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RESULTS OF THE 81ST SESSION OF THE TEXAS LEGISLATURE AND ITS IMPACT ON CONSTRUCTION DEFECT CLAIMS

The 81st Session of the Texas Legislature has now concluded. This particular legislative session will perhaps best be remembered for the political maneuvering that took place at the end of the regular session that prevented a number of bills from coming up for vote during the regular session. It was this maneuvering that resulted in the calling of a special session to keep certain critical agencies, including the Texas Department of Insurance ("TDI"), running.

One of the most important developments of this legislative session for those that handle construction defect claims is the death of the Texas Residential Construction Commission ("TRCC"). The TRCC was not renewed as an agency and its fate was apparently determined before the political maneuvering that occurred at the end of the legislative session. The result is that the TRCC will no longer be in business and will no longer be the initial governing body for residential construction defect claims in Texas.

The end of the TRCC came about because the Legislature allowed it to expire pursuant to the Sunset Act of Chapter 325 of the Government Code. The end result is that as of September 1, 2009, the TRCC expires, but the Sunset Act provides that the abolishment of a state agency does not reduce or limit its powers and authority during a one year wind-down period. Therefore, the TRCC should continue to operate until August 31, 2010 and, more importantly, the TRCC has interpreted the Legislature's actions as having that effect.

The significant question that arises from the impending demise of the TRCC is what happens to the statutory warranties that were promulgated by the agency. This is at the top of the list of the "frequently asked questions" on the TRCC's website and the TRCC has provided some guidance on how it intends to handle statutory warranties. The statutory warranties will remain in effect and will still be required for any residential construction contracts signed on or before September 1, 2009. The commission-adopted performance standards will expire at the end of the one year wind-down period (i.e. they will remain effective until August 31, 2010). What warranties apply after that remains unclear.

Of course, express warranties between a buyer and a builder are always enforceable. The question will be what sort of implied warranties, if any, are applicable after August 31, 2010. The statutory warranties promulgated by the TRCC took the place of the old implied warranties under the common law. Will the old implied warranties come back into play? Will new implied warranties be found based in some way on the standards set forth in the statutory warranties? Will there be no implied warranties at all? These questions remain unanswered. The TRCC appears to be taking the position that the statutory warranties will apply even after the agency concludes its business on August 31, 2010 for homes that were built during the existence of the agency. The TRCC's position on the issue is of course not necessarily going to govern and there is likely to be a good bit of debate in the coming months and years over the scope of warranties in residential construction.

There were other bills impacting construction and construction defect litigation that were introduced during this legislative session. The only other one of note that passed is an amendment to the Certificate of Merit statute, Chapter 150 of the Civil Practices & Remedies Code. The amended statute, which becomes effective September 1, 2009, eliminates the requirement that the expert providing the certificate of merit be actually practicing in the same area. The expert need only be knowledgeable in the particular area of practice, which opens the arena up to more forensic-only type experts. The amended statute also increases the specificity and detail required for certificates of merit and should eliminate the ability of claimants to attempt to avoid the statute by bringing claims only on theories other than negligence. The indemnity legislation that was the subject of significant legislative efforts of many trade associations representing contractors ultimately failed.