

## **Residential Construction Liability: What Builders and Contractors Need to Know**<sup>1</sup>

A letter arrives from a homeowner. Picking it up, you notice it was sent by certified mail, return receipt requested. As you read the letter, it quickly becomes apparent that the homeowner is complaining about your work. You want to investigate whether there really is a problem; and if there is, of course, you want to make it right. How can you protect yourself along the way? Didn't the Texas Residential Construction Commission use to handle these things? And what must you do now under the Residential Construction Liability Act?

This article will answer these questions. Since the sunset of the Texas Residential Construction Commission (TRCC) in 2009, the Residential Construction Liability Act (RCLA) has assumed—once again—its role as the governing law for both residential construction disputes and the procedure to follow before there is a full-blown dispute. But many builders, contractors, and remodelers are unfamiliar with the RCLA. The state of the law is certainly confusing now that the TRCC—whose procedures were mandatory—has vanished. Being familiar with and taking advantage of the RCLA is very important in limiting exposure in potential disputes and—hopefully—resolving issues out of court and before they turn into disputes. After looking at the state of the law in this area, this article will examine the applicability of the RCLA, what to do when a letter like the one above arrives in the mail, and how to limit your exposure in those instances when the customer just cannot be pleased.

### **The sunset of the TRCC and the (re)dawn of the RCLA.**

From 2003 to 2009, the TRCC was the governing body that would handle the initial claims from dissatisfied homeowners. In 2009, the Legislature sunsetted, or ended, the TRCC. The TRCC stopped receiving new claims in September 2009, stopped processing existing claims in September 2010, and thus completely shut down by September 2010. The removal of the TRCC's framework for handling construction disputes brought a return to the RCLA's framework, codified in Chapter 27 of the Texas Property Code. Without a commission to process these claims, the process has returned to direct communication between the homeowners and contractors, governed by the terms of the RCLA. While this is not new (the RCLA was enacted in 1989 and has been amended multiple times), it can certainly be unfamiliar territory since the TRCC was at the forefront for six years.

### **How do I know if this statute applies to me?**

As a general rule, the RCLA and its procedures will not normally apply to subcontractors, trades, design professionals, and suppliers. The RCLA most frequently concerns only builders, large remodelers, and warranty companies. Precisely naming to whom the act applies, however, requires working through the definitions, which, unfortunately, refer to and include sections of the old TRCC statute.

First, the RCLA applies to any action to recover damages arising from a construction defect. It does not apply to personal-injury, wrongful-death, or damage-to-goods claims. Next, "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

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appurtenance to a residence, on which a person has a complaint against a *contractor*.” Finally, a “contractor” is (and thus the act only applies to):

1. Builders,
2. Anyone making “material improvements” to residences or appurtenances,
3. Anyone making large, interior improvements to residences or appurtenances (\$20k plus),
4. Anyone building a new home or condominium, and
5. Warranty companies or risk-retention groups.<sup>2</sup>

Contractors are not:

1. Architects or engineers,
2. Suppliers, construction managers, or
3. Those working with a license supplied by the State and working in the area in which they’re licensed (i.e., trades).

### **The Nuts and Bolts of Limiting Exposure.**

The RCLA provides a great opportunity to limit exposure if the contractor makes a “reasonable” offer of settlement to a homeowner. The ultimate decision-maker (judge, jury, or arbitrator) will determine if the offer was reasonable. Most importantly, if the homeowner rejects a reasonable offer, in a later lawsuit he can recover only the cash value of that offer plus any legal fees incurred up to the date of the offer was rejected. Since legal fees at that point are normally small, this is an opportunity to freeze a plaintiff’s future damages at the outset by making a reasonable offer. The purpose behind this process is to reduce litigation by encouraging contractors to make offers of settlement and encouraging homeowners to accept those offers.

Here’s how it works. The homeowner must notify the contractor, describing in reasonable detail the nature of the complaint, 60 days before filing suit. After receiving that letter a contractor has 35 days to inspect the home and 45 days in which to make the offer. The homeowner has 25 days to accept or reject the offer and must state in reasonable detail why it is unreasonable. The contractor then has 10 days in which it may make a supplemental offer.

The categories of damages the offer should address (if they are justified) are the categories of damages available under the RCLA: (1) the reasonable cost of repairs necessary to cure any construction defect; (2) the 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) the reasonable expenses of temporary housing reasonably necessary during the repair period; (5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure; and (6) reasonable and necessary attorney's fees. The offer does not need to include all of these categories. But, since these are the types of damages available under the statute, it is good practice to include an amount for each category to the extent it is justified.

Thus, as you hold the letter from the homeowner and prepare to respond, keep in mind these categories of damages to the extent they may be justified by the defect.

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<sup>2</sup> These definitions may change when the RCLA is amended to delete references to the old TRCC statute.

The RCLA statute itself and court decisions interpreting it do get a bit more complicated; but this is the general framework and it is imperative that contractors be familiar with it. It is always a good idea to engage competent legal counsel at the outset of this process to ensure you're following the statute and doing everything possible to limit exposure.

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