The Road Less Traveled: Current Residential Issues and Topics

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Presented by:

Curt M. Covington
LAMBERTH RATCLIFFE COVINGTON, PLLC
1010 W. Ralph Hall Pkwy, Ste. 100
Rockwall, Texas

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I.
INTRODUCTION

Two roads diverged in a yellow wood,
And sorry I could not travel both…
I took the one less traveled by,
And that has made all the difference.

Such begins and ends the verses of Robert Frost's *The Road Not Taken.* The narrator, who must decide which road to take after weighing the views and potential promises of each way, chooses the one "less traveled." And so it is with this paper. Year after year, the Construction Law Foundation and Section have presented excellent residential content in the Annual Course and Basic Course. Most of that content, however, was focused on the RCLA inspection-and-offer process, residential-construction arbitration, or a specific, narrow issue within the residential arena.

This paper attempts to brief the reader on the roads (topics) "less traveled by" in residential-construction CLE. To be specific, these are not topics that are obscure or unknown, but simply are topics that do not normally make their way into a CLE paper or presentation, despite their importance. Thus, the goal is to present a well-rounded smattering of the current state of the law in a variety of areas, all touching on residential construction and residential-construction disputes. The reader may find it more practical to examine the Table of Contents for a particular topic rather than read all the way through, as the topics are wide and far-ranging, though they can be centered in a few key areas.

The first group of topics takes us on the "Arbitration Highway," and discusses relevant, developing issues in residential-construction arbitration. These issues include challenges in getting to arbitration, such as whether a subsequent purchaser is subject to an arbitration provision in the original sales contract. We further explore certificate-of-merit challenges within arbitration, class-action arbitration, joinder, scheduling order best practices, and, finally, judicial review of arbitration awards.

Next, we journey on the "RCLA dirt roads." On the main RCLA road, there many excellent papers and practice guides covering the important aspects of the RCLA: the inspection-and-offer procedure and the categories of available damages (and associated nuances). But what of the lesser-known and used aspects of the RCLA? There are many not-so-obvious provisions of the statute that can be immensely helpful in certain situations. These include areas such as attorneys' fees, causation, and subrogation.

Finally, we end by taking the "Substantive law side streets." We address areas of substantive law that frequently arise in critical situations. This includes topics like mental-anguish damages, independent-contractor liability (CPRC Chapter 95), quantum-meruit causes of action, and warranty claims.

So, grab your favorite walking stick, lace up the hiking boots, and let's proceed down the residential construction road less traveled…

II.
THE ARBITRATION HIGHWAY: CURRENT ISSUES IN RESIDENTIAL ARBITRATION

A. Compelling arbitration: subsequent-purchaser issues.

A residential home does not stay in the same hands forever—or, for our purposes, during the statute-of-repose period. Often, a home is sold to a subsequent purchaser. Sometimes that subsequent purchaser seeks benefits under the original contract and warranty from the builder, and sometimes they do not. In any event, a builder will normally want to enforce an arbitration clause found either in the warranty or in the original agreement if a dispute arises. Many subsequent homeowners resist this, asserting that *they* never signed any arbitration agreement. While there are various theories through which to attempt to compel arbitration, the ability to do so has become narrowed recently, and crafty pleading with the right set of facts can set up a scenario where there may be no ability to compel a subsequent purchaser to arbitration.

"Nonsignatories to an agreement subject to the FAA may be bound to an arbitration clause when rules of law or equity would bind them to the contract generally."[1] Courts have recognized at least six theories that may bind nonsignatories to arbitration agreements: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary.[2] An analysis of all of the above would be beyond the scope of this paper; instead, we will examine the two most commonly used theories employed to attempt to compel subsequent homeowners to arbitration.

1. Direct-benefits estoppel.

The obligation to arbitrate does not attach only to those parties who sign an arbitration agreement. "[A] litigant who sues based on a contract subjects him or herself to the contract's terms."[3] Accordingly, under direct-benefits estoppel, arbitration is required when "a non-signatory plaintiff seeking the benefits of a contract is estopped from simultaneously attempting to avoid the contracts burdens, such as the obligation to arbitrate disputes."[4] In short, a "nonparty cannot both have his contract and defeat it too."[5] Whether a claim seeks a direct benefit from the contract turns on the substance of the claim and not artful pleadings.[6]

Unfortunately, as the Texas Supreme Court has recognized, direct-benefits estoppel's "application and boundaries are not entirely clear."[7] This is due, in part, because "[a]lthough the principles of contract and tort causes of action are well settled, often it is difficult in practice to

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[1] *D.R. Horton-Emerald, Ltd. v. Mitchell*, No. 01-17-00426-CV, 2018 WL 542403, at *2-3 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (citing *Santander Consumer USA, Inc. v. Mata*, No. 03-14-00782-CV, 2017 WL 1208767, at *2 (Tex. App.—Austin Mar. 29, 2017, no pet.)).

[2] *Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45, 48 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (citing *In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 739 (Tex. 2005).

[3] *In re FirstMerit Bank*, 52 S.W.3d 749, 755 (Tex. 2001).

[4] *In re Kellogg Brown & Root*, 166 S.W.3d at 739.

[5] *In re Weekley Homes, L.P*, 180 S.W.3d 127, 130 (Tex. 2005).

[6] *Id.* at 131-32.

[7] *Id.* at 134.

determine the type of action that is being brought."[8] Nevertheless, the Texas Supreme Court has previously held subsequent owners who join the original owners' construction defect claims based on a contract, including breach of warranty, are required to arbitrate.[9] But the courts of appeals have since issued conflicting opinions in recent years on whether direct-benefits estoppel requires a subsequent owner to arbitrate construction claims against the builder.[10]

Based on the conflicting decisions, there is some momentum in Houston and Austin Courts of Appeals that if subsequent homeowners can plead implied warranty claims, DTPA claims, and negligence, and avoid any direct pleading of breach of contract or breach of warranty, then those subsequent homeowners can avoid arbitration because they are not seeking direct benefits under a contract.[11] This is a hotly contested area of law, and at the time of publication, *Whiteley* is pending review and oral arguments by the Texas Supreme Court.[12]

Builders argue, however, that direct-benefits estoppel should apply to a subsequent owner who asserts even implied-warranty claims against the builder based on alleged latent construction defects. Litigants who sue "based on" a contract subject themselves to the contract's terms.[13] This author humbly submits that certain courts of appeals would have the "based on" standard turned into a narrow, literal test, where unless specific contract provisions are cited, then it is concluded

[8] *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617-18 (Tex. 1986).

[9] *See In re FirstMerit Bank*, 52 S.W.3d at 755.

[10] *Compare Meritage Homes v. Mudda*, No. 05-18-00934-CV, 2019 WL 2865270 (Tex. App.—Dallas, July 3, 2019, no pet.) (mem. op.) (subsequent owner's warranty claims about construction defects under direct-benefits estoppel were subject to original sale contract's arbitration provision), *and Stanford Dev. Corp. v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (subsequent owners' claims of "implied contractual duties" and "express and implied warranties" fell under warranty and were subject to original sale contract's arbitration provision), *with Lennar Homes of Tex. Land & Constr., Ltd. v. Whiteley*, 625 S.W.3d 569 (Tex. App.—Houston [14th Dist.] 2021, pet. filed) (direct-benefits estoppel did not require arbitration of subsequent owner's negligent construction and implied warranties lawsuit), *Taylor Morrison of Texas, Inc. v. Kohlmeyer*, 634 S.W.3d 297 (Tex. App.—Houston [1st Dist.] 2021, pet. filed) (direct-benefits estoppel did not require arbitration of subsequent owners' DTPA, implied warranty, and negligent construction claims); *D.R. Horton-Emerald, Ltd. v. Mitchell*, No. 01-17-00426-CV, 2018 WL 542403 (Tex. App.—Houston [1st Dist.] Jan. 25, 2018, no pet.) (mem. op.) (direct-benefits estoppel did not apply to subsequent owner's construction defect lawsuit), *and Toll Austin, TX, LLC v. Dusing*, No. 03-16-00621-CV, 2016 WL 7187482 (Tex. App.—Austin Dec. 7, 2016, no pet.) (mem. op.) (direct-benefits estoppel did not apply to subsequent owners' negligent construction and DTPA violations).

[11] *See Whiteley*, 625 S.W.3d 569, *Kohlmeyer*, 634 S.W.3d 297, *Mitchell*, 2018 WL 542403, and *Dusing*, 2016 WL 7187482.

[12] It is possible that by the time of publication and presentation, the issue will be settled. In that event, read the case that settles it!

[13] *See In re FirstMerit Bank*, 52 S.W.3d at 755.

that the homeowner did not sue "based on" the contract.[14] Logic dictates that such a test cannot stand and would be open to endless gamesmanship.[15]

In sum, the law as it stands now gives attorneys for subsequent homeowners the ability to artfully avoid the words "contract" and "express warranty" and instead label their claims as violations of the DTPA, breaches of implied warranties, and negligent construction. This gives the subsequent purchaser the ability to argue the case law cited above in favor of subsequent purchasers and avoid the application of direct-benefits estoppel.

2. Third-Party beneficiary theory.

Assumption can also bind non-signatories to an arbitration agreement.[16] An implied assumption of a contractual obligation arises, in equity, when the benefit received by the assignee is so entwined with the burden imposed by the assignor's contract that the assignee is estopped from denying assumption and the assignee would otherwise be unjustly enriched.[17] "Assignees, third party beneficiaries, and successors in interest are often bound to arbitration clauses that an original contracting party entered into."[18] They effectively stand in the shoes of the original contracting party.[19]

This argument is well employed when there is a warranty which automatically transfers all rights and obligations—including the obligation to arbitrate—to successor owners.[20] If a homeowner seeks benefits under the warranty, such as filing a warranty claim, then the analysis is easier. The homeowner has sought a benefit under the contract and is now bound by its burdens. But in the absence of a warranty claim, the builder or warranty company may still argue that the warranty has been transferred to the subsequent homeowner regardless of the homeowner's intent to seek benefits under it, and they are bound by the arbitration agreement it contains.

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[14] *See, e.g., Kohlmeyer*, 634 S.W.3d at 303 (holding direct-benefits estoppel did not apply because "[the claimants] did not allege that [the builder] breached any specific provision of the original purchase agreement").

[15] For instance, a homeowner could set up a shell company to buy a house. Then, later transfer the house to themselves to avoid arbitration through artful pleading as a subsequent purchaser. Or, alternatively, buy the house directly and, if claims arise, transfer the house to a shell corporation for the purpose of litigating and avoid arbitration through artful pleading.

[16] *In re Kellogg Brown & Root*, 166 S.W.3d at 739.

[17] *See NextEra Retail of Tex., LP v. Inv'rs Warranty of Am., Inc.*, 418 S.W.3d 222, 228 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

[18] *Bonded Builders Home Warranty Ass'n of Texas v. Rockoff*, 509 S.W.3d 523, 535 (Tex. App.—El Paso 2016, no pet.).

[19] *See id.* (they have "no greater defenses than the original contracting party").

[20] *See In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011); *see also In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006) (manufacturer of the mobile home was a third-party beneficiary to arbitration agreement because the agreement "inure[d] to the benefit of the manufacturer of the Home"); *see also In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 647 (Tex. 2009) (wrongful death beneficiaries bound by a decedent's agreement to arbitrate); *In re Rangel*, 45 S.W.3d 783, 787 (Tex. App.—Waco 2001, no pet.) (third-party beneficiary bound by arbitration agreement); *Pulte Home Corp. v. Bay at Cypress Creek Homeowners' Ass'n, Inc.*, 118 So.3d 957, 958 (Fla. Dist. Ct. App. 2013) (subsequent owners were third-party beneficiaries to builder's warranty and required to arbitrate).

B. Arbitration joinder: certificate-of-merit considerations in arbitration.

Frequently in arbitration, a builder will seek to join all subcontractors who had any relation to the alleged defects, leaning on defense and indemnity requirements in the builder's subcontracts. This works well for most subcontractors, but the Legislature has placed a bump in the road when attempting to join design professionals.

Chapter 150 of the Texas Civil Practice and Remedies Code requires the notorious (or dreaded, or lovely, depending on your side) certificate of merit:

> **§ 150.002 Certificate of Merit.**
>
> (a) In any action or ***arbitration proceeding*** for damages arising out of the provision of professional services by a licensed or registered professional, a ***claimant*** shall be required to file with the complaint an affidavit of a third-party licensed architect, registered professional land surveyor, or licensed professional engineer competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer, registered professional land surveyor, or licensed architect shall be licensed in this state and actively engaged in the practice of architecture, surveying, or engineering.[21]

Notably, the definition of "Claimant" means a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification.[22]

It is critical to note that the statute was amended in 2019 to expand the language to include third-party joinder in arbitration. Previously the statute did not include "arbitration proceeding" and referred only to the "plaintiff." In 2019, the Legislature amended the statute to reflect the language above, as well as expand the definition of a "Claimant" to a "third-party plaintiff, seeking recovery for damages, contribution, or indemnification."

This can present a challenge to builders wanting to simply join a design professional at the outset of an arbitration, much like other subcontractors, when at the outset of the arbitration there is not a crystal-clear view of anyone's liability. The statute arguably requires a complete certificate of merit from the builder's engineer. The logical problem with that is that then the builder is essentially calling itself negligent if it is forced to retain an engineer swearing that the engineer the builder used during construction was negligent. Builders go to great lengths to avoid doing this, as any prudent litigant would.

In response, this practitioner has argued, with less success than he'd like to admit, that the *logic* of some pre-amendment cases should still be heeded, even if the holdings are stale because the statute no longer uses the terms the courts were considering at the time. Two particular cases outlined below contain the helpful logic. **A note of absolute caution before citing these cases:**

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[21] TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a) (emphasis added).

[22] *Id*. § 150.001(1-a).

they turn on a prior version of the statute and their holdings are not good law. However, as we learned in law school, case law is not always a black-and-white bludgeoning tool, no matter how much we may want it to be. It is not "cite the holding or nothing." Jurisprudential analysis instead requires a nuanced approach, and the *logic* used by a court can still be persuasive to the decision maker, even when a holding is undeniably stale.

In *Childress*,[23] Meritage Homes of Texas and Childress entered into a contract for Childress to provide engineering services for home foundations. The contract contained an indemnity clause. After a homeowner sued Meritage for negligence, gross negligence, breach of contract, breach of warranty, and DTPA violations, Meritage asked Childress to indemnify Meritage. While the suit between Meritage and the homeowner settled, Nationwide Mutual Insurance Company, as Meritage's additional insurer and subrogee, filed suit against Childress for breach of contract for failure to defend and indemnify Meritage in the underlying suit. Nationwide sought as damages all attorneys' fees, costs, litigation expenses, and the settlement paid to the homeowner. Childress moved to dismiss under CPRC Section 150.002, arguing that the suit arose out of the provision of services by an engineer and therefore required a certificate of merit. The trial court denied the motion, and Childress appealed.

The Fort Worth Court of appeals examined the indemnity clause between Childress and Meritage and held that "the trial court here is equipped to determine the indemnity clause's viability as a matter of law and to interpret it without requiring recourse to an expert's report."[24] "Further, the alleged error resulting in the breach of contract claim was CES's failure to comply with a contractual obligation, not a specific act, error, or omission performed in its provision of engineering service."[25] These words and phrases from the court give the builder the ammunition needed to allege that no certificate of merit is required.

A second tool used is the dreaded *Jaster* case.[26] Right up front, we must acknowledge that the *Jaster* holding turned on the party's status "as plaintiff" under a prior version of the statue.[27] The statutory changes were in fact the powerful design-professional lobby's response to *Jaster.* But setting aside whether "the plaintiff" is now "the claimant" in the statute, the logic used in *Jaster*—outside of the then-determinative "plaintiff" analysis—may prove useful. For instance, the Court discussed that:

> many defendants . . . deny the existence of any design defect, but alternatively assert third-party claims against a design professional, seeking contribution and indemnity in the event that the plaintiff prevails. It would be [] odd to require such

[23] *Childress Eng'g Services, Inc. v. Nationwide Mut. Ins. Co.*, 456 S.W.3d 725, 726 (Tex. App.—Fort Worth 2015, no pet.) (again, note that the holding turned on a prior version of the statute but only the logic here is used).

[24] *Id.* at 729.

[25] *Id.*

[26] *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 569–70 (Tex. 2014).

[27] *Id.* at 558-59.

> defendants to file an expert's certificate supporting the merits of the plaintiff's claim, thus requiring the defendants to abandon their denial of the merits.[28]

This is the exact problem faced today. And admittedly again, there has been mixed success in fighting a certificate-of-merit challenge on behalf of a builder that does not desire to shoot itself in the foot right off the bat. Centering the argument on breach of a *contractual* provision for indemnity or defense (*not* the common law indemnity encompassed by the statute) seems to be the best route. That pleading, plus the arguments above, have been the best (and only) tools to use thus far, and will likely remain so until the statute is amended or case law supports an interpretation that allows builders to add an engineer without torpedoing the builder's case against the plaintiff at the outset.

C. Class-action arbitration.

Who decides if a class may join in an arbitration? When can the class join? Can class-style relief be available in a bilateral arbitration? These questions are important because some homeowners—or their attorneys—may feel particularly strongly about a single issue and want relief beyond making the homeowner whole. The class-action jurisprudence surrounding arbitration becomes important when faced with an "issue of principle" or simply a rouge, pro-se warrior attempting to inject class relief into an arbitration.

Obviously, the first place to begin is the contract. Many larger builders have class-action waivers or a prohibition against class-action relief built into their contracts.[29] But in the absence of clear contractual authority, who decides when and if a class may join in an arbitration? That was answered resoundingly in *Robinson v. Home Owners Mgmt. Enterprises, Inc*.[30] There, the Robinsons brought suit against a builder and warranty company (HOME). HOME sought to compel arbitration, which was compelled over the Robinsons' objection. Only HOME, the builder, and the Robinsons were compelled to arbitration. Three weeks before the final arbitration hearing, the Robinsons sought to add a class-action claim on behalf of all Texas residents that HOME's proposed release—which homeowners were required to sign before receiving repair money—was overbroad.[31] HOME objected, and the arbitrator denied the objection but bifurcated the class claims on the release, allowing the hearing to go forward on the other, main issues.

After the arbitration had concluded, but before the arbitrator had issued an award, HOME went back to the trial court and asked the court to clarify the clarify the "scope of the issues"

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[28] *Id.* at 569–70.

[29] One example provision is as follows: "Buyer and Seller agree that the Parties may bring claims against the other only on an individual basis and not as a member in any purported class or representative action or collective proceeding. The Arbitrator(s) may not consolidate or join claims regarding more than one property and may not otherwise preside over any form of a consolidated, representative, or class proceeding. Also, the Arbitrator(s) may award relief (including monetary, injunctive, and declaratory relief) only in favor of the individual party seeking relief and only to the extent necessary to provide relief necessitated by that party's individual claim(s). Any relief awarded cannot be awarded on class-wide or mass-party basis or otherwise affect parties who are not a party to the arbitration. Nothing in the foregoing prevents Seller from exercising its right to include in the mediation and arbitration those persons or entities referred to above."

[30] 590 S.W.3d 518, 521 (Tex. 2019).

[31] *Id.* at 523.

referred to the arbitrator and, in the alternative, to strike the Robinsons' class claims.[32] The battle then moved to state court, with the Robinsons filing their class claims there but seeking to compel arbitration of them, and HOME moving to keep them in state court. The trial court and appellate court ruled in HOME's favor, and the Texas Supreme Court affirmed, making the following important holdings:

1) Arbitrability of class claims is a matter for courts to decide (but ultimately depends on what the parties' contract says about the matter).[33]

2) Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so;[34] and

3) "class arbitration must be explicitly referenced and not merely inferred from the parties' agreement to arbitrate"[35]

Thus, when faced with a procedural ploy to inject a class into an arbitration proceeding, either at the outset or during an arbitration, remember first that class-action arbitration is a gateway/threshold question of arbitrability for the Court. Second, the contract will control if class-action arbitration will be allowed, and that will only be if there is "clear and unmistakable evidence" that the parties intended to arbitrate class claims. This should be by explicit reference in the contract to allowing class-action arbitration—inferences and conduct are simply not enough.

While this issue may not surface daily, it certainly will yearly, at least in this practitioner's experience. One would do well to keep a copy of *Robinson* handy for those situations.

D. Scheduling Order best practices.

Once in arbitration, there are a number of ways to go about agreeing to rules and a scheduling order. Most attorneys on both sides will agree to streamlined discovery and limitations on discovery to fit with the purposes and intentions of arbitration. Deposition limitations are almost always accepted by plaintiffs' counsel, but beware to leave yourself enough time if you excel in long depositions. Regarding written 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 RFPs or artfully answering interrogatories.

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[32] *Id.*

[33] *Id.* at 531.

[34] *Id.* at 532-34 ("because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator, we agree that class arbitration must be explicitly referenced and not merely inferred from the parties' agreement to arbitrate.") (internal quotes omitted (534)).

[35] *Id.* at 534.

Approaching the hearing, we typically try to limit any pre-hearing brief to 5 pages or do away with the brief altogether. Understandably, an arbitrator may find these helpful, so try to get a window into what your arbitrator may want. The goal is to limit the time-waste of trying your case on paper when you have to go to hearing anyway. There are only so many hours to prepare for arbitration and we'd rather not waste precious time on unnecessary briefing (or worse, deposition designations.). Finally, we prefer all parties to produce their pre-hearing exhibits electronically. This is not as big of an ask anymore, and it helps greatly with the presentation of the evidence and with analyzing the other side's evidence.

E. Arbitration appeals.

After the arbitration hearing, there are very limited actions one can take to challenge or attack the award. Section 171.088 of the CRPC governs vacatur of an arbitration award:

> VACATING AWARD.
>
> (a) On application of a party, the court shall vacate an award if:
>
> (1) the award was obtained by corruption, fraud, or other undue means;
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> (2) the rights of a party were prejudiced by:
>
> (A) evident partiality by an arbitrator appointed as a neutral arbitrator;
>
> (B) corruption in an arbitrator; or
>
> (C) misconduct or willful misbehavior of an arbitrator;
>
> **(3) the arbitrators:**
>
> **(A) exceeded their powers**;
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> (B) refused to postpone the hearing after a showing of sufficient cause for the postponement;
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> (C) refused to hear evidence material to the controversy; or
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> (D) conducted the hearing, contrary to Section 171.043, 171.044, 171.045, 171.046, or 171.047, in a manner that substantially prejudiced the rights of a party; or
>
> (4) there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.[36]

A party has 90 days after receiving the award to apply for vacatur.[37]

[36] TEX. CIV. PRAC. & REM. CODE ANN. § 171.088.

[37] *Id.* § 171.088(b) (emphasis added).

Aside from corruption, misconduct, evident partiality, or other misdeeds, the only real workable objection and the one that is most commonly seen is that the arbitrator(s) "exceeded their powers." The bar is set high:

> "'[A]n award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort. All reasonable presumptions are indulged in favor of the award, and none against it . . . [I]n other words, [the court] may not vacate an award even if it is based upon a mistake of fact or law," nor may the court "substitute [its] judgment for that of the arbitrator's merely because [it] would have reached a different conclusion."[38]

Accordingly, the Court's inquiry on a motion to vacate is only whether the arbitrator had the authority, based on the arbitration clause and the parties' submissions, to reach a certain issue, not whether the arbitrator correctly decided the issue.[39] "[I]mprovident, even silly interpretations by arbitrators usually survive judicial challenges."[40] Of note:

- In *Forest,* the movant alleged that the arbitrators "essentially re-wrote the [agreement] by injecting certain terms while removing or ignoring other terms."[41] In that case, the arbitrators' award allegedly made a mistake in what it ordered the complaining party to do to comply with federal, state, and local governmental laws and regulations.[42] On review, the court held that such a mistake does not support vacatur of the award on the ground that the arbitrators exceeded their authority, and neither would any misreading or misinterpretation of the agreement itself.[43] The court further held that because the parties agreed to submit their disputes to a panel of arbitrators rather than a judge, it is the arbitrators' view of the facts and law and of the meaning of the contract that they agreed to accept.[44]
- In *Humitech*, the complaining party asserted that the arbitrator exceeded his powers because he failed to enforce the arbitration body's rules and did not follow Texas substantive law as agreed in the parties' contract.[45] The court, however, disagreed. It held that the arbitrator's failure to follow a procedural rule promulgated by the arbitration body did not deprive the arbitrator of authority to hear the case or result in an award not

[38] *Humitech Dev. Corp. v. Perlman*, 424 S.W.3d 782, 790 (Tex. App.—Dallas 2014, no pet.) (citing *Centex/Vestal v. Friendship W. Baptist Church*, 314 S.W.3d 677, 683 (Tex. App.—Dallas 2010, pet. denied)).

[39] *Anchor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829 (Tex. App.—Dallas 2009, no pet.).

[40] *Id.* at 830.

[41] *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc*., 446 S.W.3d 58, 81 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

[42] *Id.* at 82.

[43] *Id.* at 83.

[44] *Id.* at 83-84.

[45] *Humitech*, 424 S.W.3d at 791-94.

contemplated by the contract.[46] The court also held that "[e]ven if the arbitrator failed to follow Texas substantive law, that does not mean the arbitrator lacked the authority to determine the issue or that the arbitration award was not rationally inferable from the parties' agreement. It would mean only that the arbitrator made a mistake of fact or law, which does not constitute the arbitrator exceeding his authority."[47]

- In *Anchor*, the complaining party couched its argument in terms of whether the arbitrator exceeded her powers.[48] However, the argument was really a complaint that the arbitrator committed an error of law by rejecting *res judicata* and *collateral estoppel* defenses.[49] Like the cases above, the court held that "[a] complaint that the arbitrator decided the issue incorrectly or made mistakes of law, however, is not a complaint that the arbitrator exceeded her powers." The arbitration agreement in that case provided that "ANY CONTROVERSY OR CLAIM" arising out of the contract was to be submitted to arbitration, and there was no evidence that the arbitrator decided a matter not properly before her. Thus, there was no evidence that the arbitrator exceeded her powers.[50]
- Most recently, in *Fulcher*, a builder argued that an arbitrator should not have awarded attorneys' fees, expert fees, and arbitration costs, specifically referring to language from the Purchase Agreement which stated that "all fees and costs shall be borne separately between the parties, including but not limited to all attorneys' fees and expert witness costs resulting from the Dispute."[51] The builder argued that the arbitrator exceeded his powers by making the award in the face of that contractual language. The court disagreed, stating "it was within the arbitrator's authority to make such an award because the basis for the attorney's fee award is 'rationally inferable' from the parties' arbitration agreement as the agreement provides that "[t]he arbitrator shall be authorized to provide all recognized remedies available in law or in equity for any cause of action that is the basis of the arbitration."[52] The arbitrator apparently made an equitable decision in deciding to award fees when the contract said that he could not; he did not exceed his powers.

These cases can help a practitioner overcome a challenge to an arbitration award, or hone a challenge that an arbitrator exceeded his or her powers. But the main cautionary note is that the bar is set very high, and courts are quick to see through a "they got it wrong" argument masquerading as an "exceeded their powers" argument.

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[46] *Id.* at 793.

[47] *Id.* at 794.

[48] *Anchor,* 294 S.W.3d at 830.

[49] *Id.*

[50] *Id.*

[51] *Taylor Morrison of Tex., Inc. v. Fulcher*, No. 13-20-00332-CV, 2022 WL 3092553, at *2 (Tex. App.—Corpus Christi–Edinburg Aug. 4, 2022, no pet. h.).

[52] *Id.* at *5.

III.
TAKING THE RCLA DIRT ROADS:
RCLA ISSUES OTHER THAN NOTICE, SETTLEMENT, AND DAMAGES LIMITATIONS

Most RCLA papers focus on the inspection-and-offer process, the RCLA damage limitations, and the case law interpreting those aspects of the statute. Those are admittedly the main part of the statute, and those aspects of it are extremely important. The papers, also, are very well done and a great resource.[53] But other areas of the RCLA contain valuable nuggets of wisdom and argument, and a familiarity with the below will make one a more nimble residential practitioner.

A. Attorneys' fees are not recoverable without a corresponding cause of action providing for recovery.

Since the RCLA does not create a cause of action, a claimant must plead and prove an underlying cause of action that allows the claimant to recover the damages allowed by the RCLA. In a recent case, a plaintiff sued for negligence but asserted that it was entitled to recover attorney's fees because "attorneys' fees" are listed as recoverable under Section 27.004(g).[54] The plaintiff admitted that its sole basis for recovering fees was Section 27.004(g), and nothing else—that is, no pleaded cause of action could support an award of attorneys' fees and the only basis for plaintiff seeking them was that the damage category appeared in the statute. The court held that "Section 27.004(g) does not permit a plaintiff to recover attorney or expert fees in the absence of an underlying cause of action providing for the recovery of such fees."[55]

At the inspection-and-offer phase, however, no causes of action are pleaded and it is impossible to know if a soon-to-be-pleaded cause of action will allow for recovery of attorneys' fees. Thus, when crafting a RCLA response, it may be wise to add attorneys' fees to the extent they may ultimately be deemed to have been necessary. Contractor's counsel may certainly take the position that hiring an attorney was not necessary, and there are times when that is true. The underlying facts will dictate how to approach this issue during the offer phase. The take-home is, at the final hearing or trial, make sure there is a cause of action that supports recovery of fees if fees are sought.

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[53] Kimberly G. Altsuler, *The 411 on the RCLA*, Construction Law Section of the State Bar of Texas 34th Annual Construction Law Conference (2021); Ian Faria and Mason Hester, *The New Normal in Residential Construction*, Construction Law Section of the State Bar of Texas 26th Annual Construction Law Conference (2013); Ryman, Faira, and Jaffe, *The Residential Construction Liability Act* (September 2009). This author also humbly throws his own hat in the ring with Curt M. Covington, *Residential Construction Litigation: 2020 and Beyond*, Construction Law Section of the State Bar of Texas Basics Course (2020).

[54] *Mitchell v. D. R. Horton-Emerald, Ltd.*, 579 S.W.3d 135, 140 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

[55] *Id.*

B. Causation under the RCLA.

A little used section of the RCLA has gained a bit more publicity after an excellent article was published in 2020 the Texas Construction Law Journal.[56] The Section is 27.006, which provides the following:

> In an action to recover damages resulting from a construction defect, the claimant must prove that the damages were proximately caused by the construction defect.[57]

This is a heightened standard for causation that is not normally noticed by practitioners or applied by fact-finders. Most attorneys intuitively default to but-for cause or producing cause, which is the causation requirement under the DTPA.[58] That standard, however, does not require foreseeability.[59] Proximate cause does, and requires both (1) cause in fact (but-for cause) and (2) foreseeability.[60] While construction cases dealing with proximate cause are sparse, tort and negligence cases dissecting proximate cause abound, as well as opportunities to apply this standard to residential-construction cases.

The idea of making this the focal point of an RCLA defense stems from the 2020 TCLJ article, and all credit is given to the authors for bringing to light this strategy on causation in 27.006.[61] First, in approaching causation, it is important at the outset to understand that *defect* does not automatically equal *liability*: "nothing in the statute imposes strict liability for any construction defect."[62] The *Sanders* Court spells out the framework to trigger liability under the RCLA: (1) a finding of a construction defect; (2) a liability finding under the specific cause of action asserted; (3) a proximate cause finding; and (4) a finding of damages as defined in the RCLA.

This alone is a great framework to walk an arbitrator though at the outset of a hearing. From a defensive point of view, it shows an arbitrator to more appropriately focus on this framework rather than simply the elements of a cause of action. Those, too, still must be met, but there are three other elements the RCLA imposes.

One instance where causation was important was then the homeowner did not allow a builder to make warranty repairs even after the builder did not make a timely offer under the RCLA.[63] There, a state inspector under the old TRCC SIRP process found defects and the builder

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[56] Faria, Miller, Rosenburg, and Busch, *One Sentence and a Cloud of Dust: Making Causation the Focal Point of the RCLA defense*, TEXAS CONSTRUCTION LAW JOURNAL, Vol. 16, No. 2. (Winter 2020). For an in-depth treatment of this concept, please see the article.

[57] TEX. PROP. CODE ANN. § 27.006.

[58] *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex. 1993).

[59] *Id.*

[60] *Yost v. Jared Custom Homes*, 399 S.W.3d 653, 660 (Tex. App.—Dallas 2013, no pet.).

[61] Faria et al., *supra* note 56.

[62] *Sanders v. Constr. Equity, Inc.*, 45 S.W.3d 802, 803 (Tex. App.—Beaumont 2001, no pet.).

[63] *Whitecotton v. Silverlake Homes, L.L.C.*, No. 09-08-00065-CV, 2009 WL 2045224, at *7 (Tex. App.—Beaumont July 16, 2009, no pet.).

was willing and offered to repair them, though the offer was late.[64] According to the appellate court, the trial court reasonably concluded that the homeowners "did not establish, under section 27.006 of the RCLA, that a breach of warranty under the common law or through the SIRP report findings caused the Whitecottons' alleged damages."[65] While this case did involve a SIRP inspection under the TRCC, and thus caution must be used, the clear holding is that causation still must be proven. And if a builder offers to repair under warranty every defect the homeowner complains of and the homeowner does not allow the builder to repair the defects, that builder may certainly use 27.0006 as a defense to a breach-of-warranty claim.

There are two other areas where causation is important. The first is when a homeowner retains an inspector to go around and find every code violation under the sun, and uses that report to support a construction-defect claim. Code violations themselves, however, do not equal liability under the RCLA framework. The homeowner still must show that a certain code violation caused the damages of which they are complaining.[66]

Second, in a mold case, causation still must link the alleged defect to the damages sought to be recovered, and this is especially difficult when the damages are personal-injury damages. *Starr v. A.J. Struss & Co.* is instructive.[67] There, a homeowner sued an HVAC contractor, alleging that the contractor's faulty HVAC installation caused mold, which led to personal injuries. She did not present any expert testimony and the trial court granted summary judgment for the contractor.[68] In upholding summary judgment, the *Starr* court first noted the importance of expert testimony in in jury cases: "[e]xpert testimony is particularly necessary in toxic-tort and chemical-exposure cases, in which medically complex diseases and causal ambiguities compound the need for expert testimony."[69] It then brought that standard forward to mold cases, where mold is alleged to cause injury:

> "Although it may be within the general experience that water can cause mold, we conclude that it is not within the general experience and common sense of a lay person that exposure to mold causes the injuries [the homeowner] allegedly suffered."[70]

Accordingly, causation cannot be met in an injury case where the injuries stem from mold, without expert testimony on the same. These cases give valuable insight into how the causation requirement can be utilized as a defensive tool.

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[64] *Id* at *6.

[65] *Id.* at *7.

[66] *Marathon Corp v. Pitzner*, 106 S.W3d 724, 729 (Tex. 2003); *see also McDaniel v. Cont'l Apts. Joint Venture*, 887 S.W2d 167, 172 (Tex. App.-Dallas 1994, writ denied) (holding that negligence per se by code violation only goes to the owner's duty, not to proximate cause).

[67] *Starr v. A.J. Struss & Co*., No. 01-14-00702-CV, 2015 WL 4139028, at *1 (Tex. App.—Houston [1st Dist.] July 9, 2015, no pet.).

[68] *Id.* at *2.

[69] *Id.* at *6.

[70] *Id.*

C. Habitability repairs: Section 27.004(m).

There are situations where a homeowner is just burning to repair a defect, or there truly is a life-threatening situation. This is where Section 27.004(m) of the RCLA can help. It 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.[71]

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.

D. Using the RCLA to defeat subrogation claims

It's a familiar scenario. A family leaves on vacation during a cold winter month and Texas has one of its characteristic freezes. A pipe freezes and bursts, or perhaps it's a toilet supply line. In any event, the entire downstairs of a very nice, big home is flooded. The insurance company does the right thing with its insured, and pays all expenses for alternative living, brand-new wood floors, and replaces all damaged good in the residence. Sometimes it reaches out to the builder for help and the builder, unsuspecting, offers his assistance. The insurance company gratefully receives the help. As repairs are finished, and the insurance company has a final tally on its tab, it sends the file over to legal. They then find out who the proper builder is and bring a subrogation claim, suing the builder for the costs it had to pay the homeowner. The insurance company alleges that, but for the faulty construction, or missing insulation, or faulty part used in the plumbing, the flooding would not have occurred.

Luckily for builders, the RCLA has a powerful provision in the defense of such suits. Section 27.003(a)(2) provides:

> if ... a person subrogated to the rights of a claimant fails to provide the contractor with the written notice and opportunity to inspect and offer to repair required by Section 27.004 ... before performing repairs, the contractor is not liable for the cost of any repairs or any percentage of damages caused by repairs made to a construction defect at the request of ... a person subrogated to the rights of a

[71] TEX. PROP. CODE ANN. § 27.004(m).

claimant by a person other than the contractor or an agent, employee, or subcontractor of the contractor.[72]

Usually, there is no such notice. There is simply no time, and most insurers do not look to the RCLA when adjusting emergency claims. A somewhat recent case instructive.[73] There, a plumbing failure in an upstairs bathroom allegedly caused significant water damage at the home, both to the structure itself and to furnishings and other personal possessions. The family members moved out of the home, and remediation and repair efforts began. The insurer did not send a RCLA notice, but just began repairs. After fixing the issues, the insurer sent a demand letter to the builder. The insurer then sued.

The builder argued that it did not receive proper RCLA notice under 27.003(a)(2). The insurer conceded on this issue. The insurer instead argued that the definition of "construction defect" as used in section 27.003(a)(2) does not include any damages to the residence caused by the failed water line beyond repair of the line itself. The appellate court disagreed, citing the broad definition of "construction defect" in the RCLA, and generally referencing how the phrase is used throughout the Act. The court further noted that "if a subrogated party could, at its discretion, opt out of the provisions of the RCLA as to the significant physical damage, it would distort the RCLA's objective of encouraging settlement and preventing the cost of litigation."[74]

Accordingly, Section 27.003(a)(2) and the *Cameron Builders* case are powerful weapons in a subrogation fight.

E. Does repairing a defect lead to extended liability?

The statute-of-repose period for a residential home is ten years. Section 16.009 of the Texas Civil Practice and Remedies Code requires that all suits for personal injury, damage, injury, or loss of real or personal property, contribution, or indemnity "against a person who constructs or repairs an improvement to real property" be brought within 10 years of the date of substantial completion of the improvement "in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement."[75] The statute of repose runs from substantial completion, rather than when the injury occurs or cause of action accrues.[76]

There are a few exceptions:

- If the claimant presents a written claim for damages, contribution, or indemnity to the person performing or furnishing the construction or repair work during the 10-year

[72] TEX. PROP. CODE ANN. § 27.003(a)(2).

[73] *See Vision 20/20, Ltd. v. Cameron Builders, Inc.*, 525 S.W.3d 854, 855 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

[74] *Id.* at 858.

[75] TEX. CIV. PRAC. & REM. CODE § 16.009 (a)(b).

[76] *See Dallas Mkt. Ctr. Dev. Co. v. Beran & Shelmire*, 824 S.W.2d 218, 221 (Tex. App.—Dallas 1991, writ denied).

limitation period, the period is extended for two years from the date the claim is presented.[77]

- If the damage occurs during the 10th year of the limitations period, the claimant may bring suit not later than two years after the day the cause of action accrues.[78]
- If written warranty, guaranty, or other contract that expressly provides for a longer effective period[79]
- willful misconduct or fraudulent concealment in connection with the performance of the construction or repair.[80]

Assume a situation where the contractor repairs a defect in Year 7. Arguably, the law implies an implied warranty of repair and modification, the limitations period of which is likely four years.[81] Are the repairs still warranted in Year 11? And if fixed in Year 11, are four more years tacked on?

The case law is sparse on such questions. First, the language of the applicable warranty should control what kind of warranty is applied to repairs. After the warranty, it is possible that the contractor providing the repairs may issue its own warranty, such as in the case of extensive foundation repairs, which usually carry their own warranties. Next, the statute was likely not created to be an endless loop of repair liability. Valid arguments exist to apply the statute of repose and limit any repairs to take place within 10 years.

For instance, In *Coastal Chem, Inc. v. Brown*,[82] the Houston Court of Appeals held that uncompleted work and even a failure to perform warranty work "does not undo substantial completion." Additionally, the Fifth Circuit has held that warranty work that was shoddily performed or missed altogether was not a reason to change the date of substantial completion.[83]

Interestingly, RCLA Section 27.005 notes: "This chapter does not create a cause of action or derivative liability or extend a limitations period." There are no cases citing this section, but it can be argued that repairs made pursuant to Section 27.004 are also controlled by 27.005's requirement that those repairs do not extend a limitations period.

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[77] TEX. CIV. PRAC. & REM. CODE § 16.009(c)

[78] *Id.* § 16.009(d).

[79] *Id.* § 16.009(e)(1).

[80] *Id.* § 16.009(e)(3).

[81] *See Ngheim v. Sajib*, 567 S.W.3d 718, 723 (Tex. 2019) (holding that because a breach of the implied warranty of good and workmanlike repair is not limited to the DTPA, the DTPA's two-year limitations period does not apply). However, limitations was not fully argued in *Ngheim*, so there still may be an argument for a two-year statute of limitation.

[82] 35 S.W.3d 90, 97 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

[83] *See Hartford Fire Ins. Co. v. City of Mont Belvieu, Tex.,* 611 F.3d 289, 296 (5th Cir. 2010) (holding, in a performance bond case, that substantial completion occurred at "full performance" and a failure to complete punch list items and warranty requests does not affect substantial completion.

IV.
SUBSTANTIVE LAW SIDE STREETS: HELPFUL LAW ON YOUR RESIDENTIAL JOURNEY

A. Quantum Meruit/Unjust Enrichment

In many contexts, but often in the residential context, a claimant brings claims for quantum meruit, unjust enrichment, breach of contract, or some combination of those three. While there may an academic practitioner or two that has studied the material deeply and knows exactly why they are bringing these claims, for most, the motivation is likely a belt-and-suspenders approach mixed with an abundance of caution. A brief discourse into quantum meruit and unjust enrichment would be helpful for anyone practicing in the residential-construction arena.

In most construction cases, whether there is a breach-of-contract cause of action will be relatively straightforward. If there is a written or oral contract, the claim can be made. But when should one add on the quantum meruit or unjust enrichment claim?

First, quantum meruit "is an equitable remedy that is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted."[84] To recover under a quantum-meruit claim, a claimant must prove that: (1) valuable services were rendered or materials furnished to the defendant; (2) those services or materials were accepted by, used, and enjoyed by the defendant; and (3) the defendant was reasonably notified that the plaintiff was expecting to be paid by defendant for the services or materials.[85] Critically, a party generally cannot recover under a quantum-meruit claim when there is a valid contract covering the services or materials furnished.[86] Thus, as a general rule, when defending against a quantum-meruit claim, it is wise to always assert as an affirmative defense that the parties have a contract and cite the *Hill v. Shamoun & Norman* case.

But there are exceptions.[87] The existence of a contract will not bar a quantum-meruit claim if the materials/services are outside the scope of the contract.[88] Additionally, if a party has partially performed, but is prevented from continuing to perform the contract by the other party, a quantum-meruit claim may be available.[89] This is true even if the plaintiff may have breached the contract.[90] In those instances, the measure of damages is the "reasonable value of services less any damages suffered by the defendant."[91]

So, when to assert unjust enrichment? Courts have held that a party may recover under an unjust-enrichment theory when "one person has obtained a benefit from another by fraud, duress,

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[84] *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 732–33 (Tex. 2018) (internal quotes and citations omitted)

[85] *Id.*

[86] *Id.*

[87] For a thorough treatment of the exceptions and the cases deciding them, please see Gooch and Moorman, *Quantum Meruit: The Other Cause of Action*, CONSTRUCTION LAW JOURNAL, Vol. 18, No. 1 (Summer 2022).

[88] *Id.,* briefing *Black Lake Pipe Line Co. v. Union Const. Co., Inc.*, 538 S.W.2d 80, 86 (Tex. 1976).

[89] *Truly v. Austin*, 744 S.W.2d 934, 936-37 (Tex. 1998).

[90] *See. id.* at 937.

[91] *Id.*

or the taking of an undue advantage"[92] and that it carries a two-year limitations period.[93] Like quantum meruit, unjust enrichment is not available "when a valid, express contract covers the subject matter of the parties' dispute."[94] There is confusion in the appellate ranks, however, on whether unjust enrichment is an independent cause of action or merely an element of a quantum-meruit claim. On one hand, the Texas Supreme Court has explicitly referred to unjust enrichment as an independent "cause of action,"[95] a "claim,"[96] and assigned it a limitations period.[97] On the other hand, some appellate courts have questioned whether it is an independent cause of action or simply a remedy for fraud or improper conduct.[98]

In any event, it is clear that unjust enrichment is an element of a quantum-meruit claim.[99] Because of the confusion, and because lawyers are cautious creatures, it is likely that for the time being unjust enrichment will continue to be asserted along with quantum meruit and breach-of-contract when the set of facts merits such pleading. At least this author does not see any reason to abandon unjust enrichment at the petition-drafting stage. It would be a good practice, however, to reexamine at the charge-drafting stage whether the set of facts merits both unjust enrichment and quantum meruit.

B. Mental anguish

This can be a somewhat confusing topic because the RCLA expressly states that it does not apply to claims for "personal injury, survival or wrongful death or for damage to goods,"[100] but then states that "'personal injury' does not include mental anguish."[101] So the RCLA does not apply to personal injury, but then mental anguish is not included in personal injury, so is mental anguish back in? This question is answered in the damage categories listed in 27.004(g). By excluding mental-anguish damages from personal injury, they remain subject to the RCLA, and since those damages are not included in the 27.004(g) list, they are not recoverable.

If the analysis ended there, life would be simple. But, what about an independent cause of action under the DTPA or for fraud? DTPA and fraud claims arguably remain viable options in residential cases where there are actionable misrepresentations that can be alleged as occurring

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[92] *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

[93] *Elledge v. Friberg-Cooper Water Supply Corp.,* 240 S.W.3d 869 (Tex. 2007).

[94] *Fortune Production Co. v. Conoco, Inc*., 52 S.W.3d 671, 684 (Tex. 2000). According to one case, however, overpayments under a contract can be recovered under unjust enrichment. *Southwestern Electric Power Co. v. Burlington Northern Railroad Co*., 966 S.W.2d 467, 469–70 (Tex. 1998).

[95] *Elledge v. Friberg-Cooper Water Supply Corp*., 240 S.W.3d 869, 870 (Tex. 2007) (per curiam).

[96] *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex. 1998).

[97] *See* Tex. PJC § 101.44 (2020) (discussing the confusion).

[98] *See, e.g., Casstevens v. Smith*, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied) (holding that unjust enrichment is not an independent cause of action); *R.M. Dudley Construction Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App.—Waco 2008, pet. denied).

[99] *See Truly*, 744 S.W.2d at 938.

[100] *Id.* § 27.002(a)(1).

[101] *Id.* § 27.002(c)(2).

separate and apart from any specific defect.[102] And with the DTPA claims, mental-anguish damages have been specifically upheld in the residential context when there is proper evidence.[103]

Thus, the general rule is that mental-anguish damages are generally not recoverable. However, to the extent an independent claim under the DTPA or fraud survives, mental anguish may resurface as a viable damage. Just note that "Even when an occurrence is of the type for which mental anguish damages are recoverable, evidence of the nature, duration, and severity of the mental anguish is required."[104]

C. CPRC Chapter 95.

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

1. What the statute attempts to accomplish.

Generally, under the common law, a landowner "owes a duty to warn business invitees of a dangerous condition on the premises when the owner knows or should know the condition exists."[105] However, Chapter 95 of the Texas Civil Practice and Remedies Code operates to limit landowner liability "for injuries to contractors and their employees to those instances in which landowners exercise control over the work and possess actual knowledge of the injury-causing condition, and then only if the owner fails to provide an adequate warning."[106]

Chapter 95 applies to a negligence claim alleging personal injury or property damage, when brought by a contractor or its employee against a premises owner, if the claim "arises from the condition or use of an improvement to real property where the contractor…constructs, repairs, renovates, or modifies the improvement."[107] To impose liability on a premises owner for an injury on the premises, 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."[108]

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[102] *See generally Bruce,* 943 S.W.2d at 123; *Bishop Abbey Homes, Ltd. v. Hale,* No. 05-14-01137-CV, 2015 WL 9167799, at *24 (Tex. App.—Dallas Dec. 16, 2015, pet. denied); *Sanders v. Const. Equity, Inc*., 45 S.W.3d 802, 804 (Tex. App.—Beaumont 2001, pet. denied) (agreeing with *Bruce* and holding that "we find no indication in RCLA that the Legislature intended to immunize residential construction contractors from the punitive consequences of fraud, if fraud exists.").

[103] *See Hale*, 2015 WL 9167799 at *15 - *19.

[104] *Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex.2011).

[105] *SandRidge Energy Inc. v. Barfield*, 642 S.W.3d 560, 563 (Tex. 2022).

[106] *Id*. at 566.

[107] *Id*. at 565 (citing TEX. CIV. PRAC. & REM. CODE § 95.002).

[108] TEX. CIV. PRAC. & REM. CODE § 95.003 (Vernon 2005).

Initially, the property owner bears the burden of establishing the applicability of Chapter 95 to a Plaintiff's claims.[109] Once the owner establishes the applicability of Chapter 95, the burden shifts to Plaintiff to establish: "(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.[110] Moreover, "[t]he control must relate to the injury the negligence causes."[111]

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.[112] "[T]he right to control the work must extend to the 'operative detail' of the contractor's work."[113] Further, the control must relate to the injury the negligence causes.[114] 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.[115] Nor is it enough to recommend a safe manner for the independent contractor's employees to perform the work.[116]

2. 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.[117] 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.[118] 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.[119] The Court held there was no evidence that the builder controlled the means, methods, or details of the brick work.[120]

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[109] *See Gorman v. Ngo H. Meng*, 335 S.W.3d 797, 802-803 (Tex. App.—Dallas 2011, no pet.).

[110] *Id*.

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

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

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

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

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

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

[117] *Id.* at *1.

[118] *Id*.

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

[120] *Id.* at *5.

3. 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.[121] In *Hernandez,* a contractor's employee was making repairs to an air conditioner on the roof of the building.[122] As the employee was carrying the air compressor off of the roof, the roof collapsed.[123] 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.[124] 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.[125] 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.[126]

4. 2016 *Ineos* decision

Before 2016, a majority of Texas appellate courts had disavowed *Hernandez,*[127] However, the Texas Supreme Court supported the Hernandez holding 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.)

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

[122] *Id.* at 153–54.

[123] *Id.* at 154.

[124] *Id.* at 161.

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

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

[127] *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).

(holding that Chapter 95 did not apply because the injury arose from a different improvement than the one the plaintiff was repairing).[128]

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."[129] 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 created a problem by approving the *Hernandez* logic on the statute's applicability. That logic directly contradicts the intent of the statute and the Legislative history.[130]

5. Post-*Ineos* case law.

Three post-*Ineos* cases demonstrate _____.

(a) *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771 (Tex. 2021)

Los Compadres Pescadores, LLC (Los Compadres) hired Luis Paredes, Jr. d/b/a Paredes Power Drilling (Paredes) to perform specialty drilling work required to dig the foundation pilings for a four-unit condominium building on South Padre Island.[131] Paredes hired Juan Valdez and Alfredo Teran to aid with the drilling work.[132] While Paredes, Valdez, and Teran were lifting rebar into a drilled hole, the rebar contacted a power line above, resulting in the electrocution of the men.[133]

Valdez and Teran asserted premises-liability and negligence claims against Los Compadres.[134] The jury found Los Compadres liable for Plaintiffs' injuries under both theories.[135] Los Compadres appealed, contending that Chapter 95 applied to the claims made by Valdez and Teran and that Los Compadres was not liable for their injuries as a result.[136]

The court of appeals held that Los Compadres failed to meet its burden to establish that Chapter 95 applied to Valdez and Teran's claims. The court of appeals, doing its best to follow

[128] Emphasis added.

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

[130] *See* note 127, *supra*.

[131] *Los Compadres*, 622 S.W.3d 771, 777.

[132] *Id*.

[133] *Id*. at 778.

[134] *Id*.

[135] *Id*. at 779.

[136] *Id*.

Ineos, identified that the power line at issue (1) was owned by AEP Texas Central Company (AEP); (2) was located in an easement rather than on property owned by Los Compadres; and (3) could not be considered an improvement to Los Compadres' property. The court of appeals also held that it was Los Compadres' burden to establish that the power line was the "same improvement" that Valdez and Teran were hired to construct, repair, renovate, or modify, and Los Compadres failed to present any evidence to meet that burden. The court of appeals affirmed the jury verdict, and Los Compadres appealed.[137]

The Texas Supreme Court held that Chapter 95 did apply to Valdez's and Teran's claims against Los Compadres. The only element of Chapter 95 in dispute was whether Valdez's and Teran's claims arose from a condition or use of the same improvement that they were constructing, repairing, renovating, or modifying.[138] Los Compadres contended that element was satisfied "because the power line was a dangerous condition of the 'workplace' on which Valdez and Teran were working" at the time they were injured, and the rebar that contacted the power line was part of the foundation being constructed on the workplace.[139]

The Court ultimately concluded that the energized power line was a dangerous condition of the individual piling (the improvement) on which Valdez and Teran were working because the power line created a probability of harm to anyone who constructed, repaired, renovated, or modified the piling in an ordinary manner due to the power line's proximity to the piling.[140] Nevertheless, the Court affirmed the court of appeals because Plaintiffs conclusively established that Los Compadres exercised control over the manner of the work, had actual knowledge of the dangerous condition, and failed to adequately warn Plaintiffs.[141]

(b) *Martin v. WPP Properties, LLC*, No. 12-20-00243-CV, 2021 WL 2816411, at *1 (Tex. App.—Tyler June 30, 2021, pet. filed) (mem. op.)

In *Martin*, an independent contractor for an apartment complex owned by WPP Properties, LLC performed "make ready" work on various apartments, which involved making vacated apartments ready for new tenants by removing former tenants' belongings, painting, replacing carpet, etc.[142] While Martin was making a vacant upstairs apartment ready for new tenants by carrying belongings and trash from the apartment down an external staircase, he tripped, fell, and fractured his left hip.[143]

Martin sued WPP under negligence and premises-liability theories. The trial court granted summary judgment for WPP because it found that Chapter 95 applied to Martin's claims, and WPP did not control Martin's work.[144] Martin appealed, contending that he was not performing the type

[137] *Id*.

[138] *Los Compadres*, 622 S.W.3d 771, 782.

[139] *Id*. at 783.

[140] *Id*. at 784-86.

[141] *Id*. at 786-88.

[142] *Martin*, 2021 WL 2816411, at *1.

[143] *Id.*

[144] *Id*.

of work contemplated by Chapter 95, and he was not injured on or by the "same improvement" he was working on at the time of his injury.[145]

The Tyler Court of Appeals held that Martin was performing the type of work contemplated by Chapter 95, reasoning that the statute applies to a claim that arises from the condition or use of an improvement to real property where the contractor "renovates" the improvement and here, Martin was "actively working for [WPP] renovating apartments to make them ready for new tenants…"[146] The court of appeals also rejected Martin's argument that Chapter 95 only applies to claims involving inherently dangerous work or work that requires special expertise.[147]

The court of appeals further held that Martin was injured on or by the "same improvement" on which he was working, as required for Chapter 95 to apply. Drawing guidance from *Ineos* as well as *Los Compadres*, the court of appeals construed the "improvement" in this case to be the building housing the apartment in which he was working.[148] The staircase Martin fell down was attached to the building that houses the apartment. Thus, the court of appeals concluded that the staircase was part of the same improvement – the building – as the apartment.[149]

(c) *Cantu v. C & W Ranches, Ltd.*, 631 S.W.3d 434 (Tex. App.—San Antonio 2021, pet. granted, judgm't vacated and remanded by agr.).

Gabriel Cantu sued C & W Ranches, Ltd. for injuries he suffered when he fell from a billboard sign owned by C & W.[150] Cantu's employer, Media Displays, had been hired to "switch off the advertising copy," that is, to remove the vinyl from the old advertisement and hang vinyl from a new advertisement on the billboard sign located on C & W's property.[151] While standing on two-by-fours running horizontal to the billboard sign, Cantu fell from the billboard and sustained personal injuries.[152]

C & W filed a traditional and no-evidence motion for summary judgment arguing that Chapter 95 applied to Cantu's negligence and premises-liability claims.[153] C & W contended Cantu's claims arose from a condition of an improvement (the billboard) to real property where the contractor (Cantu, as an employee of Media Displays) modified the improvement (the billboard).[154] The trial court granted C & W's motion for summary judgment, and Cantu appealed,

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[145] *Id*.

[146] *Id*. at *3.

[147] *Id*. at *4.

[148] *Id*. at *4-*6.

[149] *Id*. at *6.

[150] *Cantu*, 631 S.W.3d, 434, 436.

[151] *Id*.

[152] *Id*.

[153] *Id*. at 436-37.

[154] *Id*. at 437.

arguing that Chapter 95 did not apply to his claims because he did not "modify" the improvement, for the purpose of Chapter 95.

The San Antonio Court of Appeals held that the trial court erred in granting summary judgment based on the applicability of Chapter 95 to Cantu's claims. The court of appeals reasoned that the common meaning of the term "modify," which is not defined in Chapter 95, is "'to change somewhat the form or qualities of; alter partially.'"[155] However, the court of appeals held that Cantu was not changing the form or quality of the billboard by changing out the vinyl.[156] The court of appeals agreed with Cantu that the closest analogy was hanging a picture on the wall.[157] Although hanging the picture might add to the wall, it does not change the form or quality of the wall itself.[158] Consequently, the trial court erred in concluding that Chapter 95 applied to Cantu's claims.[159]

These cases demonstrate how the Texas Supreme Court has "muddied the water" regarding the applicability of Chapter 95 to various claims. Since the *Ineos* decision, the Chapter 95 applicability analysis has become heavily dependent on how the courts construe an improvement (either broadly or narrowly) and whether the improvement being worked on is in close proximity to a different, dangerous improvement.

It is certainly ironic that the case cited by the Texas Supreme Court in the *Ineos* decision (*Hernandez*) may have been decided differently today by following the Court's reasoning in *Los Compadres.* If the dangerous condition in *Hernandez* (the roof) was in such close proximity to the improvement (the rooftop air conditioning unit) Hernandez was working on that it created a probability of harm to anyone who constructed, repaired, renovated, or modified the air conditioning unit in an ordinary manner*,* then Chapter 95 should have applied to Hernandez's claims.

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.[160]

D. Drafting Considerations: 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

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[155] *Id*. at 439 (citing *Vela v. Murphy Expl. & Prod. Co.,* No 04-18-00830-CV, 2019 WL 7196603, at *4 (Tex. App.—San Antonio Dec. 27, 2019, no pet.) (quoting *Webster's New Universal Unabridged Dictionary*)).

[156] *Id*. at 441.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *See, e.g., Garcia v. Nunez*, No. 05-17-00631-CV, 2018 WL 6065254 (Tex. App.—Dallas Nov. 20, 2018, no pet.) (mem. op.) (holding that Chapter 95 did not apply to bar a claim where a worker on a window was injured when he fell from a freestanding ladder because he was injured by the ladder and the ladder was not an improvement to real property.

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.

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, load-bearing members, such as 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.[161] 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.[162] The implied warranty of habitability "requires the builder to provide a house that is safe, sanitary, and otherwise fit for human habitation."[163] 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."[164]

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.[165] How may they be disclaimed? The implied warranty of good workmanship cannot be generally disclaimed, but may be supplanted by the parties' agreement which defines the manner, performance, or quality of the desired construction.[166] 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.[167]

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

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

[162] *Id*.

[163] *Id*.

[164] *Id*.

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

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

[167] *Id*.

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*.[168] 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."[169] 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.[170] 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."[171]

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 TRCC performance standards into its warranty.[172]

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.

V.
CONCLUSION

Residential-construction arbitration is a unique field that overlaps into multiple other areas, such as personal injury, real estate, contracts, and, of course, construction. Because of these overlaps, there is much more to the practice than simply the RCLA. We hope that this paper has pointed out areas of interest and benefit to the reader, and most of all areas of further inquiry,

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

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

[170] *Id*.

[171] *Id*.

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

because, certainly, this author has only scratched the surface of the "side streets" and would encourage all practitioners to explore the "road less traveled."