Tweeting through the Condo Act: Key Issues for Practitioners, Owners, and Developers in Bite-Sized Pieces

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I.
INTRODUCTION[1]

A. Of Booms and Busts and Hurricane Harvey

Condominiums in Texas don't know what they want to be. They are either risky, or a sure bet. A great investment, or a money pit. A hot market, or a cold-don't-you-dare-touch-them area. It seems like in each decade in recent memory, there is a condominium boom or bust. This is usually followed by differing takes on how condominiums are either a good barometer of economic strength (look at how well the market is doing!), or a horrible excess by developers and financiers (how could they build and loosely finance so many units!). At the time of this writing, we are in the former stage. Regardless of how they are characterized, the fact remains that over the last 40 years, "condominiums have become one of the most common forms of community ownership of property in the United States" because of the "increasing usefulness and flexibility of the condominium concept."[2]

That usefulness and flexibility has led to condos proliferated across the state, including a large concentration on the Texas Gulf Coast. Before August of 2017, condominium construction and unit ownership were increasing at such a rate in the state that even cautious observers considered it booming. But on August 25, 2017, Hurricane Harvey made landfall on the Texas Gulf Coast. According to the Texas Real Estate Center at Texas A&M University, pre-Harvey condominium and townhome sales exceeded $5.4 billion from August 2016 through July 2017.[3] Condo sales were $3.3 billion, which was an 8.6% increase from August 2016 to July 2017.[4] The median sales price was $179,900, which represented an annual increase of 9%.[5]

Despite Harvey's destruction, condos are coming back quickly. One source noted that when considering both condominiums and townhomes, markets rebounded quickly and the 2017 increase was still 5.8%.[6] While supply of condos was down from its pre-Harvey peak of 4.5 months, inventory is increasing again by moving from a 3.7 month supply to 3.9 months.[7]

B. The Scope of This Article

This article (and its accompanying presentation on March 2, 2018) will address current issues attorneys may face when dealing with condominium projects, lawsuits, and related clients. Previous articles by experienced practitioners have dealt in detail with specific areas, such as

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[1] The title of this paper and the lecture accompanying it is "Tweeting through the Condo Act: key issues for practitioners, owners, and developers in bite-sized pieces." The presentation and slides included with this article "tweet" through the act. But it would be difficult to address the current issues in the Condo Act in written format in 140 character tweets; thus, the paper follows a more traditional format. For the tweets, see the presentation!

[2] National Conference of Commissioners on Uniform State Laws, Prefatory Comment to the Uniform Condominium Act.

[3] *Texas Condo, Townhome Sales Top $5.4 Billion*, Texas A&M University Real Estate Center, https://www.recenter.tamu.edu/news/newstalk-texas?Item=17996 (last visited January 9, 2018).

[4] *Id.*

[5] *Id.*

[6] *MLS Report for October 2017*, Har.com, http://www.har.com/content/mls (last visited December 11, 2017).

[7] *Id.*

condo board procedures,[8] "tricks and traps" of multi-family condos,[9] and key clauses in design and construction contracts for condominium projects.[10] The latter paper contained a thorough treatment of the 2015 amendments to the Condo Act, which will be touched upon here.

This paper first examines the still-new 2015 amendments to the Condo Act, dealing with pre-suit notice and inspection procedures, which have yet to find their way into a significant appellate opinion. Second, we examine the always-hot arbitration area, and look at how that is affecting condominiums. Additionally, the Residential Construction Liability Act will affect any residential project, and its application to the condominium space will be addressed here. Then we will turn to remaining active or developing areas, and address Chapter 95 of the Civil Practice and Remedies code, the minimum express warranty required on condominium projects, and the application of the 2011 Anti-Indemnity Act.

II.
2015 AMENDMENTS TO THE CONDOMINIUM ACT

On September 1, 2015, the Texas Legislature amended the Condominium Act in the Texas Property Code to add sections 82.119 and 82.120. Generally, those amendments provide for a pre-suit dispute investigation, authorization, and inspection-and-offer process (Section 82.119). They also address arbitration (Section 82.120).

A. Pre-suit Procedure

Section 82.119 of the Property Code imposes pre-suit procedures on a condominium association. When the law was being considered, supporters argued that it "is necessary to restrict the ability of owners' associations to initiate construction defect claims without the approval of condo owners" and that the new notice requirements "would help ensure that owners were provided with sufficient information and the ability to make an informed decision."[11] This is because "[o]wners often are unaware that litigation could have a significant impact on the value of and their ability to sell their condominiums. This bill would ensure that owners were properly informed of this impact before initiating litigation. The required notice also would give the parties the ability to sit down and resolve their claims without the need for costly litigation."[12] On the other hand, opponents of the bill were concerned that the requirements were a barrier to access of the courts system by condominium associations.

1. Applicability

First, Section 82.119 does not apply to associations with less than eight units.[13] Second, it will apply to suits or arbitrations "pertaining to the construction or design of a unit or the common

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[8] Kevin M. Kerr, *Condominium Board Procedures Manual*, State Bar of Texas Advanced Real Estate Drafting Course, March 3-4, 2011.

[9] Thomas M. Myers, *Tricks and Traps of Multi-Family Condos*, Construction Law Section of the State Bar of Texas 26th Annual Construction Law Conference, February 28-March 1, 2013.

[10] Joe R. Basham, *Key Clauses in Design and Construction Contracts for Condominium Projects*, Construction Law Section of the State Bar of Texas 29th Annual Construction Law Conference, March 3-4, 2016.

[11] House Research Organization bill analysis, HB 1455, 5/7/2015.

[12] *Id.*

[13] TEX. PROP. CODE ANN. § 82.119(a).

elements."[14] Thus, any suits relating to financing, personal injury, or anything not involving the construction or design of a unit or common area will fall outside the scope of the statute. Generally stated, the statute is geared to cover defect suits. What qualifies as a "common area" has been an area of dispute in lawsuits involving condominiums, and will continue to be under this statute.

2. The pre-suit inspection—82.119(b)(1).

Before suit/arbitration is initiated, an association must "obtain an inspection and a written independent third-party report from a licensed professional engineer."[15] That report must accomplish three things:

1. identify the unit or common elements subject to the claim;
2. describe the "present physical condition" of the unit or common elements; and
3. describe any modifications, maintenance, or repairs to the unit or common elements.[16]

3. Notice of the pre-suit inspection—82.119(c).

The association must provide proper statutory notice of the pre-suit inspection by the engineer. Each party "subject to a claim" must be noticed, and the notice must be sent no later than the 10th day before the inspection is scheduled to occur. The notice further must:

1. identify the engineer engaged to prepare the report;
2. identify the specific units or common elements to be inspected; and
3. include the date and time of the inspection.[17]

Each party subject to a claim may attend either personally or through an agent.[18]

4. Inspection and correction—82.119(e).

The association must then provide the report to each unit owner and each party subject to a claim. The association must allow each party subject to a claim "at least 90 days after the completion of the report to inspect and correct any condition identified in the report."

Practice-wise, this point may not be a bad time to trigger the inspection process under the Residential Construction Liability Act (RCLA).[19] As noted below, the RCLA, which provides for an inspection-and-offer process as well, must be followed anyway in most instances. The association could send the RCLA notice in conjunction with the notice sent under 82.119(e). That way, if all

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[14] *Id.* § 82.119(b).

[15] *Id.* § 82.119(b)(1).

[16] *Id.*

[17] *Id.* 82.119(c).

[18] *Id.* 82.119(d).

[19] For a discussion of the RCLA, see section III, *infra*.

the other pre-suit requirements are met, the RCLA procedure will have been followed and there is no need to then start the 60-day RCLA process at the conclusion of this pre-suit process.

5. Approval of the unit owners—82.119(b)(2).

After this process has run, the association then must obtain approval from the unit owners to proceed with the suit. The association will have approval to move forward if it obtains 50% of the total votes allocated under the declaration.[20] The vote may be taken at a regular, annual, or special meeting called in accordance with the declaration or bylaws.[21]

(a) *Notice of the Meeting.*

The association must provide 30-days' notice of the meeting.[22] The notice must contain the following information:

1. A description of the nature of the claim, the relief sought, the anticipated duration of prosecuting the claim, and the likelihood of success;
2. A copy of the report prepared by the engineer;
3. A copy of contract/proposed contract between the condo board and any attorney retained to represent the association in the claim;
4. A description of the likely costs and fees for which the association will be liable, including attorneys' fees, consultant fees, expert-witness fees, and court costs;
5. A summary of the steps taken by the association to attempt to resolve the claim;
6. A statement that initiating a lawsuit or arbitration proceeding may affect the market value, marketability, or refinancing of a unit while the claim is being prosecuted; and
7. A description of the manner in which the association proposes to fund the cost of prosecuting the claim.[23]

Obviously, this is quite the notice. It certainly does not seem geared to encourage the filing of a claim by the association. What this will accomplish is educating the unit owners of everything that could be encountered economically with a lawsuit, such as fees, marketability, and costs. Most of these requirements are typical things an attorney would advise a client before engaging in representation. However, it is doubtful that the "likelihood of success" is something that can be addressed head-on. Most attorney engagement letters address the likelihood of success by stating that "we cannot guarantee and do not guarantee results" or some similar language. It seems unrealistic to require a condominium association—not an attorney—to peg the likelihood of success in writing before a suit is initiated with only the engineer's report in hand.

[20] This first version of this bill called for 67% approval. It was subsequently reduced to 50%.

[21] *Id* § 82.119(b)(2).

[22] *Id.* § 82.119(f).

[23] *Id.*

(b) *Preparation of the Notice*

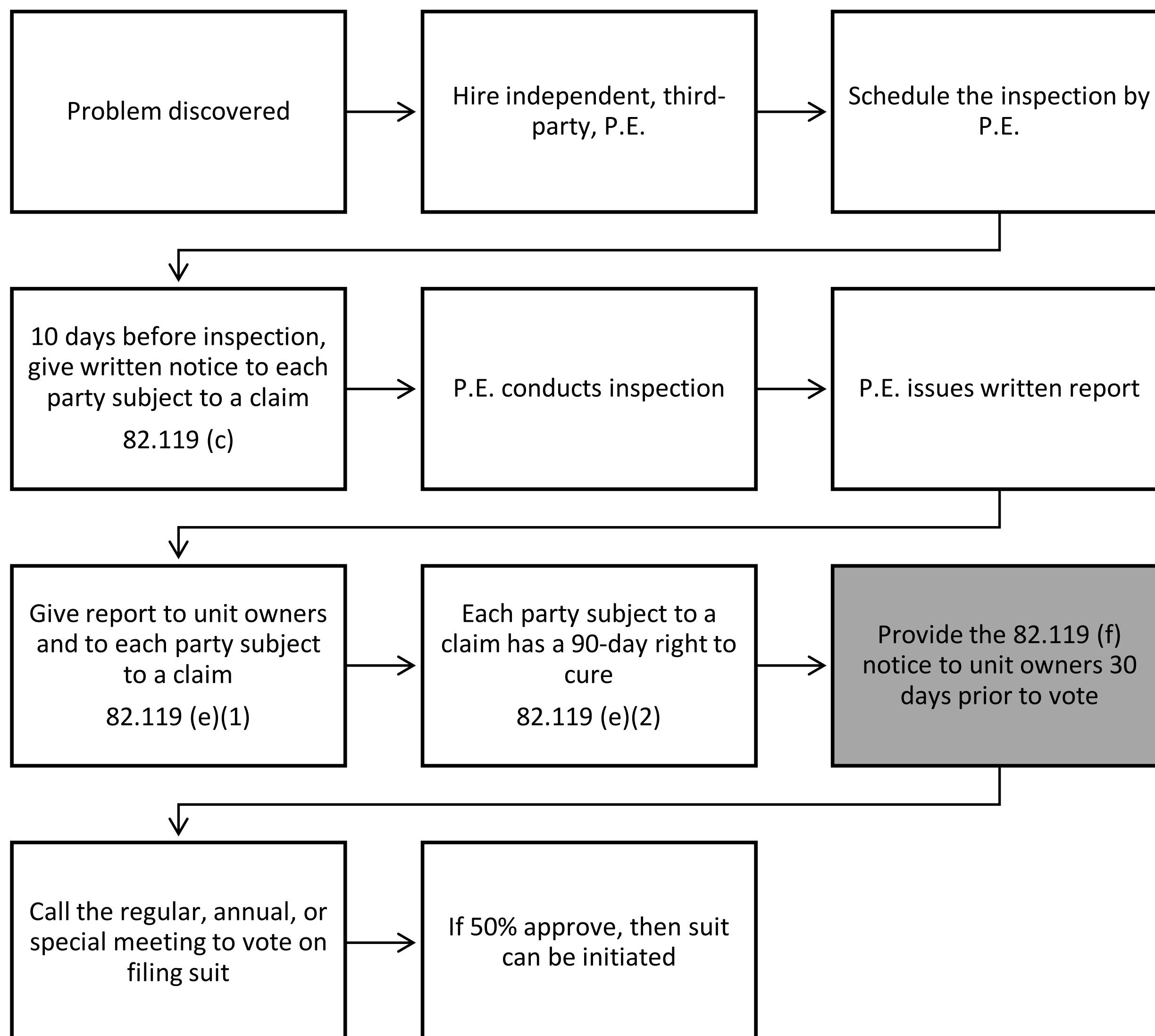
The notice must not be prepared by the attorney who will represent the association in the claim, a member of that attorney's law firm, or anyone employed by or otherwise affiliated with that attorney's law firm.[24] Since this notice must follow statutory requirements, attorney assistance would be helpful, if not necessary, to the association. The goal seems to be to preventing this from becoming an attorney-driven process and merely a formality, as some RCLA and DTPA processes have become for some attorneys. But opponents of the statute may question the fairness of requiring the association to "change horses" during the claim process, if one attorney is engaged to shepherd the association through the statutory requirements, and then a new one must be engaged to prosecute the claim.

The entire process is summarized on the chart below:[25]

[chart follows on next page]

[24] *Id.* § 82.119(g).

[25] Chart is the property of, and is published with the permission and courtesy of Joe R. Basham, *Key Clauses in Design and Construction Contracts for Condominium Projects*, p. 5, Construction Law Section of the State Bar of Texas 29th Annual Construction Law Conference, March 3-4, 2016.



6. Tolling Limitations—82.119(h).

These procedures can take some time, so concerns may arise regarding the statute of limitations. The statute addresses this concern by providing for a tolling of limitations in the final year:

> The period of limitations for filing a suit or initiating an arbitration proceeding for a claim described by Subsection (b) is tolled until the first anniversary of the date the procedures are initiated by the association under that subsection if the procedures are initiated during the final year of the applicable period of limitation.[26]

[26] *Id.* § 82.119(h).

Practitioners unfamiliar with this area of the law should also note that the statute of repose for new construction is 10 years after substantial completion.[27] That is, liability is cut off, regardless of when the cause of action accrued, after the improvement has been "substantially complete" for 10 years. This is subject to certain narrow exceptions, which are more fully laid out in the statute.[28]

7. The verdict?

(a) *Those in favor….*

As noted above, supporters of the amendment state the goal is basically to inform all unit owners of the potential claim, and the fees/costs of the claim, before a lawsuit is initiated. Additionally, providing the builder notice and an opportunity to cure, along with an engineering report, may help settle potential claims before they find their way into a courtroom or arbitration. Moreover, supporters maintain that the new provisions provide protections for developers and their design professionals, who do not fall under the RCLA. These developers and design professionals are now entitled to notice and an opportunity-to-cure process. Finally, supporters believe the amendment will strengthen private property rights by protecting condo owners from unknown and unauthorized disputes that could lead to lower market values and complications in selling or refinancing their unit.

One case that would likely not have arisen under the current act with the new amendments is *Phan v. Addison Spectrum, L.P.*, 244 S.W.3d 892 (Tex. App.—Dallas, 2008, no pet.). There, the condo board sued the condo builder on behalf of the individual unit owners, asserting defect and fraudulent-marketing claims.[29] The case settled for $4,570,000, and the condo board released the builder on behalf of the individual unit owners.[30] As part of that settlement, unit owner Phan received $4,500 cash, credited assessments, and the builder also made requested repairs.[31] One month prior to settlement, Phan initiated her own lawsuit. The builder moved for summary judgment based on the release that the condo board provided, but Phan contested that the board had the authority to provide the release.

The court held that "a release is effective both against named parties and parties that are described in the release with such descriptive particularity that their identity is not in doubt."[32] As a unit owner, Phan was a member of the condo association.[33] "Under Texas Property Code Section 82.102, she therefore consented to allow the [association] to bring and settle the [] suit in its own name and on her behalf."[34] Had the current presuit requirements in 82.119 been the law in 2008, Phan would have had full notice of the suit and been more clearly limited to that process.

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[27] TEX. CIV. PRAC. & REM. CODE §§ 16.008(a) and 16.009(a).

[28] *See id.*

[29] *Phan v. Addison Spectrum, L.P.*, 244 S.W.3d 892, 894 (Tex. App.—Dallas, 2008, no pet.).

[30] *Id.* at 895.

[31] *Id.*

[32] *Id.* at 897 (internal quotes omitted).

[33] *Id*

[34] *Id.*

(b) *Those against…*

Those against the presuit requirements note that it adds additional barriers to courtroom access. There are now many "hoops to jump through" before a claim can see the light of day in a courtroom/arbitration. These hoops are technical and statutory. Thus, attorney assistance is necessary to guide a condo board through these requirements. However, whatever attorney helps with that process (if he/she sends the notice to the owners), cannot also be the same attorney who will represent the condo board in the claim.

There are also some gaps in the statute, such as if a single owner pursued the builder. How would the procedure apply, if at all, in that instance? What if other owners, but not the condo association, joined in that suit? These questions and more will need to be sorted out by the courts system in the years to come.

8. Cases citing 82.119—none yet!

At the time of this writing, there are no published cases citing Section 82.119. Only one appellate brief cites it, and that citation is only in passing.[35] It is inapplicable to any analysis of the amendment.

B. Arbitration

1. The declaration may provide for arbitration or other dispute-resolution processes—82.120(a).

The Legislature also added Section 82.120 addressing arbitration. The statute first allows that the declaration may provide for arbitration:

> (a) A declaration may provide that a claim pertaining to the construction or design of a unit or the common elements must be resolved by binding arbitration and may provide for a process by which the claim is resolved.[36]

Careful drafters should take note of the "may provide for a process" language. Here, a pre-suit mediation procedure could be drafted into the declaration, or any other pre-suit negotiation process, such as a face-to-face meeting among representatives of the parties.

2. Arbitration provision will survive its removal to apply to claims before removal—82.120(b).

Second, the statute provides that the arbitration provision will apply to all construction/design claims from construction until the time the arbitration provision is removed. That is, an association cannot get around the arbitration provision by removing it after construction:

> (b) An amendment to the declaration that modifies or removes the arbitration requirement or the process associated with resolution of a claim may not apply retroactively to a claim regarding the construction or design of units or common elements based on an

[35] *Twin Creeks Golf Group, L.P. v. Sunset Ridge Owners Ass'n, Inc.*, Appellee's Brief, 2016 WL 7494986 (Tex. App.—Austin December 21, 2016) p. 28.

[36] TEX. PROP. CODE § 82.120(a).

> alleged act or omission that occurred before the date of the amendment.[37]

Accordingly, if the declaration builds in an arbitration requirement, it will apply to protect all builders/design professionals even if the provision is later removed. Practitioners interested in giving the arbitration provision even more sticking power may consider an attempt to make arbitration "run with the land," or requiring in the declaration that the builder/developer consent to its removal or modification.

3. Cases citing 82.120—none yet!

Like Section 82.119, there are no published cases citing Section 82.120 at the time of this writing.

III.
THE APPLICABILITY OF THE RCLA

While the amendments address pre-suit procedures for condos specifically, statutes already exist dealing with pre-suit notice of claims. One in particular looms large over any discussion of residential-construction claims—the Residential Construction Liability Act ("RCLA"), found in Chapter 27 of the Texas Property Code. This section will address the applicability of the RCLA to condominiums, and note one significant decision in this area.

A. Application and Effect

The RCLA applies generally to residential construction-defect actions. More precisely, it 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."[38] The RCLA has two main features: (1) it provides for a pre-suit inspection-and-offer process; and (2) it provides for a limited array of damages that are recoverable to the claimant. In the inspection-and-offer process, the contractor should receive notice of the defect, an opportunity to make an offer to cure the defect, and a potential to limit the claimant's damages if a reasonable offer to cure is not accepted.[39] While a complete discussion of the RCLA is outside of the scope of this paper, it is important to note that, if this process is followed and a reasonable offer from a contractor is rejected, a claimant is limited to (1) the fair market value of the contractor's last offer of settlement, and (2) the amount of reasonable and necessary costs and attorneys' fees incurred before the offer was rejected or considered rejected.[40] The point of this is to incentivize the contractor to make an offer that should be a bit more than the contractor considers reasonable (in hopes of limiting claimant's damages if the offer is rejected), and to incentivize claimants to accept reasonable offers (so that their fees and costs are not limited in the future suit).

If a reasonable offer is rejected, or no offer is made, the RCLA still applies to limit recoverable damages to a few specific items:

(1) the reasonable cost of repairs necessary to cure any construction defect;

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[37] *Id.* §82.120(b).

[38] TEX. PROP. CODE § 27.002(a)(1).

[39] *See generally id.* § 27.004.

[40] *Id.* 27.004(e).

(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.[41]

B. The RCLA will apply to certain defect actions in condominiums.

The RCLA specifically contemplates condominiums. The "Contractor" definition includes "a person contracting with an owner or the developer of a condominium for the construction of a new residence, for an alteration of or an addition to an existing residence, for repair of a new or existing residence, or for the construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence."[42] Units and common elements are included in the definition of a "Residence."[43] Finally, the RCLA defines "Developer of a condominium" as a "declarant, as defined by Section 82.003 [of the Condo Act] of the of a condominium consisting of one or more residences."[44]

C. Contract drafters: be aware of the disclosure statement.

The RCLA requires a mandatory statement about the RCLA's applicability and notice requirements in contracts subject to the RCLA.[45] That section, however, specifically excepts from that requirement contracts "between a developer of a condominium and contractor for the construction or repair of a residence or appurtenance to a residence in a condominium."[46]

Interestingly, however, contracts between the developer/contractor/declarant/seller of a unit, on one hand, and the unit buyer (i.e., homeowner), on the other hand, are not excepted. Thus, whatever entity sells the unit to the ultimate unit owner should include the mandatory statement. That statement is as follows:

> "This contract is subject to Chapter 27 of the Texas Property Code. The provisions of that chapter may affect your right to recover damages arising from a construction defect. If you have a complaint concerning a construction defect and that defect has not been corrected as may be required by law or by contract, you must provide the notice required by Chapter 27 of the Texas Property Code to the contractor by certified mail, return receipt requested, not later than the 60th day before the date you file suit to recover

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[41] *Id.* 27.004(g)

[42] *Id.* 27.001(5)(A)(iii) (emphasis added).

[43] *Id.* 27.001(7).

[44] *Id.* 27.001(10).

[45] *See* Section 27.007(a).

[46] *Id.*

damages in a court of law or initiate arbitration. The notice must refer to Chapter 27 of the Texas Property Code and must describe the construction defect. If requested by the contractor, you must provide the contractor an opportunity to inspect and cure the defect as provided by Section 27.004 of the Texas Property Code."[47]

D. Case: *Timmerman v. Dale*, 397 S.W.3d 327, 330– 32 (Tex. App.— Dallas 2013, pet. denied).

At the time of this writing, there are extremely few Texas cases that reference condominiums in light of the RCLA. One 2013 case from the Dallas Court of Appeals, *Timmerman v. Dale,* addresses whether (1) the RCLA applies to a claim for damages for delay in construction, thereby barring such a claim, and (2) whether the lost-rental value stemming from the delay in construction is recoverable. [48] The latter should be of some interest to contractors and owners of condominiums. The facts in *Timmerman* centered around the remodel of a high-end condominium. The plaintiff sued for, among other things, lost-rental-value damages due to the delay in construction. The plaintiff argued that the RCLA did not apply to that particular claim, and thus lost-rental-value damages were recoverable for condominium owners in such a scenario. The court disagreed.[49] After examining the broad applicability of the RLCA, and the plain meaning of "construction," the Court concluded that the RCLA governs any claims for delay in construction. Since the damages flowing from the delay, lost-rental-value damages, are not listed as recoverable under the RCLA, they are barred.[50] This decision has some importance for condominium owners. Since these units are often owned as investments or vacation homes and rented out, it is important to know that, since the RCLA governs any claim against a contractor (including a remodeler), lost-rental-value damages will not be recoverable in any suit.

IV.
CPRC CHAPTER 95—WITH AN UPDATE FROM THE SUPREME COURT IN 2016

Texas Civil Practice and Remedies Code Chapter 95 is a very useful tool in the residential-construction practitioner's toolbox. Due to recent case-law developments, attorneys should be aware of how courts now view the applicability of this statute.

A. What the statute attempts to accomplish.

Chapter 95 of the Texas Civil Practice and Remedies Code applies to a claim that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, or modifies the improvement.[51] To impose liability on an owner of such premises for any injury on it, the owner must have retained "some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports[,]" and must have "had actual knowledge of the danger or condition resulting in the personal injury ... and failed to adequately warn."[52]

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[47] *Id.*

[48] *Timmerman v. Dale*, 397 S.W.3d 327, 330– 32 (Tex. App.— Dallas 2013, pet. denied).

[49] *Id.* at 331.

[50] *Id.* at 331-32.

[51] TEX. CIV. PRAC. & REM. CODE § 95.002 (Vernon 2005).

[52] *Id.* § 95.003.

The Plaintiff bears the burden of establishing: "(1) that the property owner exercised or retained some control over the manner in which the work was performed and (2) that the property owner had actual knowledge of the danger and did not adequately warn of that danger.[53] Moreover, "[t]he control must relate to the injury the negligence causes."[54]

Texas courts have interpreted this to mean that the property owner must have the right to control the "means, methods, or details" of the independent contractor's work to the extent that the independent contractor is not entirely free to do the work his own way.[55] "[T]he right to control the work must extend to the 'operative detail' of the contractor's work."[56] Further, the control must relate to the injury the negligence causes.[57] It is not enough that the owner has the right to order the work to stop and start or to inspect progress or receive reports.[58] Nor is it enough to recommend a safe manner for the independent contractor's employees to perform the work.[59]

B. <u>Chapter 95 applies to condominiums.</u>

Thus, CPRC Chapter 95 could apply to bar claims against (1) unit owners for injuries during remodeling, (2) the builder for injuries during construction, if the builder owns the property, or (3) any scenario where the property owner is sued for injuries during a construction activity.

A typical scenario is detailed in *Maldonado v. D.R. Horton, Inc.*, No. 09-08-00451-CV, 2010 WL 1380996 (Tex. App.—Beaumont 2010, no pet.) (mem. op., not designated for publication). There, the plaintiff, Maldonado, was working as a bricklayer on a condominium project and sued D.R. Horton after he fell fifteen feet and injured himself.[60] D.R. Horton moved for summary judgment under Chapter 95, but Maldonado contended that D.R. Horton retained control over his work through its safety rules and regulations.[61] The court disagreed, following a line of cases holding that a premises owner does not exercise actual control when it has a safety representative on site who can stop the independent contractor's work.[62] The Court held there was no evidence that the builder controlled the means, methods, or details of the brick work.[63]

C. <u>Pre-2016 law</u>

Before 2016, this law was a hammer. However, one outlier plurality decision from the Houston Court of Appeals, *Hernandez v. Brinker Int'l,* gave plaintiffs some ground to contest the

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[53] *Gorman v. Ngo H. Meng*, 335 S.W.3d 797, 802-03 (Tex. App.—Dallas 2011, no pet.).

[54] *Abarca v. Scott Morgan Residential, Inc.*, 305 S.W.3d 110, 124 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

[55] *Elliott-Willliams Co. v. Diaz*, 9 S.W.3d 801, 804 (Tex. 1999).

[56] *Chi Energy, Inc. v. Urias,* 156 S.W.3d 873, 880 (Tex. App.—El Paso 2005, pet. denied).

[57] *Diaz*, 9 S.W.3d at 804.

[58] *See Bright*, 89 S.W.3d at 606; TEX. CIV. PRAC. & REM. CODE § 95.003(1).

[59] *Bright*, 89 S.W.3d at 607.

[60] *Id.* at *1.

[61] *Id.*

[62] *Id.* at *5. (citing *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606-07 (Tex. 2002)).

[63] *Id.* at *5.

applicability of the statute.[64] In *Hernandez,* a contractor's employee was making repairs to an air conditioner on the roof of the building.[65] As the employee was carrying the air compressor off of the roof, the roof collapsed.[66] The court, with one justice dissenting, held that because the employee was hired to repair the air conditioner, and not the roof, Chapter 95 did not apply to his claims.[67] The Court relied on Section 95.002 and select cases citing it. Section 95.002 states that the Chapter applies to (1) a claim against a property owner for personal injury to a subcontractor (2) that arises from the condition or use of an improvement to real property where the subcontractor constructs, repairs, renovates, or modifies **the** improvement.[68] The Court noted that Chapter 95 would not apply to this case because the plaintiff was working on the air conditioning (the "improvement") but was injured by the roof, and the roof was not "the improvement" he was constructing, repairing, renovating, or modifying.[69]

D. 2016 and beyond

Before 2016, a majority of Texas appellate courts had disavowed *Hernandez,*[70] However, the Texas Supreme Court supported the Hernandez holding recently in *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 567 (Tex. 2016), stating:

> The Elmgrens contend, and we agree, that Chapter 95 only applies when the injury results from a condition or use of the same improvement on which the contractor (or its employee) is working when the injury occurs. *See Hernandez v. Brinker Int'l, Inc.,* 285 S.W.3d 152, 157–58 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (plurality op.) (holding that Chapter 95 did not apply because the injury arose from a different improvement than the one the plaintiff was repairing).[71]

In *Ineos*, a contractor was injured while working on a furnace valve when a valve on a different furnace over 100 feet away burst. The Court interpreted "improvement" broadly, holding

[64] *Hernandez v. Brinker Int'l., Inc.,* 285 S.W.3d 152 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (plurality opinion).

[65] *Id.* at 153–54.

[66] *Id.* at 154.

[67] *Id.* at 161.

[68] *See* TEX. CIV. PRAC. & REM. CODE § 95.002 (1), (2) (emphasis added).

[69] *Hernandez*, 285 S.W.3d at 153-54.

[70] *See Covarrubias v. Diamond Shamrock Ref. Co., L.P.,* 359 S.W.3d 298, 301–02 (Tex. App.—San Antonio 2012, no pet.) ("[C]hapter 95 applies even if the contractor's employee was injured by an improvement separate from the improvement the employee was on the premises to repair."); *Gorman v. Ngo,* 335 S.W.3d 797, 805 (Tex. App.—Dallas 2011, no pet.) (stating that *Hernandez* "appears to be a departure from the existing case law of other intermediate courts of appeals"); *Painter v. Momentum Energy Corp.,* 271 S.W.3d 388, 398 (Tex. App.—El Paso 2008, pet. denied) ("[C]hapter 95 applies, despite the fact that the object causing the injury is not itself an improvement, where the injury arises from work being done on an improvement."); *Phillips v. Dow Chem. Co.,* 186 S.W.3d 121, 132 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("[T]he scaffolding from which Stewart fell was sufficiently related to Stewart's injuries to bring Dow within the protections of chapter 95.") (emphasis added); *Fisher v. Lee & Chang P'ship,* 16 S.W.3d 198, 201 (Tex. App.–-Houston [1st Dist.] 2000, pet. denied) (stating that chapter 95 "does not require that the defective condition be the object of the contractor's work" and discussing the legislative history of the statute which contemplates job-built scaffolding as applicable under the statute).

[71] Emphasis added.

that a system of furnaces, pipes, and valves were considered an improvement under the statute which would bar the contractor's claims even though each furnace was independent and connected by valves. The Court held that "[t]he valves and furnaces, though perhaps "separate" in a most technical sense, were all part of a single processing system within a single plant on Ineos' property."[72] The Court thus rejected the plaintiff's proposition that the Chapter was inapplicable because his injuries arose from something he was not attempting to repair.

Thus, while the Court found the statute applied under those specific facts, and rejected the inapplicability argument, it may have created a problem by seemingly approving the *Hernandez* language.

E. Post-*Ineos* Problems.

Two post-*Ineos* cases demonstrate the problems *Ineos* caused in agreeing with *Hernandez*, which directly contradicted the Legislative history and intent of Chapter 95.[73]

1. *Torres v. Chauncey Mansell & Mueller Supply Co., Inc.,* --- S.W.3d. ----, 2017 WL 877335, at *1 (Tex. App.—Amarillo Mar. 3, 2017, no. pet. h.).

In *Torres,* the employee of a subcontractor was electrocuted while working on a cement parking lot in connection with building a larger office building.[74] He was smoothing concrete when his smoothing tool contacted an overhead high voltage power line. The tool was not being used for work on the power line. The employee alleged that Chapter 95 did not apply because the improvement being completed did not cause his injury.

The *Torres* court held that "the line's presence had to be factored into the manner in which he performed his work at that spot; indeed, he experienced the result of not factoring it into the equation."[75] Further, "under those circumstances, we cannot but conceive the power line as an aspect of the improvement's state of being or as a condition of the improvement. That being said, we view his injuries as arising from a condition of the improvement on which he worked."[76]

As a part of its holding, the *Torres* court conducted a deep analysis of *Hernandez* and *Ineos*, and was ultimately critical of *Hernandez*:

> [M]issing from *Ineos* is any expression by the Supreme Court that it approved of the manner in which the plurality applied the legal principle to the actual facts in *Hernandez* . . . the *Ineos* court, like the *Abutahoun* court, read the word "improvement" as having a broad reach or definition. And, in so broadly defining the word, it concluded that the system *in toto* with all its different or separable components comprised the improvement, not just that separate component on which Elmgren worked.

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[72] *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 568 (Tex. 2016).

[73] *See* note 70, *infra*.

[74] *Torres v. Chauncey Mansell & Mueller Supply Co., Inc.,* --- S.W.3d. ----, 2017 WL 877335, at *1 (Tex. App.—Amarillo Mar. 3, 2017, no. pet. h.).

[75] *Id.* at *7.

[76] *Id.*

> Obviously, the plurality in *Hernandez* did not have the benefit of either *Abutahoun* or *Ineos*. Had it, we wonder whether the outcome would have been the same. And why we wonder begins with the observation that the air conditioner being serviced in *Hernandez* needed a foundation on which to rest for it was not floating. The foundation happened to be the roof, and to complete the work, the repairman necessarily had to walk atop that roof. To say that the air conditioner's foundation is not a part of the air conditioner is to ignore the interrelationship between the air conditioner and its physical and geographic surroundings. And, that is what *Ineos* and *Abutahoun* warned against.[77]

The *Torres* court further cautioned that the statute must be read as a whole, with Section 95.002 being read in conjunction with 95.003, which states that the property owner is not liable for "injury ... arising from the failure to provide *a safe workplace*"[78] The court thus the "could not but factor the concept of "a safe workplace" and "the nature of the workplace" into the nature of the improvement."[79]

2. ***Rawson v. Oxea Corp.*, No. 01-15-01005-CV, 2016 WL 7671375 at *8 (Tex. App.—Houston [1st Dist.] Dec. 22, 2016, no pet.) (mem. op.).**

In *Rawson*, a worker was electrocuted while repairing the insulator of a transformer.[80] The electrocution was caused by electricity from a different transformer in the substation. The court held that the "improvement" was the electrical substation itself, despite the Plaintiff trying to separate the components within the substation.

These cases demonstrate the lengths that Courts are going in trying to uphold what seems to be the clear intent of Chapter 95, while navigating the roadblock laid down by *Ineos* when it approvingly cited *Hernandez* regarding applicability. Unless the Legislature acts to make clear its intent regarding the applicability of the statute, contesting the applicability of the statute will be a fruitful area in which to overcome summary judgment on Chapter 95 if you are a plaintiff, and contractor-owners will continue to lose out on the defense.

V.
DRAFTING CONSIDERATIONS: WARRANTIES AND INDEMNITY

A. Is there a minimum warranty post TRCC?

During the existence of the Texas Residential Construction Commission (TRCC), warranties for new homes were statutory and codified in the Property Code. With the sunsetting of the TRCC in 2010, there is currently no minimum, required warranty for a new home or condominium. As a result, builders and developers may wonder what type and length of express warranty is required for new condominium and home projects.

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[77] *Id.* at *5 (internal citations omitted).

[78] *Id.* at *6 (emphasis by the court).

[79] *Id.*

[80] *Rawson v. Oxea Corp.*, No. 01-15-01005-CV, 2016 WL 7671375 at *8 (Tex. App.—Houston [1st Dist.] Dec. 22, 2016, no pet.) (mem. op.).

1. The TRCC warranties.

First, between September 1, 2003, and August 31, 2009, the TRCC mandated statutory express warranties in the sale of new homes. These are important as homes still exist within the repose period that may contain these warranties. The warranties are (1) one year for workmanship and materials, electrical, mechanical, and plumbing; (2) two years for delivery systems (i.e., electrical, mechanical, HVAC, and plumbing); and (3) 10 years for structural/foundations. These warranties ceased to exist by statute, probably after August 31, 2009 (when the TRCC was sunsetted), but certainly after August 31, 2010 (when the TRCC closed its doors).

2. Two implied warranties attach to every new home sale.

Now we are back to the standard implied warranties that existed before the TRCC. Simply put, there are two implied warranties in Texas that attach to every new home sale: (1) the implied warranty of good workmanship and (2) the implied warranty of habitability.[81] The implied warranty of good workmanship requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances.[82] The implied warranty of habitability "requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation."[83] The warranty "only protects new home buyers from conditions that are so defective that the property is unsuitable for its intended use as a home."[84]

3. Disclaiming the warranties.

The above implied warranties likely restarted when the TRCC closed its doors on September 1, 2010, and apply by default in every new home contract.[85] How may they be disclaimed? The implied warranty of good workmanship cannot be generally disclaimed, <u>but may be superseded</u> by the parties' agreement which defines the manner, performance or quality of the desired construction.[86] This typically takes the form of a 1-2-10 express warranty. Habitability may not be disclaimed generally, but may be specifically disclaimed when the actual defects rendering the home unsafe or unsanitary are adequately disclosed.[87]

4. The minimum express warranty.

Is there a minimum express warranty that a builder can issue? Does it have to be one year warranty? Two years? 10 years? There is currently no authority providing what the minimum express warranty is that a builder/developer must provide in order to supersede the implied warranty of good workmanship. This author and other practitioners have seen a builder provide a one-year warranty to a homeowner, and have also seen some volume builders move to a 2-2-10 warranty due to competitive pressures. It seems to be the "wild west" out there on express warranties, but caution is advised.

As far as cases addressing this issue, the only case that is close to being applicable is an unpublished decision, *Richardson v. Duperier*, 14-04-00388-CV, 2005 WL 831745, at *3 (Tex.

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[81] *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002).

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] TEXAS RESIDENTIAL CONSTRUCTION LAW MANUAL § 3:6 (2014).

[86] *Buecher*, at 274-75.

[87] *Id.*

App.—Houston [14th Dist.] Apr. 12, 2005, no pet.). There, a court held that a one-year warranty on a "post frame building" (i.e., a barn) qualified as an express warranty and superseded the implied warranty under *Centex*.[88] Since this did not deal with a home (what the Texas Supreme Court called the "most important transaction of a lifetime" when it created the implied warranties in 1968 in *Humber v. Morton*), its influence only goes so far.

It would thus be advisable to not depart too far from the industry standard. In his *Buecher* dissent, Justice Hecht noted that "the amici tell us that federal regulations govern the quality of many newly constructed homes and have come to be followed industry-wide."[89] He lamented that the Court did not address, as urged by the builder lobby, whether the common, 1-2-10-year express warranty is sufficient to waive the implied warranty of good workmanship.[90] He also notes that "The shorter the express warranty period, the more abusive it appears for builders to press it on buyers in lieu of an implied warranty that is not so limited."[91]

The federal regulations referenced by Justice Hecht are those governing warranties on FHA and VA-financed homes, which require a typical 1-2-10 year warranty. *See* 24 C.F.R. § 203.205 (mandating a warranty providing one year for workmanship and materials, two years for major systems, and ten years for structural defects). Of note, the Texas Association of Builders contract form incorporates a slightly modified version of the TRCCA performance standards into its warranty.[92]

While parties are now free to contract for whatever warranty they so choose, the authorities in the prior paragraphs indicate that a 1-2-10 year warranty is likely the standard of care in the industry. Providing a drastically different warranty, such as a one-year warranty, risks having a judge deem the contract unconscionable in that it effectively guts the implied warranty and the Court's original purpose in providing it to homeowners. While this approach may be overly cautious and some clients may not like it, caution is strongly advised in this area.

B. <u>Anti-Indemnity statute</u>

In 2011, the Texas Legislature passed Chapter 151 of the Texas Insurance Code, the Texas Anti-Indemnity Statute. Among other things, and subject to certain exceptions, the statute renders void and unenforceable broad-form and (most) intermediate-form indemnity clauses in most construction contracts.[93]

A notable exception to the statute is residential construction. That is, the act will not apply to bar "an indemnity provision in a construction contract, or in an agreement collateral to or affecting a construction contract, pertaining to: a single family house, townhouse, duplex, or land

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[88] *Richardson v. Duperier*, 14-04-00388-CV, 2005 WL 831745, at *3 (Tex. App.—Houston [14th Dist.] Apr. 12, 2005, no pet.).

[89] *Buecher*, 95 S.W.3d at 280.

[90] *Id.*

[91] *Id.*

[92] TEXAS RESIDENTIAL CONSTRUCTION LAW MANUAL § 9:2, fn 1.

[93] For an in-depth discussion of the statute and the types of indemnity clauses, *see* Robert C. Bass, Jr., *Indemnity Legislation: Making the Shoe Fit*, Construction Law Section of the State Bar of Texas 25th Annual Construction Law Conference, 2012; *and* Patrick J. Wielinski, *Three Years Into It: Selected Issues on the Effect of Chapter 151 on Indemnity and Additional Insured Status*, Dallas Bar Ass'n Construction Law Section, April 2, 2015.

development directly related thereto…."[94] Accordingly, builders and developers in the residential space, generally, have been able to draft indemnity provisions without worrying about the act.

Condominiums and other related multi-family, however, are different. They are not expressly named in the exclusion, so it has been assumed that, to be on the safe side, condos and multi-family should be treated as subject to the Anti-Indemnity Statute.[95] Other commentators believe that, since condominiums are a type of ownership and not necessarily a type of construction, there could be some space for the exclusion in the statute to apply, particularly when it comes to single-family detached homes built and run as condominiums (but that look nothing like traditional condominiums).[96] It bears repeating, however, that caution is advised and since condos are not explicitly named in the exclusion, the safe practice is to assume they do not fall under it, and are thus subject to the statute, until the courts speak to this otherwise.

VI.
CONCLUSION

As hot-and-cold as the condominium market can be, so seems to be the speed at which the law develops concerning them. 2015 saw new and thorough amendments to the Condominium Act, while the following years up to the point of this paper's publishing have not seen any court cases dealing with those amendments. As the market continues to rise post-Harvey, and as condominium ownership remains an affordable option for home ownership, we would expect to see more disputes and, correspondingly, more cases interpreting and applying the amendments. For now, beware the requirements in the new Section 82.119 and the arbitration protections in Section 82.120.

Further, practitioners should be aware of the applicability of the RCLA to condominium projects, and the interplay between the notice requirements of the RCLA and the notice requirements in the amendments to the Condominium Act. There are certain areas in the new pre-suit procedure where a RCLA-notice may fit.

The last two years also saw a large shift in the application of Civil Practice and Remedies Code Chapter 95, with the Supreme Court in *Ineos* quoting with approval the outlier *Hernandez* decision, and courts subsequently struggling with finding ways to apply the statute in accordance with its obvious legislative intentions, despite the seemingly narrow language.

When drafting documents in this area, note that express warranties are what the drafter wants them to be, but there very well may be a standard of care when it comes to unconscionability in what warranties should be offered on condominiums. Lastly, note that the 2011 Anti-Indemnity statute likely applies to condominiums, and condominiums do not seem to fall under the residential exclusion in the act.

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[94] TEX. INS. CODE § 151.105(10)(A).

[95] *See* Ian Faira, *New Normal in Residential Construction*, Construction Law Section of the State Bar of Texas 26th Annual Construction Law Conference, 2013, p45 and note 231.

[96] Bass, *supra* note 76, pp. 28 – 29.