

# **16TH ANNUAL CONSTRUCTION LAW CONFERENCE**

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## **“UPDATE ON RESIDENTIAL CONSTRUCTION ISSUES”**

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# UPDATE ON RESIDENTIAL CONSTRUCTION ISSUES

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. Background	1
B. Summary	2
II. APPLICATION	4
A. Scope	4
B. Important Definitions	5
C. Statutory Defenses	6
D. Notice and Offer of Settlement	8
III. DAMAGES	13
A. If Offer Unreasonably Rejected	13
B. If There is No Reasonable Offer	14
C. Are Other Claims and Damages Allowed?	19
IV. ISSUES UNDER THE DTPA	19
V. IMPLIED WARRANTIES	21
VI. CONCLUSION	23

## I. INTRODUCTION

### **A. Background.**

In 1989 the legislature first passed the Residential Construction Liability Act (“RCLA”) which separated residential construction disputes from other commercial disputes and sought to promote the settlement of these matters. TEX. PROP. CODE. ANN. § 27.001 *et seq.* The statute was amended in 1993, 1995 and 1999. This discussion is of the statute as of the latest amendments in 1999. A copy of the statute is attached to this paper.

With the enactment of this statute, disputes between homeowners and contractors are handled differently than other commercial disputes. There is a specific notice and inspection procedure with time sensitive deadlines. There is an opportunity to cure construction defects prior to suit being filed. There are certain limitations on damages and attorneys fees. Because a contractor can greatly benefit from making a reasonable pre-suit offer to repair or settle, and a homeowner can suffer if he or she unreasonably rejects such an offer, there is great momentum to resolve residential construction disputes without costly litigation. While the DTPA provides opportunities to inspect and offer to settle, residential construction disputes are much more suitable to this process because the problems can usually be analyzed and solutions proposed within the statutory time. A contractor should take advantage of the protections of the RCLA. A homeowner should allow the contractor the opportunity to inspect and make an offer to repair.

Having said that homeowners and contractors should both take advantage of the statute, it must be pointed out that there are contentious disagreements about what the

RCLA means and how it is implemented. Those disagreements will be discussed in this paper.

There had been confusion about whether the RCLA was a cause of action or just a mechanism for handling residential construction defects. In its current version, the statute makes clear that it “does not create a cause of action or derivative liability or extend a limitations period.” § 27.005.

## **B. Summary**

1. **What is it?** The Residential Construction Liability Act is a Texas law that applies to construction defect claims against “contractors” (which includes home warranty companies). If a contractor takes certain actions when it first learns of a homeowner complaint, it can limit damages claims if that homeowner later decides to file suit. The idea behind the law is to try to get construction items repaired without litigation.

2. **Certified letter from homeowner.** If a contractor receives a letter sent by certified mail from a homeowner who is complaining about construction defects or other problems with the house, the procedures of the RCLA have probably been triggered. The letter will sometimes come from the homeowner, not the lawyer.

3. **Inspect the house within 35 days.** After receipt of the certified letter, a contractor has 35 days to inspect the property and to review the complaint raised by the homeowner.

4. **Make an offer within 45 days.** A contractor has 45 days from the date it receives the written letter from the homeowner, to send a written offer to repair the items complained of in the homeowner letter. The offer to repair must be sent certified mail, and

it must describe the repairs in reasonable detail. It does not have to have any magic legal language. The letter should address the items raised in the homeowner letter.

5. **Make repairs within 45 days.** If repairs are agreed to, they should be completed within 45 days of the date the homeowner agrees to allow them to be performed.

6. **Impact.** If the homeowner unreasonably rejects the written offer made by the contractor or does not allow the contractor to make the repairs, the homeowner's damages in a lawsuit can be significantly decreased. For example, the homeowner's attorneys fees may be capped at the date of the unreasonable rejection, and he/she may not be entitled to recover any damages other than the cost to repair. However, if the contractor does not make an offer within the 45 day period, or does not make a reasonable offer, the homeowner will be entitled to recover a more extensive scope of damages in a lawsuit.

7. **Bottom line.** If a homeowner has a dispute with a contractor, he/she should advise the contractor in writing, by certified mail of the complaints and should allow the contractor to inspect the defects identified in the letter. If a contractor receives a letter from a homeowner about construction defects that is sent by certified mail, it should assume that the letter from the homeowner is being sent under the RCLA. Plaintiffs' lawyers sometimes draft RCLA letters but have the homeowner sign it. In order to get the benefit of the RCLA, the complaints should be inspected within 35 days of receipt of any certified letters. If repairs should be made, or if it makes sense to offer to make some repairs, a response

should be made to the homeowner, in writing by certified mail, within 45 days. Repairs should be made within 45 days of the homeowners agreement to allow them to be done.

## **II. APPLICATION**

### **A. Scope.**

The scope of the RCLA is set out in § 27.002:

Application of Chapter

(a) This chapter applies to: (1) any action to recover damages resulting from a construction defect, except a claim for personal injury, survival, or wrongful death, or for damage to goods; (2) any subsequent purchaser of a residence who files a claim against a contractor.

(b) 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), this chapter prevails.

Generally speaking, construction defect cases with property damage, but not damages to goods, are controlled by the RCLA. While the RCLA does not apply to claims for personal injury, personal injury is defined to exclude mental anguish. TEX. PROP. CODE § 27.002(b). Thus, the statute does apply to claims for mental anguish, and damages for mental anguish are not recoverable under the RCLA. See § 27.004(h).

Typically, cases brought under the RCLA involve defects in the quality of construction i.e., a leaky roof, a problem with a foundation, shoddy workmanship. It is unclear whether the statute should apply to a dispute in which a contractor is terminated prior to substantial completion. Depending on the nature of the termination, such a dispute may not be an action “resulting from a construction defect.” What if the contractor has misrepresented its abilities or economic strength? What if there is a dispute over how to

perform the construction? There may be construction defects in the uncompleted work, but the overall dispute is really not a dispute over a construction defect.

Some of the language of the RCLA seems to establish that it is not applicable to a situation in which there is not substantial completion. For example, in Section 27.004(i), under certain circumstances, damages in a suit subject to the RCLA “may not exceed the greater of the claimant’s purchase price for the residence or the current fair market value of the residence without the construction defect.” The use of the terms “purchase price” and “fair market value” seem to imply that the RCLA applies to a completed structure. On the other hand, the RCLA applies to any action to recover damages resulting from a construction defect, which is defined to include a matter concerning the design, construction, or repair of a residence. This is an unsettled area.

**B. Important Definitions.**

1. **Construction Defect** is defined as: “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.” § 27.001(2).

2. **Contractor** is 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, repair of a new or existing residence, or construction, sale, alteration, addition or repair of an appurtenance to a new or existing residence.” § 27.001(3). Contractor also includes a risk retention group and owners, officers, directors, partners and employees of the contractor. Subcontractors are not included within the

scope of the RCLA, because they would not have a contract with an owner, as is required under § 27.001(3). Thus, a plaintiff could try to avoid the limitations of the RCLA, if a direct claim were to exist against a solvent subcontractor responsible for a significant portion of the damages.

Developers, appraisers, real estate agents and inspectors do not fall within the definition of “contractor” and therefore claims against those persons would not be subject to the RCLA. Claims against engineers and architects are not subject to the RCLA unless there is a direct relationship between them and the homeowner. If there is a direct relationship, the individual claim would need to be examined to determine whether it fits within the definition of “construction defect” and “contractor.”

**3. Residence** is defined as “a single family house, duplex, triplex or quadruplex or a unit in a multi-unit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system” § 27.001(4). The RCLA does not apply to commercial construction.

### **C. Statutory Defenses.**

Section 27.003 provides the following defenses to claims for construction defects:

**1. Negligence of others.** A contractor is not liable for any percentage of damages caused by negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor. § 27.003(a)(1)(A). If the homeowner is contributorily negligent, that is a defense to the contractor. If a homeowner retains an architect, engineer or other person directly, their negligence could also be a defense to the contractor.

2. **Mitigation of Damages.** A contractor is not liable for a 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. § 27.003(a)(1)(B). For example, if a homeowner knows that there is a water leak but does nothing about it, the contractor may be protected from damages caused by the water damage. If a foundation problem is caused by overwatering or underwatering, that could also be a defense.

3. **Construction Tolerances.** The contractor is not liable for normal wear, tear or deterioration, and normal shrinkage due to drying or settlement of construction components within the tolerance of building standards. § 27.003(a)(1)(C) and (D). These defenses recognize that carpet will deteriorate over time, wood might shrink or crack, counters can chip. These are measured by an undefined industry standard. Factors that would have to be investigated would be the age of the home, and relative damage or deterioration. The quality of the component parts, and what the homeowner paid for them, would also be a consideration.

4. **Government Records.** The contractor is protected from damages when it has relied on written information relating to the residence, appurtenance, or real property that was obtained from official government records, if the written information was false or inaccurate and the contractor did not know and could not reasonably have known of the falsity or inaccuracy of the information. § 27.003(a)(1)(E).

5. **Assignment/Subrogation.** Beginning with the 1999 amendments, an assignee of the claimant or a person subrogated to the claimant's rights (usually

homeowner's insurance company) must provide notice to the contractor before performing repairs. § 27.003(a)(2). If a contractor does not receive the notices before repairs are performed, the contractor is not liable for the cost of the repairs or any part of the damages caused by repairs, even if it is otherwise a construction defect. Thus, if an insurer pays a homeowner claim and then seeks to recover the cost from the contractor, it will face this hurdle, unless it gave the contractor the proper notice prior to making the repairs.

In addition to these statutory defenses, the RCLA makes clear that except as specified, the RCLA does not limit or bar any defenses. § 27.003(b).

**D. Notice and Offer of Settlement.**

Section 27.004 describes the notice and settlement requirements of the statute.

1. **Notice.** Sixty days before the claimant files suit, written notice must be provided by certified mail to the contractor at the contractor's last known address. § 27.004(a). What if the letter is not sent certified mail but states that it is being sent pursuant to the RCLA and it identified construction defects? If the contractor does not respond, it may be difficult to argue that the letter was not a proper notice under the RCLA. However, if the owner cannot establish that it was received, or the letter is vague, the contractor will have an argument that the letter cannot satisfy the statutory requirements.

That notice must specify, in "reasonable detail" the construction defects that are the subject of the complaint. "Reasonable detail" is not defined. It is recommended that every issue being complained of is identified in the letter. From a practical standpoint, the standard is whether the letter includes enough information to allow the contractor to inspect

the items being complained of and offer a response. However, it is not always clear what is needed to meet that standard.

It is important to note that a plaintiff cannot choose to “avoid” the RCLA by pleading around it. If the case involves a “construction defect” against a “contractor,” the RCLA will apply. This is in contrast to the DTPA. A plaintiff can choose not to sue under the DTPA, and thus sidestep the notice and inspection requirements.

**2. Inspect.** A contractor has 35 days from the date it received the notice to inspect and have inspected the property. It must be given a “reasonable opportunity” to inspect. § 27.004(a). Written requests for this inspection should be made by the contractor. The contractor should determine who it wants to attend the inspection. If structural defects have been alleged, it is helpful to have an engineer attend. If certain component parts are being complained of, subcontractors or third party contractors should attend. The goal is to be able to properly and fully respond to the homeowner’s allegations. Anyone needed to assist in the preparation of the written response should attend the inspection. Upon request of the contractor, the homeowner “shall” provide any evidence that depicts the nature and extent of repairs necessary to remedy the defect, including reports, photographs and videotapes “if that evidence would be discoverable” under the Texas Rules of Civil Procedure. § 27.004(a). The lawyer representing the contractor should always request that this information be provided prior to the inspection.

The contractor may take reasonable steps to document the defect. This would allow videotapes and still photography, but does not speak to testing, especially destructive testing. § 27.004(a). Often soil borings or other testing may be needed. The contractor

should clearly set out in writing what testing it intends to perform. A homeowner is required to give the a “reasonable opportunity” to inspect. If a homeowner believes that the contractor is requesting unnecessary testing that is destructive or disruptive, they can refuse to allow it. However, the contractor will argue the testing is needed to defend against the clams. Ultimately, the homeowner will have to explain to the judge or jury why the contractor was not allowed to do the testing.

**3. Offer.** The contractor has 45 days from the time that it received the notice, to make a written offer of settlement to the claimant. The offer should be in writing and sent by certified mail. The contractor can agree to repair or have repaired at its expense, the defects described in the notice, and its offer to repair should include a description in “reasonable detail” the kind of repairs that are to be made. § 27.004(b). Thus, even if a claimant believes the contractor has had ample opportunity to fix the house, and no longer has any confidence that the contractor can do the work, the claimant will need to be careful about refusing to allow the contractor to make the repairs on that basis alone. In other words, under the statute, a homeowner may not be able to choose who will do the work. As with so many other aspects of the statute, the test is reasonableness.

As an alternative to offer to repair, a contractor can make a monetary settlement offer. 27.004(n). Sometimes if the scope of repair is going to be in dispute, a contractor might want to offer to buy the house back from the homeowner. In a buyback, the contractor will need to think about what it will take to reasonably compensate the homeowner, and include that in the offer. Closing costs, moving expenses and other costs associated with a buyback may need to be offered in an effort to try to assure that the offer

is considered “reasonable.” The contractor will need to determine whether it will buy the house back at the original purchase price or the current fair market value. If the offer is to make repairs, you should consider including language that to the extent any part of the offer is unclear, or additional details are needed, you will be glad to provide that additional information. This can help avoid rejection of the offer on the basis it was not detailed enough.

**4. Accept or Reject.** An offer of settlement is automatically deemed rejected if it is not accepted by the claimant within 25 days after it is received. § 27.004(j). It is recommended that the homeowner provide a written notification of its acceptance or rejection. Because a key determination later on will be whether the rejection was unreasonable, a homeowner will be well served by explaining the basis for the rejection. Having an engineer, contractor or other professional on board at this early stage will allow the homeowner to make a fully informed decision about whether to accept or reject the offer. That professional can also potentially backup a decision to reject an offer.

**5. Time to Make Repairs.** If the contractor makes an offer to repair, those repairs shall be made within 45 days after the contractor receives written notice of the acceptance of the settlement offer, unless the contractor is delayed by the claimant or other events beyond the control of the contractor. TEX. PROP. CODE § 27.004(b). The contractor would be excused from this deadline if claimant fails to provide access to the contractor. But it is less clear whether problems with delivery of materials which are outside the contractor’s control would excuse completion within the 45 days. What if there are weather problems? Presumably, a contractor would get extra time if there are weather delays, but

that could become an area of dispute. Clearly the contractor should leave as much time to finish as possible. If the contractor starts late, and then is delayed by weather problems, it may find itself being unable to finish within the 45 days. It could thereby lose the benefits of the statute. Again, reasonableness should be the guide.

There are some repairs that realistically will not get done in 45 days. The statute does not address that situation. The parties should agree in writing if the work is going to take longer than 45 days. If the homeowner will not agree to an extension beyond the 45 days, counsel for the contractor should put in writing that it wants to do the repairs but that the homeowner will not allow it. The contractor may want to determine what it can complete in 45 days and do that work. It should make it clear that it is willing to do the rest, but that the homeowner has not consented. From a practical standpoint, if the first 45 days goes smoothly, it is more likely that the homeowner will allow the contractor to finish, even beyond the 45 days.

**6. Extend in Writing.** The parties can agree in writing to extend the periods for inspection, repair, offer, and for the implementation of the repairs. § 27.004(b).

**7. Abatement.** If suit is filed without the notice and opportunity to inspect, contractor should seek to abate suit. § 27.004(d). The court “shall” grant the abatement if it finds that the claimant failed to provide the notice or that the contractor was not given a reasonable opportunity to inspect. The suit is automatically abated if the plea in abatement is verified and not controverted by an affidavit filed by the claimant before the 11<sup>th</sup> day after the plea is filed. The abatement continues until the 60<sup>th</sup> day after the written notice is served. If giving the notices is impracticable because of the onset of limitations,

notice is not required. 27.004(c) However, the suit is to specify “in reasonable detail” each construction defect that is complained of, and an inspection must be allowed for the 60 day period following service of the suit. An offer of settlement is allowed during that same 60 day period.

### **III. DAMAGES**

The key to the applicability of the limitations imposed by the RCLA is the “reasonableness” of the contractor and the homeowner. The trier of fact determines reasonableness. § 27.004(k).

#### **A. If Offer Unreasonably Rejected.**

In certain situations, the RCLA limits damages to the reasonable cost of the offered repairs which are the responsibility of the contractor, or the amount of the monetary settlement, plus the amount of reasonable and necessary attorneys’ fees and costs incurred before the offer was rejected or considered rejected. That damages cap applies:

If a claimant unreasonably rejects an offer; or

If the claimant does not permit the contractor or independent contractor a reasonable opportunity to repair the defect after the settlement offer has been accepted.

§ 27.004(f). Thus, if a contractor makes an offer and it is unreasonably rejected, or if the offer is accepted and the contractor is not given the opportunity to make the repairs, the claimant is not entitled to recover mental anguish, temporary housing, reduction in market value, or any other actual, consequential or punitive damages. The claimant is limited to the reasonable cost of repairs, or the amount of the monetary settlement, and attorneys’

fees. That recovery is also capped at the greater of the claimant's purchase price of the house or the fair market value without a defect. § 27.004(i).

**B. If There is No Reasonable Offer.**

Lawyers representing contractors and homeowners have long disagreed about the RCLA damage caps and damage limitations. These arguments are fueled by the ambiguous nature of the statute. At § 27.004(g), the statute states that if a contractor fails to make a reasonable offer "under this section," or fails to complete, in a good and workmanlike manner, the repairs specified in an accepted offer made "under this section, the limitations on damages and defenses to liability provided for in this section shall not apply." Contractors have argued that the effect of this provision is that if a contractor fails to make a reasonable offer, the claimant is no longer limited to the reasonable costs of repairs plus the amount of reasonable and necessary attorneys fees incurred before the offer was rejected. However, contractors argued that the other statutory limitations still applied.

Claimants argue that this language means that a contractor who fails to make a reasonable offer loses all the benefits and limitations of damages provided for in the entire chapter. They argue that unless a claimant unreasonably rejects an offer, the claim is taken out of the RCLA and the claimant is entitled to recover all damages. Homeowners relied on the use of the language "this section," which they say refers to the entirety of § 27.004 rather than limiting the application to subsection (f).

Sec. 27.004 (h) only complicates this issue further. Subsection 27.004(h) provides that except when there has been an unreasonable rejection of an offer, in a suit subject to “this chapter,” the claimant may recover only the following damages:

- 1) the reasonable cost of repairs necessary to cure any construction defect, including any reasonable and necessary engineering or consulting fees;
- 2) the reasonable expenses of temporary housing, reasonable and necessary during the repair period;
- 3) the reduction in market value, if any, to the extent the reduction is due to structural failure; and
- 4) reasonable and necessary attorneys fees.

Additionally, § 27.004 (i) states that the total damages award “in a suit subject to this chapter” may not exceed the greater of the claimant’s purchase price for the residence or the current fair market value of the residence without the construction defect. Contractors argued that when a claimant unreasonably rejects an offer, the provisions of § 27.004(f) limit the damages. Otherwise, a claimant in a construction defect claim is limited to those damages allowed by § 27.004(h) and (i). Contractors argued that because § 27.004(h) (which allows recoveries for repairs, temporary housing, reduction in market value, and reasonable and necessary attorneys fees), does not apply if the offer was unreasonably rejected, it must apply when a reasonable offer has not been made. To read otherwise, they argued, would mean that § 27.004(h) is entirely meaningless, surplus language that does not apply to any fact situation brought under the RCLA. Attorneys for homeowners argued that § 27.004(h) applies when a contractor makes a timely, reasonable offer of repair which is reasonably rejected. The argument is that the limitations of subsection (h) apply to situations in which both the contractor and the homeowner have acted reasonably.

The Fort Worth Court of Appeals has lined up in favor of the homeowners' analysis, although it has not specifically addressed the statutory interpretation issued discussed above. In *O'Donnell v. Roger Bullivant of Texas, Inc.*, 940 S.W.2d 411 (Tex. App.–Ft. Worth 1997, writ denied), the court found that as a matter of law the contractor failed to make a reasonable offer. The court went on to discuss the distinction between those parts of the RCLA that limit the “types of damages” and those that limit the “amount” of damages. The court focused on the “amount” or the damages cap, which is now contained in subsection (i). The court held that because the contractor did not make a reasonable offer, that cap did not apply to limit the O'Donnells' damages to the purchase price of the home. The *O'Donnell* case did not address the limitation on the types of damages.

Both contractors and homeowners found a silver lining in *O'Donnell*. Contractors were optimistic about the distinction that the court made between the “types” of damages and the “amounts” of damages. At the same time, lawyers for claimants believed that the *O'Donnell* opinion supported the argument that the effect of a contractor's failure to make a reasonable offer was that none of the limitations on damages in § 27.004 would apply.

In 2000, the Fort Worth Court of Appeals addressed that issue head-on and ruled in favor of the homeowners' interpretation. In *Perry Homes, Joint Venture v. Aziz Alwattari*, 33 S.W.3d 376 (Tex. App.–Ft. Worth 2000, pet. denied), the homeowner sued the contractor, Perry Homes, complaining of foundation problems. In response to a legal demand letter, Perry Homes provided a plan whereby 20 piers would be installed at a cost of \$7,000. Perry Homes agreed to pay 60% of the cost up front, with the other 40% to be submitted to the Homeowners Warranty Corporation. Perry Homes' offer stated that if

Homeowners Warranty did not pay the remaining 40%, Perry Homes would reimburse the homeowner for that part of the claim. Perry Homes also offered to repair all cosmetic items related to any foundation movement. It also offered to pay some attorneys' fees. Ultimately, Perry Homes hired a foundation company, paid for the entire foundation repair, and completed all the repairs demanded by the plaintiffs. By the time of the trial, the foundation repairs had been completed, and Perry Homes had substantially completed the repair of the cosmetic problems.

The jury found that Perry Homes did not make a reasonable written offer of settlement. The jury also found that Perry Homes was negligent and violated the DTPA. The jury awarded the homeowners' actual expenses of \$10,000 for the diminution in market value in its repaired condition, \$5,000 for knowing conduct, and \$35,000 in attorneys' fees.

On appeal, Perry Homes argued that the DTPA claim was preempted by the RCLA. Perry Homes further argued that it made a reasonable written settlement offer as a matter of law, and that the Alwatarris unreasonably rejected the offer. Perry Homes argued that even if it did not make a reasonable written settlement offer, the result is that the limitation of the **amount** of damages set out in the RCLA does not apply, but that a limitation of the **types** of damages provided for in the RCLA would still apply.

The court held that it could not find as a matter of law that the settlement offer was reasonable. It pointed out that at least initially, the homeowners were required to pay 40% of the cost of repairs, with only a promise of future reimbursement, and that the offer was conditioned on obtaining a full release of claims. The court held that there was at least some evidence that the settlement offer was unreasonable.

The court also held that because a jury found the settlement offer was unreasonable, none of the defenses or limitations provided for in the RCLA would apply. According to the Fort Worth Court of Appeals, the contractor loses the benefit of all limitations on damages and defenses to liability, including the limitation on the types of damages and the limitation on the amount of damages. The court held that because those limitations do not apply, there was no conflict with the DTPA. Therefore, there was no preemption and the homeowners were entitled to recover under the DTPA.

This opinion is instructive for a couple of reasons. First, it explains how difficult it can be to get a finding that a contractor's offer was reasonable. It is also the first RCLA case that I am aware of, which holds that if a contractor does not make a reasonable offer, it loses the entire benefit of the RCLA. This is also the first case that I'm aware of that holds that under such facts, DTPA claims are not preempted.

Under the reasoning of the *Alwattari* case, if a jury finds that a builder failed to make a reasonable offer, or failed to implement such offer within the requirements of the RCLA, the plaintiff would be entitled to recover under the DTPA. The plaintiff could recover actual damages, any diminution in value, plus all reasonable and necessary attorneys' fees and other consequential damages. They could also recover treble damages if a jury finds that the acts were committed knowingly or intentionally.

### **C. Are Other Claims and Damages Allowed?**

Some courts have allowed other claims and damages despite finding that the RCLA applied. In *Bruce v. Jim Walter Homes, Inc.*, 943 S.W.2d 121 (Tex. App.—San Antonio 1997, writ denied), the court held that damages in a fraud action are not adequately

measured by the terms in which the damages allowed under the RCLA are defined. The court concluded that a common law fraud cause of action is independent of an action under the RCLA, and therefore the preemptive language of the RCLA is not triggered in connection with a fraud claim. Moreover, the RCLA may not bar recovery of exemplary damages. *Sanders v. Construction Equity, Inc.*, 45 S.W.3d 802 (Tex. App.–Beaumont 2001, no pet.).

#### **IV. ISSUES UNDER THE DTPA**

The RCLA speaks in terms of an offer being “reasonable” or an offer being unreasonably rejected. The Texas Deceptive Trade Practices Act (“DTPA”) also has notice and settlement provisions, but with language that is a little different. Because suits involving residential construction will almost always include a DTPA claim, the provisions of that statute must also be addressed.

As a prerequisite to filing suit under the DTPA, a consumer is required to give notice 60 days before filing suit, advising in reasonable detail of the complaints and the amount of damages including attorneys’ fees. During that 60-day period, a written request to inspect, in a reasonable manner and at a reasonable time and place, the goods that are the subject of the consumer’s action may be made.

A person who receives a notice under the DTPA may tender an offer of settlement at any time beginning on the date the notice is received and ending on the 60th day after that date.

Under the DTPA, section 17.5052, the damages and attorney fees portion of a settlement offer must be evaluated separately. An offer of settlement:

- (d) must include an offer to pay the following amounts of money, separately stated:
  - (1) an amount of money or other consideration, reduced to its cash value, as settlement of the consumer's claim for damages; and
  - (2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorney's fees incurred as of the date of the offer.

If the court finds that the amount tendered in the settlement offer for **damages** is the same as, substantially the same as, or more than the damages found by the trier of fact, the consumer can only recover the **lesser** of (1) the amount of damages tendered in the settlement offer; or (2) the amount of damages found by the trier of fact.

If the court finds that the damages portion of the settlement offer is the same as, substantially the same as, or more than the actual damages, it shall determine the amount of "reasonable and necessary attorney's fees to compensate the consumer for attorney's fees **incurred** before the date and time of the rejected settlement offer." If the court finds that the amount of attorney fees tendered in settlement is the same as, substantially the same as, or more than the amount of the "reasonable and necessary" attorneys fees **incurred** by the consumer as of the date of the offer, the consumer can not recover attorneys fees greater than the amount of fees offered.

Claims brought under the DTPA can be significantly impacted by the notice and offer of settlement provisions.

## **V. IMPLIED WARRANTIES**

Claims involving residential construction often include allegations of breach of an implied warranty. The Texas Supreme Court recently held that the implied warranty of good workmanship may be disclaimed by the parties when the agreement provides for the

manner, performance or quality of the desired construction. The court further held that the warranty of habitability may not be generally disclaimed. *Centex Homes v. Buecher*, 46 Tex. Sup. Ct. J. 294 (Dec. 31, 2002). The case was remanded, presumably for a determination as to whether the agreement at issue properly provided for the manner, performance or quality of the desired construction.

The *Centex* case involved a standard form sales agreement provided by the builder. The standard sales contract provided that the builder's express limited warranty replaced all other warranties, including implied warranties. The provision at issue stated:

At closing, Seller will deliver to Purchaser, Seller's standard form of homeowner's limited home warranty against defects in workmanship and materials, a copy of which is available to Purchaser. Purchaser agrees to accept said homeowner's warranty at closing in lieu of all other warranties, whatsoever, whether express or implied by law, and including but not limited to the implied warranties of good workmanlike construction and habitability. Purchaser acknowledges and agrees that Seller is relying on this waiver and would not sell the property to Purchaser without this waiver. Purchaser's initials in the margin indicate their approval of this Section 8.

The supreme court addressed key Texas cases that had discussed implied warranties, including those decided by the Texas Supreme Court. The court also reviewed authorities from out of state. The court pointed out that in many instances, the implied warranty of habitability and the implied warranty of good workmanship had been improperly lumped together. The court commented that these two warranties provide separate and distinct protection, and the particular purpose of each must be considered when addressing issues of waiver or disclaimer.

The implied warranty of good workmanship focuses on the builder's conduct. It recognizes that a builder should perform with at least a minimal standard of care.

According to the court, the implied warranty of good workmanship serves as a “gap filler” and applies unless and until the parties express a contrary intention. Thus, the court held that the implied warranty of good workmanship attaches to a new home sale if the parties’ agreement does not provide how the builder or the structure is to perform. Because the implied warranty of good workmanship defines the level of performance expected, the parties’ agreement may supercede the implied standard for workmanship, but the agreement cannot simply disclaim it. It is yet to be seen how courts will interpret whether an agreement provides for the “manner, performance or quality of the desired construction.”

The implied warranty of habitability focuses on the state of the completed structure. It is a result-oriented concept protecting the purchaser only from those defects that undermine the very basis of the bargain. It simply requires the builder to provide a house that is safe, sanitary and otherwise fit for human habitation. The warranty of habitability can only be waived in unique circumstances, such as when a purchaser buys a problem house with express and full knowledge of the defects.

This opinion in *Centex v. Buecher* replaced a previous supreme court opinion that was withdrawn. See *Centex v. Buecher*, 2001 WL 1946128 (Aug. 29, 2002).

## **VI. CONCLUSION**

It seems that during every legislative session, lobbying efforts occur and amendments are proposed. However, the major disputes about damage limitations and preclusion of other causes of action have never been clarified through amendment. Case law is only just beginning to flesh out and address these issues. Many aspects of the statute have been left vague, presumably because no agreement could be reached

between the two sides. The statute uses the word “reasonable,” or a form of that word, 28 times. Because a standard of reasonableness is always subject to different interpretations, the RCLA has not ended litigation in this area.