

The Texas Residential Construction Liability Act

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History

- Development of residential construction defect law in the past 40+ years has been significant.
- Generally, the law has improved for builders and worsened for homeowners.
- Looking back over the past 20 years shows an erosion of rights for Texas homeowners.

RCLA

- Chapter 27 of the Texas Property Code (a.k.a. Residential Construction Liability Act)
- It does not create a cause of action, but provides framework for homeowners bringing claims against their builder.
- Purpose –
to encourage settlement



RCLA

What Does It Do?

- 1) Provides Notice Provisions Homeowner Must Follow Before Filing Suit (Giving Contractor Opportunity to Inspect and Make Reasonable Offer of Repair/Settlement)
- 2) Limits and Controls Damages Available to Homeowner
- 3) Provides Defenses to Contractor

Is The Claim Governed by the RCLA?



- Applies to “any action to recover damages or other relief arising from a **construction defect**, except a claim for personal injury, survival, or wrongful death or for damage to goods.”

What Is a Construction Defect?

- **Construction Defect:** “A matter concerning the design, construction or repair of a new residence, of an alteration of or repair or addition to an existing **residence**, or of an appurtenance to a residence, on which a person has a complaint against a **contractor**. The term may include any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.”
- Broadly defined – it just has to “concern” the construction of a new or existing residence.

Is The Claim Governed by the RCLA?

- What is a **Residence**?
 - Real Property and improvements for a:
 - Single Family Residence
 - Duplex, triplex or quadplex
 - Condominiums, including common elements (but be aware that if it is over 8 units, Texas Property Code 82.119 pre-suit requirements apply)

Is The Claim Governed by the RCLA?

- Who is a **Contractor**?
 - Builder, ~~as defined by Section 401.003~~ (which is no longer in existence), contracting with an owner for the construction/repair/alteration of a new or existing residence or appurtenance to a residence.
 - Person contracting with purchaser for sale of new residence constructed by or on behalf of that person.
- What about Subcontractors?
 - RCLA suggests that subcontractors aren't protected by RCLA

Does the RCLA Apply?

- Overcharging for incorrect windows and incorrect hanging of door?
 - In re Classic Openings, Inc., 318 S.W.3d 428, 429 (Tex. App. 2010)
- Delay of constructing a residence?
 - Timmerman v. Dale, 397 S.W.3d 327 (Tex. App.—Dallas 2013)

RCLA – Notice Procedures

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

RCLA – Notice Procedures

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

RCLA – Notice Provisions

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

RCLA – Notice Provisions

- Homeowner must reject in writing or accept within **25 days**, if neither, deemed rejected.
- If rejecting offer, must state in reasonable detail why the offer is unreasonable.
- Advisable to write letter with a view to it being read before jury, judge or arbitrator.



RCLA – Notice Provisions



- If Homeowner Rejects the Offer, Contractor Can Supplement Offer **within 10 days**.
- Trier of fact would look to the supplemental offer to determine reasonableness.

Deadline Extensions

- The RCLA allows the parties to agree to extend the time periods contained in Chapter 27. § 27.004(h).
- *Smith v. Overby*, No. 2008-CL-02799, 2016 WL 444437 (Tex.App.—San Antonio August 14, 2016, no pet.) (mem. op.)
 - The builder argued that the parties agreed to extend the deadline, but the agreement was not contained in a writing. The builder argued the homeowners' implicit agreement the extension was shown through continued communications about revised offers.
 - The Court of Appeals: there was no evidence of an implicit agreement to extend deadlines. The builder did not provide a timely written offer of repair.

RCLA – Notice Procedures

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

Other “Notice” Considerations

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

RCLA—Avoid Notice?

- *In re Kimball Hill Homes Texas, Inc.* 969 S.W.2d 522 (Tex.App.—Houston [14th Dist.] 1998, orig. proceeding).
 - Underlying nature of the claim controls.
 - If the RCLA applies, the lawsuit will be abated.
- *Vision 20/20, Ltd. v. Cameron Builders, Inc.*, 525 S.W.3d 854 (Tex.App.—Houston [14th Dist. 2017, no pet.)
 - Insurance carrier filed a subrogation claim against the builder. Insurance carrier had to provide notice prior to performing repairs.
 - Insurance Carrier's claims barred by Tex. Prop. Code § 27.003(a)(2).

Other “Notice” Considerations

What if Suit Is filed and Homeowner Finds Further Defects?

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

What if Homeowner Rejects a Reasonable Offer or Doesn't Allow Opportunity to Inspect and Repair?

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

AND

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

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

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

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

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

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



- *Perry Homes v. Alwattari* (Tex. App.- Fort Worth 2001)
 - Court held under former language of RCLA, if builder failed to make a reasonable settlement offer, limitations on damages for homeowner were gone and available defenses to the builder were lost!
- *Horak v. Newman* (Tex. App. – Austin 2009)
 - Even under the most recent amendments to the RCLA, court found that when a contractor fails to make a reasonable settlement offer, limitations of statute as to both type and amount of damages are inapplicable.



- Design Tech Homes v. Maywald (Tex. App.-- Beaumont 2013)
 - Held that Section 27.004(g) restricts only economic damages and that it does not bar additional damages that can be recovered under the RCLA.
 - Additional damages for “knowing” violations under RCLA are punitive in nature and not barred by RCLA.
 - Exemplary damages and damages for mental anguish are allowed.

Is the offer reasonable?

– *Perry Homes v. Alwattari*

- Evidence shows that one year after purchasing home, it began showing signs of structural damages due to shifting foundations. Perry volunteered to perform cosmetic repairs, then offered to pay offered to make repairs if plaintiffs paid 40 percent of the cost up front with a promise of future reimbursement conditioned on whether claim was paid by homeowner's warranty and requiring full release.

Is the offer reasonable?

– *Hernandez v. Lautensack*

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

– *Roubein v. Marino Home Builders, Inc.*

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

Damages Allowed Under RCLA

- Reasonable Cost to Repair Construction Defect
- Reasonable and Necessary Cost for Replacement/Repair of Damaged Goods
- Reasonable and Necessary Engineering and Consulting Fees
- Reasonable and Necessary Temporary Housing Expenses during repair period
- Reasonable and necessary attorneys' fees

Damages Allowed Under RCLA

Stigma Damages

- Provided for in 27.004 (g)(5) –Reduction in current market value after defect is repaired if defect is a structural
- Premise that pool of buyers will be less for a home with “fixed” serious construction defects than for a similar home
- Only applies to structural defects
- Who should testify?
 - Homeowners
 - Licensed appraisers or realtors
 - Credibility imperative
- Appraisals/market values should provide value in 3 scenarios:
 - As-Normal
 - As-Repaired
 - As-Is

Reasonable and Necessary Attorney's Fees

- Provided for in 27.004(g)(6)
- Critical for homeowners
 - Complex litigation - Costly fees
- Reasonable and necessary even when fees greatly exceed actual damages awarded
- Other statutory bases:
 - DTPA
 - Fraud in Real Estate or Stock Transaction
 - Tex. Civ. Prac. & Rem. Code Ann. 38.001

Damages Do Not Include

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

Damages Under RCLA

Must Be “Reasonable and Necessary”

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

Damages Under RCLA

Must Be “Reasonable and Necessary”

- Owner must provide expert testimony.
- Arbitrators often allow for expert affidavits.
- May use CPRC 18.001 affidavit of reasonable and necessary services and costs
- Counter affidavits must be served not less than 30 days after service of affidavit and not less than 14 days before trial

Damages Under RCLA

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

Contractor's Affirmative Defenses

- Under § 27.003, the contractor is not liable for any percentage of damages caused by:
 - (A) the negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor;
 - (B) failure of a person other than the contractor or an agent, employee, or subcontractor of the contractor (1) to take reasonable action to mitigate the damages; or (2) take reasonable action to maintain the residence;

Continued...

Contractor's Affirmative Defenses

- Under § 27.003, the contractor is not liable for any percentage of damages caused by:
 - . . .
 - (C) normal wear, tear, or deterioration;
 - (D) normal shrinkage due to drying or settlement of construction components within the tolerance of building standards; or
 - (E) the contractor's reliance on written information relating to the residence, appurtenance, or real property on which the residence and appurtenance are affixed that was obtained from official government records . . .

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

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