fraud in a real estate transaction, breach of contract, and breach of warranty. After Kimball Hill filed its verified plea in abatement alleging lack of notice, the homeowners dropped their breach of contract and breach of warranty claims in an attempt to avoid the RCLA by recasting their claims as "misrepresentations," rather than complaints regarding construction defects. Although the plea in abatement went uncontested by the Plaintiffs, the trial court nevertheless concluded that the homeowners did not "plead a cause of action under the RCLA" and denied Kimball Hill's motion to abate.

After discussing that mandamus is an extraordinary remedy, only available in limited circumstances involving manifest and urgent necessity, the court found mandamus appropriate because abatement was automatic under section 27.004(d) of the RCLA when a verified motion to abate is not timely controverted. The court concluded that forcing Kimball Hill to trial without reviewing the propriety of an abatement under the RCLA would deprive Kimball Hill of the opportunity to inspect the homes, make a reasonable settlement offer, and present a defense to damages based on such an offer. Therefore, an appeal would be an inadequate remedy.

The court then went on to address the application of the RCLA to *Kimball*. The court concluded the Plaintiffs' pleadings were sufficient to "trigger the RCLA" even though their pleadings did not mention the RCLA. The court discussed that *O'Donnell* and *Trimble* properly held that the failure of the homeowners to plead the RCLA does not preclude its application where appropriate. The court held that the underlying nature of the claim controls and a "plaintiff cannot by artful pleading recast a claim in order to avoid the adverse effect of a statute." In summary, the court held that a claim that exists "solely by virtue of alleged construction defects" falls within the RCLA. Nevertheless, the court states: "This is not to say that the real parties are barred from bringing other claims that do not conflict with the remedial purpose of the RCLA."

It should also be noted the court urged that, if it was the Plaintiffs' contention that the RCLA did not apply to this case, then the Plaintiffs were obligated to raise that point in a timely response. Because the RCLA abatement provisions are mandatory on the trial court, plaintiffs who believe they have grounds to challenge the abatement must respond timely to a plea in abatement.

D. *Perry Homes v. Alwattari*

The efforts of consumer advocates to limit the effect of the RCLA were realized by the courts in *Perry Homes v.*

Alwattari.¹¹² The first issue in *Alwattari* was whether the builder's offer of settlement was "reasonable." The jury found that it was not, and the court of appeals agreed. In so finding, the court of appeals cited evidence that Perry Homes: 1) only agreed to initially pay for 60% of the cost of the construction defects (thereby requiring the homeowner to seek reimbursement from the home warranty company for the remaining 40%); and 2) conditioned its offer on the homeowner signing a release.

Upon finding sufficient evidence that Perry Homes' offer was not reasonable, the court then turned to the issue of whether the homeowner's damages were still limited to the types of damages in section 27.004(h). The court reviewed its earlier holding in *O'Donnell* and noted with regret that its earlier opinion resulted in an incorrect disposition. Specifically, by limiting the *O'Donnell* opinion to the application of the damages cap in section 27.004(i), the trial court was left open on remand to limit the *O'Donnell*'s damages to the four types of damages in section 27.004(h). The *Alwattari* court disapproved this result and overruled *O'Donnell* to the extent it could be interpreted as limiting a homeowner's damages in either type or amount when the contractor fails to make a reasonable offer of settlement.

Alwattari thus confirmed that the RCLA does not supplant the DTPA or any other cause of action as the sole, exclusive remedy for residential construction defect claims, by holding that when a contractor fails to make a reasonable offer settlement, the homeowner can proceed with his DTPA and other causes of action unfettered by the limitations on damages in the RCLA:

We, therefore, hold that, under Subsection 27.004(g), the effect of a contractor's failure to make a reasonable settlement offer is that the contractor loses the benefit of all limitations on damages and defenses to liability provided for in Section 27.004, including both the limitation of Subsection 27.004(h) on the types of damages recoverable by a homeowner and the limitation of Subsection 27.004(i) on the amount of damages recoverable by a homeowner. We overrule *O'Donnell* to the limited extent that it may be interpreted as holding, either expressly or impliedly, that the only limitation on damages that does not apply when a contractor fails to make a reasonable settlement offer is the limitation on the amount of damages provided for in Subsection 27.004(i).¹¹³

Thus, far from a new or independent cause of action, *Alwattari* makes clear that the RCLA was designed to be a set of pre-suit procedures engrafted upon the DTPA and common law to promote non-litigated resolutions to residential construction claims.

E. *Sanders v. Construction Equity, Inc.*

The most recent case to weigh in on the RCLA is *Sanders v. Construction Equity, Inc.*¹¹⁴ In *Sanders*, the trial court granted the builder's motion for summary judgment on the basis that the RCLA pre-empted the homeowner's causes of action for DTPA, fraud, breach of contract, negligence and breach of warranty. In a well-reasoned opinion, the court of appeals reversed.

The court in *Sanders* was the first to use the new language of RCLA section 27.005 and section 27.007 (added by the 1999 Amendments) to support its holding that the RCLA "does not create a cause of action but instead simply limits and controls causes of action that otherwise exist." Citing

specific provisions of the RCLA that contemplate causes of action for negligence, DTPA, breach of contract and breach of warranty, the *Sanders* court concludes that barring these remedies would be inconsistent with the statutory language.

In addition to its discussion on limiting liability for certain causes of action, the *Sanders* court also addressed the effect of the damages limitations in the RCLA on a claim for exemplary damages. Citing both precedent and public policy reasons in favor of exemplary damages, the court concluded that the RCLA did not limit exemplary damages.

Perhaps the most interesting aftermath of *Sanders* will be how courts apply the decision to construction defect cases sounding in fraud. *Sanders* held that the RCLA governs a claim for fraud “to the extent of conflict.” In so holding, *Sanders* is in direct conflict with the holding in *Bruce v. Jim Walters Homes, supra*, where the San Antonio Court of Appeals held that fraud was outside the scope of the RCLA, and therefore not limited in any way by the RCLA. The Supreme Court denied review of both *Sanders* and *Bruce*, ensuring that, for now, the courts will remain divided on the applicability of the RCLA to an action for fraud.

V. LEGISLATIVE HISTORY OF THE RCLA

A. 1989 Passage of the RCLA

The same year the DTPA was passed in Texas, the National Association of Homebuilders (“NAHB”) formed the Home Owners Warranty Corporation (“HOW”) as a subsidiary organization to manage and administer an insurance backed warranty program for builders with qualifying homes.¹¹⁵ In creating the HOW program, it was the intent of the NAHB to prevent the imposition of consumer-oriented government regulations on the building industry by developing their own system of self regulation.

It is not surprising therefore, that when it became apparent that the DTPA was an effective consumer protection tool having a substantial effect on the construction industry in Texas, HOW and members of other homebuilder groups across the state issued a

response. In 1989, the Texas Association of Builders (“TAB”) and HOW were key proponents for Senate Bill 1012, a proposed act that would effectively exempt builders from the initial scrutiny of the DTPA by creating an additional set of procedures to which the consumer must adhere before initiating litigation against a contractor. With the considerable assistance of the bill’s sponsor, Senator John T. Montford, Senate Bill 1012 passed the Texas Legislature to become Chapter 27 of the Texas Property Code, the Residential Construction Liability Act.

In 1990, Senator Montford, along with co-authors Will G. Barber and Robert L. Duncan, published an article in the St. Mary’s Law Journal detailing the 1989 tort reform

experience.¹¹⁶ The St. Mary’s article describes the framers’ intent to create with the RCLA a pre-suit notice and expedited settlement statute that, to the extent a contractor complies with its provisions, will serve to limit the contractor’s damages in a subsequent suit:

New Chapter 27 seeks to restore a fair and appropriate balance to the resolution of residential construction disputes between the contractor and the owner, including DTPA disputes. Chapter 27 allows the contractor to make a timely written offer to settle the dispute by repairing the construction defect complained of and limits recovery against the contractor if the owner unreasonably rejects the offer or fails to permit the contractor to make the repairs after an offer has been accepted.¹¹⁷

B. 1993 Amendments

In 1993, the Legislature passed House Bill 1395, which substantially amended the RCLA. Although offered by its proponents to merely “clarify” some issues raised by the 1989 version of the Act, few sections of the RCLA remained untouched by the 1993 amendments. The most significant changes were the addition of a damages cap tied to the purchase price of the house and limitations on the categories of damages recoverable when the contractor complies in good faith with the settlement provisions of the Act.¹¹⁸ These changes came about after considerable negotiations led on the consumer side by two Austin attorneys, David Bragg and Michael Curry, and on the builder’s side by the bill’s author, Representative Robert Duncan (R-Lubbock).

The version of the bill initially introduced by Representative Duncan included new section 27.006 that capped the damages in a lawsuit concerning construction defects to the purchase price of the home regardless of whether the contractor complies with the notice and opportunity to cure provisions of the RCLA. After intense opposition from consumer groups and several revisions of the bill in subcommittee, on the floor of the House and in the Senate a deal was finally struck between Representative Duncan and opponents to the bill. The proposed damage cap was moved to section 27.004 in order to ensure that the cap was one of the “limitations on damages” in section 27.004 that would be unavailable to contractors who failed to make reasonable offers of repair or failed to perform agreed-upon repairs in a good and workmanlike manner. In exchange for the assurance that contractors who failed to comply with the notice and opportunity to cure provisions of the RCLA would not receive the Act’s protections, the consumer groups backed off their aggressive opposition.

The most unexpected 1993 amendment to the Act was a twelfth hour change in the definition of a “contractor” in section 27.001(3) to include “risk retention groups” registered as such under Article 21.54 of the Texas Insurance Code. Despite lengthy negotiations between construction industry representatives and consumer advocates on the substance of House Bill 1395, the proposed inclusion of risk retention groups under the Act’s protection does not appear in any earlier draft of the bill. Rather, the extension of the Act to entities such as HOW and its progeny was by a last minute amendment on the House floor.

C. 1995 Amendments

The only changes to the RCLA brought about by the



1995 amendments were the addition of sections 27.004(d) and (e) and a re-lettering of the former Act to allow for the new provisions. New subsections (d) and (e) deal with abatement in situations where the contractor has not been provided notice and an opportunity to cure. Both sections were added as a Committee Substitute to House Bill 668, the bill that made dramatic changes to the DTPA.

The sections added by the 1995 amendments to the RCLA merely codify what practitioners in this area already suspected after the Texas Supreme Court ruling in *Hines v. Hash*,¹¹⁹ and the San Antonio Court of Appeals decision in *Trimble v. Itz*¹²⁰ – essentially, that the appropriate remedy for failure to give statutory notice is a plea in abatement to allow the claimant to comply with the Act.¹²¹

Far more interesting than the RCLA amendments that did pass in 1995 are the amendments that were proposed, but eventually defeated by operation of law. House Bill 2530, sponsored by the Greater Houston Builder's Association, limited the amount of damages in a construction defect suit to the purchase price of the house and the types of damages recoverable to the cost of repair, attorney's fees, temporary housing, and reduction in market value (if the defects constituted "structural failure") *even in situations where the contractor failed to comply with the settlement provisions of the Act*.¹²²

Other salient aspects of the proposed homebuilder version included an automatic release for "cured" construction defects, and an expanded settlement provision that allows contractors to consider the last notice sent by the homeowner to be the operative notice for the running of the statutory response deadline, *apparently regardless of whether the contractor ever responded to previous notices*.

House Bill 2530 passed out of committee on May 5, 1995 and was sent to the Calendars Committee. From there, consumer advocates lobbied Calendars Committee members to prevent the committee from setting the bill for a vote by the full House. The bill was never set for a vote and eventually died in Calendars.

D. 1997 Failed Amendments

After their defeat in 1995, the builder's lobby decided to take a new approach. A substantial group of the largest builders in Texas and their defense counsel banded together to form an organization called Concerned Builders of Texas ("CBT"). By pooling their vast resources, members of CBT hired one of Austin's best known and most powerful lobbyists, Robert E. Johnson, Jr., and launched an aggressive campaign to re-write the RCLA and further strip homeowners' rights.

The builders introduced identical bills in the House and Senate, House Bill 1742, originally authored by Representative Fred Bosse (D-Houston) and Senate Bill 867, authored by Senator David Cain (D-Dallas). The bills were initially "sold" to both Senator Cain and Representative Bosse as being consumer-friendly legislation designed to remedy the unfairness of the damage cap to claimants with older or inherited homes. Specifically, the CBT pointed to *O'Donnell v. Roger Bullivant of Texas, Inc.*, where the claimants were capped by the trial court at the \$45,000 purchase price the O'Donnell's paid in 1976, despite evidence that the O'Donnell's home was worth about \$85,000 at the time the home was severely damaged by a repair contractor.¹²³ To remedy the unfairness of the cap as applied to older homes, the CBT offered the following amendatory language to section 27.004(i):

- (i) The total damages awarded in a suit

subject to this chapter may not exceed the greater of the claimant's purchase price for the residence or the fair market value of the residence without the construction defect.¹²⁴

Although the CBT's proposed amendment to section 27.004(i) provided an expanded damage cap to a limited class of claimants, in reality, the changes to the damage cap offered by CBT were a Trojan horse for the CBT's real agenda. As filed, Senate Bill 867 and House Bill 1742 included the following amendments to the RCLA:

- The definition of "contractor" was expanded to include insurance companies, home warranty administration companies, subcontractors, design professionals, and officers, directors, shareholders and employees of the contractor.
- Language was added to section 27.002(a) to apply the RCLA to downstream purchasers.
- "[E]mployee" and "subcontractor" were removed from the list of persons a contractor is responsible for under section 27.003(a).
- Section 27.004(f) was amended to shift the burden to homeowners to determine whether the contractor's offer was "reasonable."
- Section 27.004(g) was amended to reflect that even contractors who fail to make an offer, fail to make a reasonable offer, or fail to perform the agreed-upon repairs in a good and workmanlike manner still receive the protections of the RCLA.
- Section 27.004(m) alters the requirements for notice of construction defects posing an imminent threat to health or safety of the occupants. The amendment provides that notice to a contractor of conduct by the contractor's employees or subcontractors is insufficient notice to trigger the contractor's duty to respond.
- A new mediation provision was added in section 27.004(p).

Despite the drastic changes to the RCLA reflected in the filed bills, both Senator Cain and Representative Bosse insisted in early conversations with opponents of the amendments that the bills were pro-consumer and that their intent in bringing the bills was simply to fix the unfairness of the damage cap. This misconception of the true impact of the bills by both Senator Cain and Representative Bosse is understandable in light of the disingenuous bill analysis provided to both Senator Cain and Representative Bosse by the lobbyist for CBT. The bill analysis prepared by CBT completely mischaracterizes the legislative history of the RCLA. Specifically, the RCLA was not enacted to take residential construction disputes "out of the DTPA" and the penalty clause in subsection (g) (providing that the limitations on damages and defenses to liability in section 27.004 do not apply when the contractor fails to comply with the RCLA) was not a drafting error.¹²⁵

Consumer advocates finally got their opportunity to testify against House Bill 1742 on the evening of May 15, 1997. Much to their surprise, however, opponents to the bill arrived only to find that a Committee Substitute had replaced the bill. After some difficulty in even obtaining a copy of the new Committee Substitute to House Bill 1742 ("C.S.H.B. 1742"), consumer advocates were shocked to find that all pro-homeowner amendments obtained in the House had been eliminated. The new bill contained only two provisions: (1) changes to subsection (g) that allowed contractors to receive

the protections of the RCLA regardless of whether they comply with the Act; and (2) the damages cap was expanded to the “greater of the claimant’s purchase price for the residence or the fair market value of the residence without the construction defect.”

Only Senate Jurisprudence Committee members Senator Jeff Wentworth (R-San Antonio) and Senator Steve Ogden (R-Bryan) were present for the testimony in vigorous opposition to House Bill 1742 and the lack of a quorum made any vote that night impossible. The public hearing was left open pending a quorum of the Committee the next morning.

Expecting a vote and an opportunity to answer questions from other members of the Jurisprudence Committee who were not present for the testimony, consumer advocates arrived early on the morning of May 16, 1997. Despite the urging of Senator Wentworth that C.S.H.B. 1742 should be presented while several out-of-town witnesses were present and available to answer questions, Senator Harris did not lay out C.S.H.B. 1742.¹²⁶

The Senate Jurisprudence Committee’s last opportunity to report bills out of committee was midnight on May 18, 1997. With the public hearing still open, consumer advocates arrived once more, hoping to prevent a last minute coup by the CBT. As the committee finalized the public hearings and took votes on the remaining bills, House Bill 1742 was conspicuously overlooked. Finally, at the close of the hearing, Senator Harris stood and remarked that there was one more piece of business, House Bill 1742. However, the senator stated, after much “arm-twisting” by Senator Ellis, he had decided to leave the issues in House Bill 1742 “to the courts.” With that, House Bill 1742 was dead.

E. 1999 Amendments

For years now, attorneys representing residential contractors have argued that the RCLA was the sole “cause of action” for disputes concerning the design, construction or repair of a home. Courts who embraced this reasoning (and many did), struck the homeowner’s DTPA cause of action and forced the plaintiff to re-plead “under the RCLA.”

In 1999, advocates for the builders and consumers abandoned the high stakes power plays and met face-to-face to craft compromises to the RCLA. The end result was an improved statute with benefits for both sides. The amendments were as follows:

- Section 27.001(3)(A) was added to clarify that a “contractor” includes officers, employees, etc. of a contractor.
- Section 27.003(a)(2) protects a contractor from liability for repairs when an assignee of the claimant fails to provide notice and an opportunity to cure.
- Section 27.0031 adds a penalty for frivolous lawsuits.
- Section 27.004(a) was amended to require the contractor to send their settlement offer by certified mail.
- Section 27.004(d) was amended to allow abatement when homeowners do not give the contractor a reasonable opportunity to inspect the property.
- Section 27.004(h) adds “reasonable and necessary engineering or consulting fees required to evaluate and cure the construction defect” to the RCLA’s “menu” of recoverable damages.
- Section 27.004(i) expands the damages cap (previously limited to purchase price) to include, “the greater of the claimant’s purchase price for the residence or the current fair market value of the

residence without the construction defect.”

- Section 27.004(p) ensures that a contractor who settles with a homeowner will not lose any contribution rights against subcontractors.
- Section 27.0041 adds an expedited mediation provision for suits where the amount of damages is in excess of \$7,500.
- Section 27.005 clarifies that the RCLA is not a cause of action.
- Section 27.007 requires all contracts subject to the RCLA to provide certain disclosures regarding the homeowner’s rights and obligations under the Act. This new provision is enforced by a \$500 civil penalty.

Although some fundamental differences between builder and homeowner groups could not be resolved, the final product of the 1999 Legislature was a much improved RCLA.

F. 2001 Failed Amendments

Despite the progress made in 1999 clarifying the RCLA and establishing constructive dialogue between the two camps, in 2001 no new amendments to the RCLA were achieved. Nevertheless, it was a busy legislative session for homeowners and builders.

The builders filed two bills attempting to further limit homeowners’ rights. The first would have mooted the holding of the Fort Worth Court of Appeals in *Perry Homes v. Alwattari* that a builder who fails to make a reasonable offer is not entitled to the benefit of the limited menu of damages contained in the RCLA.¹²⁷ The builders claimed the court had misconstrued “relic” language in section 27.004(g).

The second bill would have mooted the San Antonio Court of Appeals’s opinion in *Buecher v. Centex Homes*.¹²⁸ In *Buecher*, homeowners brought a class action against Centex Homes, seeking, among other things, an injunction to prevent the builder from asserting in its standard home construction contract that purchasers of a Centex home waive the implied warranty of habitability and good and workmanlike construction.¹²⁹ The trial court granted the builder’s special exception and dismissed the homeowners’ claims as to the enforceability of the warranty disclaimer.¹³⁰ Relying on *Melody Home Mfg. Co. v. Barnes*,¹³¹ the court of appeals reversed the trial court in a brave showing of common sense:

It would be incongruous if public policy required the creation of an implied warranty, yet allowed the warranty to be disclaimed and its protection eliminated merely by a pre-printed standard form disclaimer or an unintelligible merger clause.¹³²

Buecher was argued before the Texas Supreme Court in November 2000, but as of the 2001 legislative session, an opinion had yet to be issued.¹³³

Consumer advocates vehemently rejected both bills. Extensive negotiations ensued. Sweeping revisions of the RCLA were contemplated, as drafts of substitute bills were exchanged and negotiated. Finally, after nearly reaching an accord on dramatic amendments to the RCLA, the negotiations broke down when the proposed bill was rejected by a more extremist group of builders. The result was that both bills died in committee for a lack of action and benefits to both builders and homeowners were lost. Bottom line, the builder opponents to the compromises were betting the Texas Supreme Court would grant the petition for discretionary review on *Alwattari* and reverse the Fort Worth Court of

Appeals. They were wrong. Although too complex to detail here, some salient aspects of the failed 2001 amendments to the RCLA were:

- A chance for the contractor to revise the offer of repair if the homeowner rejected the initial offer as inadequate.
- A pre-suit alternative dispute resolution procedure to determine the issues of the reasonableness of the contractor's offer and/or the reasonableness of the homeowner's rejection of the offer.
- Codification of the *Alwattari* decision that the RCLA does not offer any protections to a contractor who fails to make a reasonable offer.

V. CONCLUSION

When it was created by the Texas Legislature in 1973, the DTPA was the first, comprehensive mechanism for private causes of action in cases of misrepresentation, breach of warranty and unconscionable conduct in consumer transactions. The RCLA however, retreats from the all encompassing language of the DTPA to effectively insulate two groups of residential contractors and "warranty" companies from the DTPA's long arm of consumer protection.

When I began writing on this topic shortly after the RCLA was originally enacted, I questioned whether the Act was really necessary. I still do. The RCLA as originally drafted was replete with issues of constitutionality and fundamental fairness. Although amendments have mooted some of the constitutionality issues, more have been created by the 2003 Amendments. I still challenge anyone to deny it is, pure and simple, special interest legislation.

While I agree with the Act's proponents that notice and an opportunity to cure are laudable objectives, these objectives sometimes come at an extraordinary cost to the homeowner. As many have been saying for years: "If the Act is to exist at all, it must do so in a manner that allows a claimant to recover the actual damages they have sustained and in a manner that does not protect contractors who ignore the claimant's notice or whose conduct amounts to gross negligence or fraud."

To compound the problems faced by homeowners and contractors grappling with the RCLA, the increasingly high incidence of arbitration clauses in residential construction contracts means that many of the complex RCLA issues will be left to the discretion of arbitrators. Not only will the existence of arbitration clauses likely hinder the development of case law on the RCLA, but the extreme lack of clarity in the Act may lead to vastly inconsistent determinations by persons who, in many cases, have little or no legal training.

The sizable risks to both sides involved in residential construction defect cases make litigation of RCLA cases complex. Add to that the dense and confusing new TRCCA, and you have a landscape for vastly inconsistent results that will continue to drive the cost of residential construction litigation up, while the corresponding remedies for homeowners continue to dwindle.

Footnotes

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1. TEX. PROP. CODE ANN. § 27.001, et seq. (Vernon 2003).
2. TEX. BUS. & COM. CODE ANN. § 17.41, et seq. (Vernon 2003).
3. The first case on the RCLA was *Trimble v. Itz*, 898 S.W.2d

370 (Tex. App.—San Antonio 1995, writ denied). However, the issues addressed in *Trimble* were codified in 1995 by adding to the RCLA new subsections 27.004(d) and (e). The effect of these subsections is discussed below.

4. 940 S.W.2d 411 (Tex. App.—Fort Worth 1997, writ denied).
5. 943 S.W.2d 121 (Tex. App.—San Antonio 1997, writ denied).
6. 969 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1998, no pet. h.).
7. 42 S.W.3d 364 (Tex. App.—Beaumont 2001, pet. denied), *mot. for rehearing denied*, 45 S.W.3d 802.
8. 33 S.W.3d 376 (Tex. App.—Ft. Worth 2000, pet. denied).
9. TEX. PROP. CODE ANN. § 401.001, et seq. (Vernon 2003).
10. *Id.* at § 426.001(a)(1).
11. *Id.* at § 401.004(a)(1).
12. TEX. PROP. CODE ANN. § 27.01(2).
13. TEX. BUS. & COM. CODE ANN. § 27.01.
14. TEX. PROP. CODE ANN. § 162.001, et seq.
15. TEX. PROP. CODE ANN. § 426.001(b).
16. *Id.* at § 401.004.
17. *Id.* at § 401.005.
18. *Id.* at § 428.001(c).
19. *Id.*
20. *Id.* at § 428.001(a).
21. *Id.* at § 428.001(b) (emphasis added).
22. *Id.* at § 428.002(c).
23. *Id.* at § 428.001(b)(5).
24. *Id.* at § 428.005.
25. *Id.*
26. *Id.* at § 428.003(a).
27. *Id.* at § 428.003(b).
28. *Id.* at § 428.004(b).
29. *Id.*
30. *Id.* at § 428.004(a).
31. *Id.* at § 428.004(b).
32. *Id.*
33. *Id.* at § 428.004(c)(1)-(2).
34. *Id.* at § 428.004(d).
35. *Id.* at § 429.001(a).
36. *Id.* at § 429.001(b).
37. *Id.*
38. *Id.* at § 429.001(c).
39. *Id.* at § 428.001(h).
40. *See Id.* at § 426.008 (emphasis added).
41. *Id.* at § 426.005(b).
42. *Id.* at § 426.006.
43. *Id.* at § 426.001(a)(2).
44. *See Id.* at § 426.005.
45. *Id.* at § 430.002(a).
46. *Id.* at § 430.002(b).
47. *Id.* at § 401.002.
48. *Id.* at § 430.006.
49. *Id.* at § 430.007.
50. *Id.* at § 430.001(b).
51. *Id.* at § 430.011(c).
52. TEX. PROP. CODE ANN. § 27.004(a).
53. TEX. PROP. CODE ANN. § 436.003.
54. *Id.* at § 438.001.
55. *See Id.* at § 437.001.
56. *Id.*
57. *See Id.* at § 417.001.
58. TEX. PROP. CODE ANN. § 27.002(a)(1).
59. *Id.* at § 27.001(4).
60. *Id.*
61. *Id.* at § 27.006.

62. *Id.* at § 27.001(7) (emphasis added).
63. As set out in Section IV, the Court in *Bruce* rejected the application of the RCLA to fraud.
64. TEX. PROP. CODE ANN. § 92.252.
65. 859 S.W.2d 107 (Tex. App.—Eastland 1993, writ denied).
66. *Id.* at 108, citing TEX. PROP. CODE ANN. § 92.252(a) (Vernon Supp. 1993) (emphasis added).
67. TEX. PROP. CODE ANN. § 27.002(b).
68. *Id.* at § 27.004(f).
69. *Id.* at § 27.004(e).
70. TEX. BUS. & COM. CODE ANN. § 17.49(g) (Vernon Supp. 1996) (emphasis added).
71. TEX. PROP. CODE ANN. § 27.001(3).
72. *Id.* at § 27.001(5).
73. *Id.* at § 27.001(3)(A).
74. *Id.* at § 27.004(a).
75. *Id.*
76. 940 S.W.2d 411 (Tex. App.—Fort Worth 1997, writ denied).
77. *See Id.*
78. *Id.*
79. 843 S.W.2d 464 (Tex. 1992); *See Hash v. Hines*, 796 S.W.2d 312, 315 (Tex. App.—Amarillo 1990).
80. TEX. PROP. CODE ANN. § 27.004(c).
81. *Id.* at § 27.001(3)(B) (emphasis added).
82. *Id.* at § 27.004(a).
83. *Id.*
84. *Id.* at § 27.004(d).
85. *Id.* at § 27.004(a).
86. *Id.* at § 27.004(e)(2).
87. *Id.* at § 27.004(b).
88. *See Id.* at § 27.004(k).
89. *Id.* at § 27.0042(b)(2).
90. *Id.* at § 27.0042(c)(1).
91. *Id.* at § 27.0042(c)(2)(A)-(B).
92. *Id.* at § 27.0042(c)(3).
93. *Id.* at § 27.0042(d).
94. 898 S.W.2d 370 (Tex. App.—San Antonio 1995, writ denied).
95. Itz was actually a subcontractor, and therefore not entitled to protection by the RCLA. Had the general contractor made the repair request, it is uncertain how the RCLA would have been applied.
96. TEX. PROP. CODE ANN. § 27.004(j).
97. *Id.* at § 27.004(b).
98. *Id.* at § 27.004(g).
99. *Id.*
100. *Id.* at § 27.004(l).
101. *Id.* at § 27.004(k).
102. *Id.* at § 27.003(a)(1)(B).
103. *Id.* at § 27.003(a)(1)(C)-(D).
104. TEX. BUS. & COM. CODE ANN. § 17.50(a).
105. TEX. PROP. CODE ANN. § 27.006.
106. 940 S.W.2d 411, 413 (Tex. App.—Fort Worth 1997, writ denied).
107. *Id.* at 420. Clearly the Defendant's failure to properly controvert the affidavit of O'Donnell and Bitting mandated this result. However, the court did not stop its analysis there, and it is unwise to dismiss this case as more a summary judgment/procedure case than a RCLA case as has been suggested by some commentators.
108. 943 S.W.2d 121 (Tex. App.—San Antonio 1997, writ denied).
109. *See also* Kimball Hill discussed below.
110. Clearly it does not do so in Houston and Beaumont. *See* Kimball Hill and Sanders, below.
111. 969 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1998, n.w.h.).
112. 33 S.W.3d 376 (Tex. App.—Ft. Worth 2000, pet. denied).
113. Alwattari, 33 S.W.3d at 384.
114. 42 S.W.3d 364 (Tex. App.—Beaumont 2001, pet. denied), *mot. for rehearing denied*, 45 S.W.3d 802.
115. HOW went into receivership on October 7, 1994. *See* Commonwealth of Virginia, *ex rel.* State Corporation Commission and Steven T. Foster, Commissioner of Insurance *v.* Home Warranty Corporation, Home Owners Warranty Corporation, and HOW Insurance Company, a Risk Retention Group, Cause No. HE-1059-1, (Cir. Ct. of City of Richmond, Va. 1994). While HOW is not writing any new policies, it is currently paying a percentage of accepted claims under the supervision of a temporary receiver.
116. John T. Montford, Will G. Barber & Robert L. Duncan, 1989 *Texas Tort Reform: Closing the DTPA Loophole in the 1987 Tort Reform Laws and the Ongoing Quest for Fairer DTPA Laws*, 21 ST. MARY'S L. J. 525, 599 (1990).
117. Montford, 21 ST. MARY'S L. J. at 578 (emphasis added).
118. Formerly §§ 27.004(f) and (g) (1993 version), and re-lettered as §§ 27.004(h) and (i) (1995 version).
119. 843 S.W.2d 464 (Tex. 1992).
120. 898 S.W.2d 370 (Tex. App.—San Antonio 1995, writ denied).
121. In *Hines v. Hash*, the Supreme Court resolved a contentious battle and held that when notice is not given under the DTPA, the defendant is required to make a timely request for an abatement of the suit, at which time, the trial court can put a halt to the proceedings unless and until proper notice is given and the time period for responding has passed.
122. The senate companion, S.B. 1471, was introduced by Senator Turner and referred to the Economic Development Committee. No action was ever taken.
123. *See* 940 S.W.2d 411 (Tex. App.—Fort Worth 1997, writ denied).
124. (emphasis added).
125. Quite the contrary, the keeping the word "section" in Subsection (g) was the crux of the deal struck in 1993 between consumer groups and then Representative Duncan! *See* II(B), above.
126. Before legislation can be formally considered, a member of the Committee must "lay out" the bill. Essentially, the committee member gives a brief description of the proposed legislation. Because a quorum was not present when the public testimony was presented on May 15th, the Committee Substitute to H.B. 1742 could not be laid out.
127. 33 S.W.3d 376 (Tex. App.—Ft. Worth 2000, pet. denied).
128. 18 S.W.3d 807 (Tex. App.—San Antonio 2001, pet. granted).
129. *Id.*
130. *Id.* at 809.
131. 741 S.W.2d 349, 355 (Tex. 1987).
132. *Id.* at 808.
133. That opinion is now available at 95 S.W.3d 266 (Tex. 2002)