A Walk on the Wild Side: Residential Construction Arbitration from Demand to Final Hearing

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TABLE OF CONTENTS

PART II: SUBSTANTIVE LAW ISSUES TO CONSIDER

"[H]e came to a place where the wild things are . . ."[1]

I.
INTRODUCTION

In 1968 the Texas Supreme Court wrote into our body of law the emotional nature of residential-construction practice:

> The old rule of caveat emptor does not satisfy the demands of justice in [the sale of new homes]. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime.[2]

Most cases in the residential-construction arena center on that "most important transaction"—the home. With that comes emotion, conviction, and passion. Thus, the title of this paper—residential arbitration can get a little wild.

On a macro level, one need look no further than that Great Recession of 2008 – 2010 to see the impact of residential construction on the national economy. The housing market was both an indicator and a main driver of the downturn. The lax financial practices, speculation, and bubble-building gave many a taste of the wild side of the housing industry on a large scale.

With the "wild side" in mind, this paper's goal is modest. In Part I, it will seek to provide an outline of how residential-arbitration cases proceed, from the discovery of a claim to the final hearing, with a number of best-practices, tips, and tricks along the way. The focus is effective advocacy on either side of the docket through the final hearing. As a bonus, we include tips for the under-40 lawyer, a topic dear to my heart. In the age of the disappearing civil-jury trial, arbitration can provide wonderful trial experience for the up-and-coming (really, we're already here) generation.

Part II of this paper will examine substantive-law issues common to residential practice. Chapter 95 of the Civil Practice and Remedies code, once a hammer of a defense for landowners, has been significantly whittled down by the Texas Supreme Court. Practitioners prosecuting and defending worksite-injury claims must be familiar with the recent jurisprudence. Finally, we will explore the minimum express warranty required on homes and the application of the 2011 Anti-Indemnity Act to residential construction.

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[1] Maurice Sendak, Where the Wild Things Are (1984)

[2] *Humber v. Morton,* 426 S.W.2d 554, 561 (Tex. 1968)

PART I:
FROM DEMAND TO FINAL HEARING

I.
DISCOVERY OF A CLAIM AND INVESTIGATION

A. The Parties

On the homeowner side, the claim begins with the discovery of a defect. Sometimes a lawyer is called right away, sometimes after working with a contractor to no avail, and sometimes after hiring their own experts. It is important that the proper experts are retained early— at this stage, if possible. Often a homeowner will come to a lawyer after having multiple experts look at an issue, and the attorney is then stuck with those opinions. By "stuck," the attorney can hire a second expert with which the attorney is more familiar, but unless the prior reports/opinions are shielded from the second expert, the prior reports are discoverable, and the second expert will have to deal with the loss of credibility that may come from any different opinion. Other times, a homeowner will not know other areas of recoverable damages that would require hiring another expert. Accordingly, attorney involvement early on helps get the right experts retained for the homeowner during the investigation stage.

For the contractor,[3] discovery of a claim usually comes with a letter or warranty claim. Just like the homeowner, proper investigation is critical to success down the road, in terms of both protecting interests and setting up defenses moving forward.

B. The Experts

With the focus on retaining the "right" experts, a note on experts is proper here. This paper focuses on cases that will actually go to final hearing. Thus, the expert will need to testify. It is no secret that both sides of the residential-construction docket have a stable of experts whose opinions are commonly seen in arbitration. While the practitioner may enjoy the opinions that these experts give, I would encourage them to think about how the expert actually testifies at final hearing.

On the defense side, the effort is commonly made to get someone with the best credentials. But, have you seen them under cross? Have they ever met a foundation they would fail? Is every house built perfectly in their opinion? Despite their credentials and whatever industry standards say, credibility is important, as is the ability to testify competently. If the expert has never met a foundation they would fail, or believes every home is built perfectly, the arbitrator is going to struggle to ascribe credibility to the expert, regardless of their credentials.

Similarly, on the homeowner side, a homeowner may find their own expert who reports that there is a problem, and then proposes a modest fix. An attorney gets involved, hires their

[3] Most cases are between a homeowner and contractor. Some cases involve a warranty company, design professional, or other person/entity contracting with or providing services for the homeowner. For the sake of simplicity, the term "contractor" will be used throughout this paper.

preferred expert, and then the house must be torn down and rebuilt. That, also, impairs that expert's credibility.

The point of this is not to recommend that one find an expert who will waffle or be right down the middle every time, but to caution practitioners who have a preferred expert who may not be the most balanced witnesses. If the case will be tried, and if in doubt, keep searching.

C. Subcontractors

Subcontractor practice in residential-construction arbitration is not quite as sophisticated as in the commercial space. Often there is no subcontract at all between contractor and subcontractor. If there is, there is rarely a good indemnity clause. And in some cases where (1) there is a subcontract and (2) it is a work of art (*i.e.*, cases on behalf of large, sophisticated builders), the subcontractor may not have signed in the right capacity or with the right entity, he normally has no clue what his obligations are and has no intention of abiding by them, and you are lucky if he got the correct insurance policy. All of these issues severely impact third-party practice in arbitration. Subcontractors are often brought in and participate, but subcontractor practice remains fertile ground for disputes among contractors and subs.

On a practical note, it is important to get any potentially liable subcontractors on notice of a claim at the investigation stage. If there is an early mediation at this stage, the subcontractor and the insurer should be invited to attend and participate, and the contractor's attorney should document those efforts.

D. Insurance-coverage issues

Like commercial construction, insurance issues can dominate how the parties maneuver before and during arbitration. The point of bringing a claim is to attempt to be made whole (get paid). The point of having insurance is to have a bucket with which to pay. Insurers, on the other hand, are not incentivized to pay. It logically follows that, so long as man walks the earth, there will always be disputes in this area. Some practical tips on the homeowner side are as follows:

1. **Plead into coverage**. Include allegations in the written demand that name subcontractors specifically and include allegations against them.

2. **Sue the subcontractors you know about**. This gets the subcontractor and the insurer directly involved and makes it more likely they will contribute to any settlement.

3. **If suit against subcontractors is nor proper, name the subcontractors in the lawsuit**. If you know the name of the subcontractor, at least including their name and pleading allegations against them helps the contractor rope the insurers and potential the subs, with whom they have privity, into the suit.

On the contractor side, you need to tender defense and indemnity to the subcontractor and insurer early, and follow up often.[4] Many times there is a delay, and you must remind the claims handler of the Prompt Payment of Claims Act. Send all pleadings and any mediation date to the

[4] A sample tender letter is included as Exhibit 1 in the Appendix.

insurer. Finally, if there is an improper denial or delay, consider a declaratory judgment action against the insurer in a separate action or the main one.

II.
BEGINNING THE PROCESS: THE DEMAND

Nearly all residential-construction cases begin with a demand, and the ones that do not should, as one is required by Texas law. Any discussion of the demand must include a discussion of the RCLA and the DTPA.

A. RCLA

The Residential Construction Liability Act ("RCLA"), found in Chapter 27 of the Texas Property Code, looms large over residential-construction claims.

1. 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."[5] The RCLA has two main features: (1) it provides for a pre-suit inspection-and-offer process; and (2) it provides for a limited menu 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.[6] While a complete discussion of the RCLA is outside of the scope of this paper,[7] 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.[8] 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;

(2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence;

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[5] TEX. PROP. CODE § 27.002(a)(1).

[6] See generally id. § 27.004.

[7] For a more thorough discussion of the ins and outs of the RLCA, see RYMAN AND FARIA, THE RESIDENTIAL CONSTRUCTION LIABILITY ACT, September 2009.

[8] TEX. PROP. CODE 27.004(e).

(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.[9]

2. 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.[10] 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."[11]

The required 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 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."[12]

One twist of the RLCA that has been a point of contention for procedural warriors is that while the RLCA requires the statement that any demand must refer to the RCLA to be put into contracts, the RCLA itself does not require that the demand refer to the RCLA. Thus, if the required statement is not in the contract, the demand does not need to reference the RCLA (but it is strongly advised that it does). Or, even if the required statement is in the contract, is it an actionable breach of contract if an otherwise perfectly written demand neglects to mention that it is sent under the RCLA? Hours in deposition have been wasted on this issue; thus, it is advised that the demand reference the RCLA.

[9] *Id.* 27.004(g)

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

[11] *Id*. 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.

[12] *Id*.

3. Don't forget Condos! Case: *Timmerman v. Dale*, 397 S.W.3d 327, 330– 32 (Tex. App.— Dallas 2013, pet. denied).

While there are few cases fully examining the RCLA, one case involving a condominim is instructive because of its discussion on damages. This 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. [13] 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.[14] 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.[15] 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.

4. What if the defect is so bad that my client can't wait for this process to play out? Section 27.004(m).

Section 27.004(m) of the RCLA provides that

> … a contractor who receives written notice of a construction defect resulting from work performed by the contractor or an agent, employee, or subcontractor of the contractor and creating an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable.
>
> If the contractor fails to cure the defect in a reasonable time, the owner of the residence may have the defect cured and may recover from the contractor the reasonable cost of the repairs plus attorney's fees and costs in addition to any other damages recoverable under any law not inconsistent with the provisions of this chapter.

In this instance, if the homeowner has not already notified the contractor, the attorney should send notice noting the imminent nature of the threat. If a "reasonable time" elapses, the homeowner may cure the defect. It is strongly advised that the letter set forth what will be viewed as a "reasonable time," to set the stage on how an arbitrator may view a spoliation issue.

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

[14] *Id.* at 331.

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

B. The DTPA

The RCLA preempts the DTPA to the extent of any conflict.[16] While the DTPA is pre-empted, it is always relevant, and a good demand will cite both. While the nuances of pre-emption are outside the scope of this paper, in general, DTPA and fraud claims remain viable options in residential cases where there are actionable misrepresentations that can be alleged as occurring separate and apart from any specific defect.[17]

C. So, what should the demand include?

It follows that a good demand should cite the RCLA and, if applicable, the DTPA. It should "specify[] in reasonable detail the construction defects that are the subject of the complaint."[18,19] In response, the contractor should reply and confirm the RCLA timelines and ask for "any evidence that depicts the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect, including expert reports, photographs, and videotapes, if that evidence would be discoverable under Rule 192."[20,21]

III.
THE BEGINNING OF SUIT

A. Where to file?

Once the RCLA/DTPA process has played out, suit may be filed. If a private arbitrator has been agreed to beforehand, simply notify the arbitrator. If the AAA rules are in the contract or are already agreed upon, one must go through the AAA body.

TIP. Filing in state court is an unique way to get to arbitration, but may be of use in some circumstances. The Texas Arbitration Act in Texas Civil Practice and Remedies Code allows parties to file in state court in order to "invoke the jurisdiction of the court over the adverse party and to effect that jurisdiction by service of process on the party before arbitration proceedings begin."[22] This may be helpful when you suspect that the defendant may not obey the arbitration body or be difficult to serve or make appear. In that instance, you would have to go to the court anyway to get them to behave, and this cuts of that process.

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[16] 27.002(b).

[17] *See generally Bruce v. Jim Walters Homes, Inc.,* 943 S.W.2d 121, 123 (Tex. App. – San Antonio 1997, writ denied); *Bishop Abbey Homes, Ltd. v. Hale,* No. 05-14-01137-CV, 2015 WL 9167799, at *1 (Tex. App.—Dallas Dec. 16, 2015, pet. denied).

[18] 27.004(a).

[19] A sample demand is attached as Exhibit 2 in the Appendix.

[20] 27.004(a).

[21] A sample response letter is attached as Exhibit 3 in the Appendix.

[22] TEX. CIV. PRAC. & REM. CODE 171.086(a)(1); *see also Quanto Int'l Co. v. Lloyd*, 897 S.W.2d 482, 487 (Tex. App.—Houston [1st Dist.] 1995, orig. Proceeding) (noting that CPRC 171.082 predecessor "authorizes, as an independent cause of action, the invoking of a trial court's jurisdiction to compel arbitration.)

Another instance where this may be useful is in a "race to the courthouse," where both parties believe they should be the plaintiff. For example, in a case where a homeowner stopped paying a contractor because work was believed to be defective, and the contractor alleges payment is owed, both parties believe they are wronged. If one wants to secure its status as the plaintiff, but believes that if it files in arbitration the other party may file its own, competing arbitration, this can be helpful. Rather than have the AAA or arbitration body sort out who should be the plaintiff or attempt to join competing arbitrations, the party can run to the courthouse and file its petition, requesting jurisdiction over defendant pursuant to the TAA. If in the meantime the other party files a competing arbitration, the first-filing party (in court) may request a stay over the later filed arbitration, and request that first-filed matter be compelled to arbitration with the first-filing party as plaintiff.

This procedural tactic has always received pushback from opposing counsels who are not aware what the TAA allows. However, it works. [23] If it is important that a party is the plaintiff, this is one tool to keep in your toolkit.

A sample jurisdictional statement to include in a Petition utilizing this procedure is as follows:

> ***Arbitration.*** The contract between the parties provides that all disputes and controversies between the Parties shall be submitted to arbitration with the American Arbitration Association. Accordingly, Plaintiff requests that this court exercise jurisdiction over this matter to compel arbitration and render such orders, as necessary, as provided for in Texas Civil Practice and Remedies Code Section 171.086. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.081, 171.082, 171.086.

B. What Rules?

In many instances, the AAA Home Construction Arbitration Rules are required.[24] The AAA Rules are calculated for limited discovery, except in large, Level 3 cases. One quirk is that depositions are called "Interviews," and the party deposing the witness not only pays for its copy of the deposition, but for copies of the deposition for any other party that wants one. In any event, whichever rules are required, the practitioner should review them and be familiar with them before the initial conference with the arbitrator.

If no rules are required in the contract, the parties are free to agree to whichever rules they or the arbitrator choose. In most cases, the parties default to the Texas Rules of Civil Procedure. As noted in the following section, we recommend the parties negotiate some caps on those rules, since arbitration is supposed to be fast and efficient, and Texas's discovery rules are certainly not.

[23] *See* Appendix, Exhibit 4, Order from the 192nd District Court of Dallas County.

[24] A full copy of the rules is available at https://www.adr.org/sites/default/files/Home%20Construction%20Arbitration%20Rules%20and%20Mediation%20Procedures.pdf (last visited January 11, 2019).

IV.
PREPARING THE CASE

A. Arbitrator Selection

This is an important part of the process. Just as many cases are won in jury selection, many are won in arbitrator selection. This is not to say that arbitrators are biased. But like every single juror, including every reader of this paper, each person has a lens through which they view reality. If your facts and your case align with that lens, or, stated another way, if the fact-finder's belief system is set up to receive and believe the story your evidence is telling, you have a significant advantage. For instance, arbitrators viewed as "consumer-friendly" may have a belief system that most contractors do jobs on the cheap. Arbitrators viewed as "builder-friendly" may have a belief system that builders generally do a good job, and there should never be a windfall to a homeowner. Just like with juries, it is your job as an advocate to research and know the background of the person or persons deciding your case.

Private arbitrator. As always, parties have wide latitude in agreeing to procedural issues. This includes arbitrator selection, rules, and other items. Despite what an agreement may say, if both parties can agree on an arbitrator, they are free to submit their dispute to whomever they choose, and many do.

When the parties cannot agree. If the contract does not call for an arbitrator or arbitration service, and the parties cannot agree, they may file suit and ask the judge to appoint one. Or, they can agree on a particular arbitration service and let the service select the arbitrator.

AAA arbitration. In cases proceeding under AAA administration, the AAA submits lists of arbitrators to the parties. The arbitrators are pre-selected as having experience in this area. Most are lawyers, but some are engineers or architects. The parties may strike arbitrators they do not want and rank the remaining ones. Upon receiving the rankings, the AAA then makes the choice.

B. The Initial Conference

Once an arbitrator is selected, the parties have a joint conference call with the arbitrator in an initial conference. Here, a final-hearing date is agreed to, and the parties map out discovery deadlines and other procedures. It is also here where the parties can agree to streamlined discovery. What we typically seek is a date certain by which the parties will exchange Rule 194-style disclosures and their respective "files" on the case. Any party is free to follow up by letter if more documents are requested. No interrogatories. In about half the cases, this is well-received. It is designed to get to the heart of what you need in discovery, without the empty billing exercise of answering hundreds of RFP or artfully answering interrogatories. A sample proposed scheduling order is attached as Exhibit 5 in the Appendix.

C. Working up the case

With the rules agreed to, the parties can prepare their case. Aside from the rule differences discussed above, working up the case in arbitration is much like any other case. You have to secure the evidence needed to tell your story or prepare your defenses. There are a few nuances, however, to keep in mind.

Experts. As noted, the expert can play a large role in the effectiveness of the presentation of the evidence. Many cases come down to a "battle of the experts" scenario, and a lot is riding on

the expert's opinion. Working closely with the expert to formulate and understand an opinion that makes sense is critical.

Damages and damage models. On the homeowner side, resist the tendency to overreach in damages. A windfall may happen every now and then, but arbitration is attractive for because arbitrators are normally reasonable decisionmakers that try to do what it right, and are not normally interested in changing an industry or emotionally punishing a defendant. The vast majority of the time, a $550,000 damage model on a $250,000 house is not going to be effective in arbitration.

Dispositive motions. Use them sparingly. Unless it is a clear-cut limitations issue (a *really* clear-cut one), a dispositive motion is not going to be granted. Some attorneys may want to use a dispositive motion to "educate" the arbitrator on issues that will be argued at the hearing. Most likely, such briefing is better done in a pre-hearing brief.

Mediation. Most civil cases settle before trial, and residential construction is no exception. The key to mediation is giving it your best effort so that, if the case does not settle, you and your client can continue litigation with a clear conscience, knowing you tried all you could to resolve the dispute. This requires a bit more preparation work than other cases. On both sides, the parties much complete inspections obtain all necessary bids to build and rebut damage models. As discussed, a contractor needs to notify any subcontractors, insurers, or any other party that may contribute and invite them to attend.

V.
THE FINAL HEARING

The simplest and best approach to the final hearing is to try to help the arbitrator try to find where the justice lies through your presentation of evidence. You and your witnesses are aides in the arbitrator's search for the right thing to do. If the arbitrator sees you in this role, you stand a much better chance of a desirable result. Trial practice is its own topic, and entire multi-day CLEs are devoted to trials, persuasion, and the latest brain science on how to get fact-finders to rally to your side. This section simply touches on some tips for the final hearing from this practitioner's perspective.[25]

A. Site visit

The final hearing often includes a site visit. If a picture is worth 1000 words, an in-person visit with all five senses is worth a million. At the site visit, the homeowner-claimant will typically show the arbitrator around the house and the arbitrator can get his or her eyes on the issues. A bit of advocacy is occurring during the visit, where the homeowner is essentially giving unsworn testimony by showing the issues and speaking about them. The homeowner should not overdo it and lose credibility by being strident or dramatic during the walkthrough. Nor should the defense attorney press too hard on issues important to them. Just make sure the arbitrator sees the issues that are critical to your case, or the defense thereof, and call it a day.

[25] Other excellent papers have been written by arbitrators discussing effectiveness at the final hearing from the arbitrator's perspective. *See, e.g.,* Robert A. "Bob" Gammage and Richard Faulkner, *Effective Advocacy in Arbitraiton- the Arbitrator's View*, The Advocate, Winter 2003; Paulo Flores, *Residential Construction Law Update,* Dallas Bar Association Real Estate Section, April 6, 2015.

B. Trial preparation

This is, for many, the toughest part of law practice. Long days preparing for the final hearing and slogging through deposition testimony, witness outlines, and preparing exhibits— all without the corresponding glory of actually doing anything in trial. Preparation for arbitration proceeds much like any trial preparation. A good place to start is the trial notebook, where opening, witness exams, and closing all start to take shape.

Evidence-wise, the flexibility of not being tied to a courthouse, however, brings a good opportunity to use whatever technology is comfortable for you in working with witnesses and presenting the evidence. We bring our own technology and use it liberally. Technology can and will fail, however, so paper backups are always present in the room. Additionally, while technology is helpful in presenting the evidence, the vast majority of arbitrators want a hard copy binder of the exhibits. Be familiar with what the arbitrator prefers and make sure you have it there.

A huge benefit and stress-reliever at this stage is knowing that the strict rules of evidence do not apply. The arbitrator is judge and jury, and will decide both the facts and the law. The arbitrator also decides what qualifies as evidence. While the arbitrator will consider objections to evidence, he or she does not have to follow any evidence rules. The import of this is that the lawyer can focus on preparing their side's story for arbitration without sweating how something is coming into evidence. The advocate is not up late during trial preparation preparing bench briefs on hearsay or mundane evidence rules that it knows the other side will interject.

Finally, do not overlook the opportunity to file a pre-hearing brief. If it is not addressed in the Scheduling Order, request the ability to file one. A good pre-hearing brief sets forth both the facts and the law, and begins to tell your story. It is your opportunity to set the scene before walking into the arbitration room.

C. The Hearing

In nearly all cases, the hearing will be in a typical office-style conference room. We highly recommend you visit the room beforehand to make sure the technology you bring is compliant and works in the room.

Everyone normally remains seated throughout the process. Before openings occur, the parties discuss housekeeping matters with the arbitrator: how the day will proceed, when breaks will be, when lunch will be, any motions that have not been ruled on, and any objections to exhibits (which the arbitrator always reserves ruling on until the exhibit is presented). For opening statements, some attorneys remain seated for opening and closing presentations and some stand, depending on their personal style. Ask the arbitrator what they prefer. After opening statements, the hearing proceeds much like a normal trial with the orderly presentation of witnesses.

1. Expert testimony at the hearing.

The expert plays a large role in convincing the arbitrator of your view of the defect. The number one tip for experts is this: be a teacher. If the expert can see himself/herself as a high school teacher with a passion for teaching their subject matter, credibility will flow out of the expert. Note—the expert is not to be a professor; he or she must resist the urge to take on a professorial tone. There is always the temptation to use industry jargon and technical language. Instead, the

"high school teacher" model is actually harder for the expert, and will require the expert to relinquish the jargon and explain concepts so everyone in the room can understand.

Your experts should know that they are not in a battle with opposing counsel or the other experts. Their job is to help you persuade the arbitrator, and everything that comes out of their mouths is for the arbitrator. Visual aids are useful. Examples and anecdotes are helpful. Finally, on cross, "may I explain?" is a great question for the expert to ask the opposing lawyer. The expert will almost always be allowed by the arbitrator to explain, and thus can break the momentum of a cross examination.

2. Final matters

When the evidence is closed, each party normally does a closing argument. The arbitrator then sets timetables for any post-hearing briefing. Arbitrator preference on this varies wildly, from no post-trial briefing at all, to multiple briefs targeting different areas of the law. Then at long last, after post-trial briefs, the award is received.

VI.
PRACTICE TIPS FOR THE UNDER 40 LAWYER

Arbitration provides a wonderful opportunity for younger lawyers to gain valuable trial experience. This is real trial experience, with hostile witnesses, objections to examinations, and disputes during arbitration. Even more so, arbitration can be better experience than trial because, without a bailiff in the room and the formality of a courthouse, attorney behavior may not be where it would be if the parties were in a courthouse (*i.e.*, it can be more "wheels off" or "wild west"). The arbitrator may not have as good of control of a room as a judge. This means the attorney will need to think more quickly and use more personality in situations that would not arise in a courthouse. Growing up on the mean streets of arbitration can make the boulevard of the courthouse seem easy.

Additionally, cases are more likely to be arbitrated than tried to a jury. While a company may not trust a jury to determine defects in a residential home, it is more likely to allow an experienced construction lawyer to decide the case. Thus, since arbitration provides a (relatively) safe forum for younger lawyers to get experience, what follows are some tips for the under-40 lawyer wading into the arena.

Go with what you are comfortable with.

> *"I cannot go in these," he said to Saul, "because I am not used to them." So he took them off. Then he took his staff in his hand, chose five smooth stones from the stream, put them in the pouch of his shepherd's bag and, with his sling in his hand, approached the Philistine.*[26]

Many are familiar with the story of David and Goliath. The young, ruddy, inexperienced shepherd's boy volunteers to fight the old, experienced giant of his profession. The giant laughs at the lack of experience of the young David, and how he does not wear the armor common to

[26] 1 Samuel 17:39-40.

experienced warriors. The giant then, without even seeing it, gets a stone to the forehead that knocks him down, and within seconds has lost his head.

But was David so inexperienced? He had tried on Saul's armor, the armor of a king and a man and of an experienced warrior. It was too big and heavy. David had been using other, lighter weapons (his stones and sling) on animals for many years in the wilderness with great success. Thus, he may have been inexperienced in the armor of the old day, but he was extremely proficient at his method, as Goliath found out.

What can be gleaned from this old story? **Use the tools you are comfortable with.** If you are young enough to be a digital native, go with your technology and iPad. You have much more experience using those tools than the older lawyer. You will be comfortable and relaxed using your method, rather than trying to force yourself into the methods other lawyers use. Just as importantly, if you are not technological, do not feel the stress to compete on that level. Again, find your method and use it.

Simply refuse to feel the pressure to do what you have seen. There are many things lawyers do and they do not know why they do them. Why do Bates labels have leading zeros? Why do we write, "WHEREFORE, PREMISES CONSIDERED"? Many things in our profession are relics from a time past. As a younger lawyer, you are free of the momentum of many years of experience, and that freedom can lead to great creativity. Use it!

Do not overdramatize. In my first few arbitrations, I had the tendency to attempt to deploy all of my trial training in a two-day hearing. Resist that urge. A small hearing may not be the time for diving off into folksy anecdotes during opening, impeaching every witness, and becoming emotionally charged over a contract. Yes, tell a story. Yes, make it interesting—do not be the boring lawyer. But this may not be the time to use every single tactic, tip, and trick you have ever learned. Do not feel that pressure squeeze it all into one hearing.

It is not going to come out perfectly. An oft-used military adage says that "no plan survives first contact with the enemy."[27] Dwight Eisenhower has said "In preparing for battle, I have always found that plans are useless but planning is indispensable." Or, as the learned Mike Tyson has put it, "everyone has a plan until they get punched in the mouth." The point is, while your trial notebook may be perfect going into arbitration, in the first few hours, things absolutely will happen that will make you alter your plan. Be adaptable, both in overall theme and strategy and with individual witnesses. There are really two cases tried in any given case. There is the case all the parties think they are working up. Certain issues arise in motions and in depositions that become critical. And then there's the case that unfolds during the hearing. Often, the issues are different.

[27] The adage originates from Prussian Field Marshal Helmuth Karl Bernhard Graf von Moltke. In his 1871 work, *On Strategy*, he notes "The material and moral consequences of every major battle are so far-reaching that they usually bring about a completely altered situation, a new basis for the adoption of new measures. One cannot be at all sure that any operational plan will survive the first encounter with the main body of the enemy. Only a layman could suppose that the development of a campaign represents the strict application of a prior concept that has been worked out in every detail and followed through to the very end."

What seemed critical to everyone during discovery is casually dismissed by the arbitrator. The focus can change in an instant. Your ability to read that is key.

Lastly—and this point deserves its own paragraph—be alert when the arbitrator is bored and understood the point long ago. Move on.

We'll leave this section with succinct advice from Washington lawyer Karen Koehler: (1) be who you are; (2) trust your instincts; (3) do your best and move on.

PART II:
Substantive Law Issues to Consider in Residential Construction Arbitration

I.
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.[28] 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."[29]

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.[30] Moreover, "[t]he control must relate to the injury the negligence causes."[31]

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.[32] "[T]he right to control the work must extend to the 'operative detail' of the contractor's work."[33] Further, the control must relate to the injury the negligence causes.[34] It is not enough that the owner has the right to order

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

[29] *Id.* § 95.003.

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

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

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

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

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

the work to stop and start or to inspect progress or receive reports.[35] Nor is it enough to recommend a safe manner for the independent contractor's employees to perform the work.[36]

B. How it works.

Thus, CPRC Chapter 95 could apply to bar claims against (1) landowners 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.[37] 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.[38] 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.[39] The Court held there was no evidence that the builder controlled the means, methods, or details of the brick work.[40]

C. Pre-2016 law

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 applicability of the statute.[41] In *Hernandez,* a contractor's employee was making repairs to an air conditioner on the roof of the building.[42] As the employee was carrying the air compressor off of the roof, the roof collapsed.[43] 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.[44] 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.[45] The Court noted that Chapter 95 would not apply to this case because the plaintiff was working on the air conditioning (the

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

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

[37] *Id.* at *1.

[38] Id.

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

[40] *Id.* at *5.

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

[42] *Id.* at 153–54.

[43] *Id.* at 154.

[44] *Id.* at 161.

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

"improvement") but was injured by the roof, and the roof was not "the improvement" he was constructing, repairing, renovating, or modifying.[46]

D. 2016 and beyond

Before 2016, a majority of Texas appellate courts had disavowed *Hernandez,*[47] 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).[48]

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 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."[49] 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.

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

[47] *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).

[48] Emphasis added.

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

E. Post-*Ineos* Problems.

Three post-*Ineos* cases demonstrate the problems *Ineos* caused in agreeing with *Hernandez*, which directly contradicted the Legislative history and intent of Chapter 95.[50]

1. *Torres v. Chauncey Mansell & Mueller Supply Co., Inc.,* 518 S.W.3d. 481 (Tex. App.—Amarillo 2017, pet. denied).

In *Torres,* the employee of a subcontractor was electrocuted while working on a cement parking lot in connection with building a larger office building.[51] 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."[52] 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."[53]

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.
>
> 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.[54]

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

[51] *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.).

[52] *Id.* at *7.

[53] Id.

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

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*"[55] The court thus "could not but factor the concept of "a safe workplace" and "the nature of the workplace" into the nature of the improvement."[56]

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.[57] 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.

3. *Morales v. Alcoa World Alumina L.L.C.*, 2018 WL 2252901, at *1 (Tex. App.—Corpus Christi May 17, 2018, pet. filed)

In *Morales*, the employee of a subcontractor received chemical burns while supervising a crew that was hired to maintain and repair Alcoa World Alumina's ("AWA") alumina refining facility. Two employees used a jackhammer to remove a scale deposit. When the jackhammer broke through the scale deposit, fluid sprayed out of a pipe onto Morales, causing severe burns on his back and right arm. Morales and his wife filed suit against AWA. *Morales*, 2018 WL 2252901, at *1.

The trial court granted AWA summary judgment motion based on Chapter 95. *Id.* at *2. Morales appealed, alleging that Chapter 95 did not apply because "he and his crew were performing routine maintenance rather than 'construct[ing], repair[ing], renovat[ing], or modify[ing]' improvements at the plant." *Id.* at *7. Morales cited *Montoya v. Nichirin-Flex, U.S.A., Inc.*, 417 S.W.3d 507, 513 (Tex. App.—El Paso 2013, no pet.).

The *Montoya* court looked at Webster's New Universal Unabridged Dictionary to determine the ordinary meaning of the words construct, repair, renovate, modify and maintenance. "'Maintenance' is ordinarily defined as 'care or upkeep, as of machinery or property; and 'maintain' is defined as 'to keep in an appropriate condition, operation, or force; keep unimpaired or to keep in a specified state." *Morales*, 2018 WL 2252901, at *7. The *Montoya* court held that Chapter 95 applied because the employee's actions were "not aimed at keeping the roof in an existing state; instead, it was done to restore a primary function of a roof, namely, keeping water and other elements out of the building's interior." *Id.*

Morales argued that unlike *Montoya*, he and his crew were doing ordinary, routine maintenance, which is not covered by Chapter 95. The *Morales* court disagreed and found that Morales's argument "hinges on the notion that 'maintenance'" and the Chapter 95 activities are mutually exclusive, which the Court could find no authority to support. Instead, the Court

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

[56] *Id.*

[57] *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.).

determined that even though Chapter 95 does not mention "maintenance," nowhere does Chapter 95 indicate, "implicitly or explicitly," that the activities described therein may not be done as part of routine maintenance." Therefore, the Court concluded that the summary judgment evidence established that work done by Morales and his crew "was of the type covered by Chapter 95." Specifically, the work done renovated or modified the equipment; "thus Chapter 95 applies regardless of whether the work could be also considered 'maintenance.'" *Id.* at *8.

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.

II.
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. As a result, builders and developers may wonder what type and length of express warranty is required for new home projects.

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.[58] 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.[59] The implied warranty of habitability "requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation."[60] The warranty "only protects new home

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

[59] *Id.*

[60] *Id.*

buyers from conditions that are so defective that the property is unsuitable for its intended use as a home."[61]

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.[62] How may they be disclaimed? The implied warranty of good workmanship cannot be generally disclaimed, but may be superseded by the parties' agreement which defines the manner, performance or quality of the desired construction.[63] 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.[64]

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. 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*.[65] 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 not to 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."[66] 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.[67] 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."[68]

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[61] *Id.*

[62] Texas Residential Construction Law Manual § 3:6 (2014).

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

[64] *Id.*

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

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

[67] *Id.*

[68] *Id.*

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.[69]

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. Anti-Indemnity statute

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.[70]

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 development directly related thereto…."[71] 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.[72] 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).[73] 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.

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[69] Texas Residential Construction Law Manual § 9:2, fn 1.

[70] 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.

[71] TEX. INS. CODE § 151.105(10)(A).

[72] *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.

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

III.
CONCLUSION

Residential-construction arbitration is a unique field and can be a wild place, but also a wonderful place for the younger lawyer to gain valuable experience. Practitioners can help their clients greatly by becoming involved early on in the investigative stages. From the demand through final hearing, advocates have a great opportunity to tip the scales in their favor through thorough preparation.

Importantly, practitioners should be aware of the applicability of the RCLA to this area. The ins and outs of the statute provide many pitfalls and defenses. Also, 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 homes. 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.

Residential-construction arbitration will always be a unique area since it deals with a person's home. Walking on the wild side, however, can be a very rewarding practice. It is my hope and intention that you have found value in the pages above.

A Walk on the Wild Side: Residential Construction Arbitration from Demand to Final Hearing- Appendix

1. Form tender letter
2. Form demand
3. Form RCLA response letter
4. State-Court Order exercising jurisdiction and compelling arbitration under the TAA
5. Form arbitration scheduling order

Appendix 1

Lamberth | Ratcliffe | Covington PLLC

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Facsimile: 469-698-4037

Curt M. Covington
Curt@LRClegal.com

August 27, 2018

Accident Insurance Company
[address]

Via CMRRR No.
Regular mail, and Email

Re: Notice of Tender: [style of case]

Your Named Insured: [name of sub]
Your Additional Insureds: [client's name]

To Whom It May Concern:

We represent [client] as counsel in the above-referenced matter. The Plaintiff in this action is [plaintiff] and own the home located at [address] (the "Home"). Plaintiff alleges defects in, and damage from, the construction of the Home. In particular, your insured's work is alleged to be defective and to have caused damage.

For your convenience, enclosed is a copy of the Certificate of Liability Insurance. I have also enclosed a copy of Plaintiff's Original Petition in this matter.

Our records reflect that our client is an additional insured under certain policies issued by you, including, without limitation, the following policy issued to your named insured, [subcontractor]:

Policy: [policy no.]
Effective Dates: [date]

It appears that your insured was insured under the same policy for a number of years.

We request that you provide complete copies of the above-listed policies, including all certificates and endorsements which name [client], including its subsidiaries, as an additional insured, and any other policies of insurance that name [client], including its subsidiaries as an insured, additional insured, or named insured.

We hereby tender the defense and indemnification of this matter to you under all potentially applicable coverages of the policies listed above, as well as any other policies that name [client], including its subsidiaries, as an insured, additional insured, or named insured.

Please contact the undersigned at your earliest convenience to discuss our tender and Accident Insurance Company's fulfillment of its defense and indemnification obligations to [client], including its subsidiaries.

We thank you very much for your anticipated cooperation and assistance in this matter. We look forward to hearing from and working with you to resolve this matter efficiently and cost effectively.

Sincerely,

Curt M. Covington

CMC/lt
Enclosures

cc (w/o enc.):

Via Certified Mail, RRR No.
[subcontractor]

Appendix 2

Lamberth | Ratcliffe | Covington PLLC
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1010 W. Ralph Hall Parkway, Suite 100
Rockwall, Texas 75032
Telephone: 469-698-4300
Facsimile: 469-698-4037

Curt M. Covington
curt@lrclegal.com

[DATE]

Alliance Foundation Repair
Address

Via CMRRR and Regular Mail

Re: **DEMAND** regarding the Plaintiff residence at (the "Home").

Greetings:

Please be advised that this firm represents Plaintiff in connection with their claims against Alliance Foundation Repair. Please direct all future correspondence pertaining to this matter, whether oral or written, to me. You are directed also to furnish a copy of this letter to any insurance carrier that may be able to pay this claim in whole or in part. This letter is written to comply with Texas Property Code Chapter 27.004 and Texas Business and Commerce Code Chapter 17.505.

I.
FACTUAL BACKGROUND

Our investigation of the facts and circumstances reveals the following.

[state the facts]

II.
DEMAND

The conduct of Alliance described above constitutes negligence, breach of warranty (express and implied), breach of contract, and violations of the Deceptive Trade Practices Act (DTPA) §17.50 (a)(2), (3), and §17.46(b)(5), (7), (13), and (24). Because of this conduct, the Plaintiffs have suffered very serious damages, including loss of value of the home, loss of use and enjoyment of the home, cost of repair, cost of substitute housing during future repairs, mental anguish, consulting fees, and attorneys' fees. **It has also come to our attention that their home insurance company will not renew their homeowners' insurance in May 2016 due to the condition of the home—a condition Alliance created and was supposed to fix**.

The Plaintiffs have spent an inordinate amount of time and energy working with Alliance to attempt to get the foundation repair they contracted for, and wish to make one final attempt to resolve the matter short of litigation. It is our experience that entire foundation repairs on a home of this size, combined with the associated damages to the home, and lost market value, will cost the Plaintiffs well over $200,000.00 to remedy. That amount increases with each day that passes

while no fix is performed. In an effort to compromise, **Demand is hereby made in the amount of $175,000.00**. If payment is not made to this law firm within fourteen (14) days, no further notice or demand will be issued by this office before filing suit. The fourteen days is all that can be extended due to the necessity of resolving this matter before the insurance carrier cancels insurance coverage for the home.

The purpose of this letter is to encourage you to resolve this claim in a fair and equitable manner without the need for legal action. If we cannot resolve this matter, I will recommend that we proceed with litigation against you in order to recover not only the full measure of damages set forth above, but also treble or punitive damages to the extent that they are supported by evidence of knowing or intentional wrongful conduct, additional attorney fees, prejudgment interest, costs of court, and postjudgment interest.

I trust that this action will not be necessary and I hope to hear from you at your earliest convenience.

Very truly yours,

Curt M. Covington

cc: [clients]

Appendix 3

Lamberth | Ratcliffe | Covington PLLC
ATTORNEYS & COUNSELORS

1010 W. Ralph Hall Parkway, Suite 100
Rockwall, Texas 75032
Telephone: 469-698-4300
Facsimile: 469-698-4037

Curt M. Covington
curt@lrclegal.com

April 24, 2018

COMMUNICATION MADE PURSUANT TO SECTION 27.004 OF THE TEXAS RESIDENTIAL CONSTRUCTION LIABILITY ACT, WHICH INCORPORATES THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT AND SECTION 17.505 OF THE TEXAS BUSINESS & COMMERCE CODE

OPPOSING COUNSEL

Via CMRRR No.
email

Re: [homeowner name and address]

Dear OPPONENT:

BUILDER has retained this Firm and the undersigned to represent it in connection with this matter. Please direct all future correspondence to me. BUILDER is in receipt of your April 19, 2018 letter. As you indicate, such a demand invokes the procedures and timelines under the Chapter 27 of the Texas Property Code (the "RCLA"). Pursuant to that statute, we request all evidence depicting the nature and cause of the alleged defect and the nature and extent of repairs necessary to remedy the alleged defect, including expert reports, photographs, and videotapes. *See* TEX. PROP. CODE § 27.004(a). To the extent you have such information and it is not provided to BUILDER prior to BUILDER's inspection, it is possible that BUILDER will need to reinspect once it has received the information.

BUILDER requests an opportunity to inspect the home in accordance with the RCLA. As such, please let me know as soon as possible dates when the home is available for inspection, or, if the home is generally available and you need a date from us, please let me know that immediately.

The three-business-day deadline in which to respond included in your letter does not accord with the statute. BUILDER received your letter on April 23, 2018. As such, we calculate the 35-day RCLA-inspection deadline to fall on **May 28, 2018,** and the 45-day RCLA-offer deadline to fall on **June 7, 2018**. Please let me know if you disagree with these deadlines or have a different understanding. We are certainly willing to be flexible.

My client disputes your recitation of the facts but, for brevity's sake, will not respond in kind here and will respond at the appropriate time. While no specific DTPA sections were cited, BUILDER vigorously denies making any misrepresentation or failure to disclose to your client and requests that you forward immediately any communication that you will claim is a

misrepresentation or such a failure. In addition, your DTPA demand is deficient in that it lacks the required itemization of damages listed in Texas Business & Commerce Code § 17.505(a). Please amend your DTPA demand to include those items. If those items are not provided we will move to abate any lawsuit in accordance with Section 17.505(c).

I look forward to hearing from you. If you have any questions in the meantime, just let me know.

Very truly yours,

Curt Covington

CMC/lt

cc: clients

Appendix 4

Cause No. DC-16-11442

PROCAL STONE DESIGN, LLC,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
v.	§	DALLAS COUNTY, TEXAS
DARREN ASCHAFFENBURG,	§	
Defendant.	§	192nd JUDICIAL DISTRICT

ORDER COMPELLING ARBITRATION AND STAYING ACTIONS

On this day, the Court considered Plaintiff ProCal Stone Design, LLC's ("Plaintiff" or "ProCal") *Motion to Compel Arbitration* the ("Motion").

The Court, having considered ProCal's Motion, the evidence, and the arguments of counsel, finds that

(1) it has jurisdiction over the Parties to compel arbitration and provide necessary orders under the Texas General Arbitration Act, Texas Civil Practice and Remedies Code § 171.001 et seq.;

(2) a written agreement to arbitrate exists between ProCal and Defendant and that the arbitration agreement covers all of Plaintiff's claims against Defendant; therefore, the Court finds that the Motion should be **GRANTED**.

It is therefore **ORDERED, ADJUDGED AND DECREED** that all claims alleged by Defendant against Plaintiff in AAA Case number 01-16-0004-2125, currently pending with the American Arbitration Association, are stayed; it is further

ORDERED, ADJUDGED AND DECREED that all claims between and among Plaintiff and Defendant in this action are ordered to arbitration with the American Arbitration Association in accordance with the contract between the Parties with Plaintiff as Claimant and Defendant as Respondent; and it is further

ORDERED, ADJUDGED AND DECREED that all proceedings in the instant action are abated and stayed pending conclusion of the arbitration ordered herein.

SIGNED and entered this 7 day of Nov., 2016.

JUDGE PRESIDING

Appendix 5

DOYLETTA MINIX	§	IN ARBITRATION
	§	
VS.	§	
	§	
LINWOOD TOWNHOMES, LTD., APARTMENT MAINTENANCE SERVICES, INC., MARC A. BIRNBAUM, HOME OWNERS MANAGEMENT ENTERPRISES, INC., D/B/A HOME OF TEXAS, and WARRANTY UNDERWRITERS INSURANCE COMPANY	§	MARK GILBERT, PRESIDING
	§	
	§	
	§	
	§	
	§	DALLAS COUNTY, TEXAS

SCHEDULING ORDER

The parties have agreed to the pre-hearing dates and procedures outlined below, and it is therefore ordered by the arbitrator that those dates and procedures shall govern in this arbitration:

A. Scheduling Order.

1. September 18, 2016: Claimant shall file a Statement of Claim.

2. October 2, 2016: Respondents shall file a Response to the Statement of Claim.

3. October 16, 2016: Documents and Disclosures: The parties shall exchange all documents relevant to their claims and defenses, along with Rule 194 Disclosures.

4. December 1, 2016: Claimants' expert designation, with expert reports and other information required by Texas Rule of Civil Procedure 194.2(f).

5. January 3, 2017: Respondents' expert designation, with expert reports and other information required by Texas Rule of Civil Procedure 194.2(f).

6. January 15, 2017: Deadline to amend pleadings to assert new claims or defenses.

7. February 5, 2017: Deadline to respond to amended pleadings which added new claims or defenses, or, 21 days after the pleading was filed, whichever is earlier.

8. March 6, 2017: Discovery deadline.

9. April 3, 2017: The parties shall exchange exhibits (hard copies or electronic) along with witness lists.

10. April 17, 2017: Home walkthrough with arbitrator and attorneys only.

11. April 18 – 20, 2017: Final Hearing, to be held at the offices of the arbitrator, 12001 N. Central Expressway, Suite 650, Dallas, Texas 75243, beginning at 9:00 a.m.

B. **Modification**: The parties may agree to modify the above dates and procedures, as well as enter into other agreements facilitating the disposition of this matter. Such agreements shall be in writing.

C. **Serving documents**: Service shall be made in accordance with Texas Rules of Civil Procedure 21 and 21a.

D. **Depositions**: Depositions shall be limited to the parties and their experts. To the extent additional depositions are requested, the parties may agree to the same or, if no agreement can be reached, move to compel the deposition.

E. **Form of Award**: The award shall be a reasoned award.

IT IS SO ORDERED.

Dated this ____ day of September, 2016.

_____
MARK GILBERT, ARBITRATOR