SUING BUILDERS – AFTER TRCC, RCLA

Mark S. McQuality

SHACKELFORD, MELTON & McKINLEY, LLP
3333 Lee Parkway, 10th Floor
Dallas, TX 75219
Telephone: (214) 780-1400
Facsimile: (214) 780-1401
E-Mail: mmcquality@shacklaw.net

CENTER FOR CONSUMER LAW

UNIVERSITY OF HOUSTON LAW CENTER

CONSUMER LAW BASICS – KNOW THE LAW!

October 23, 2009

MARK S. MCQUALITY
SHACKELFORD, MELTON & McKINLEY, LLP
3333 Lee Parkway, 10th Floor
Dallas, TX 75219
Telephone: (214) 780-1400
Facsimile: (214) 780-1401
E-Mail: mmcquality@shacklaw.net

SUMMARY

Mark McQuality is a partner of the law firm of Shackelford, Melton & McKinley. His litigation and dispute resolution practice concentrates in the areas of residential and commercial construction and development, real estate, insurance and commercial law. Mark was actively involved in the negotiations on the amendments to the Residential Construction Liability Act starting in 1995 and subsequent amendments to that statute. He is a frequent speaker for continuing education seminars and author for a variety of legal and consumer publications.

LAW PRACTICE

Partner with the law firm of Shackelford, Melton & McKinley, 2007-present
Partner with the law firm of Bragg Chumlea McQuality, 1988-2007
Partner with the law firm of Phalen, Chumlea & McQuality, 1981-88
Associate with the law firm of Besing & Associates, 1980-81
Texas Assistant Attorney General, Consumer Protection Division, 1977-80

EDUCATION

J.D. Southern Methodist University, 1977
B.A. With Honors University of Illinois, 1974

LICENSURES

Texas Supreme Court, 1977
United States District Court for the Northern District of Texas, 1981
United States Court of Appeals for the Fifth Circuit, 1983

ASSOCIATIONS & MEMBERSHIPS

American Bar Association, 1977-present
State Bar of Texas Consumer Law Council, 1984-2003
Chairman, 1986-87, 2000-01
Advanced DTPA/Consumer/Insurance Law Course Director, 1994
Texas Young Lawyers Association Director, 1986-90
Outstanding Director, 1990
Dallas Bar Association, 1983-present
Texas and Dallas Bar Foundations Life Fellow
American Arbitration Association, Dallas Construction Advisory Council, 1997-2002
State Bar of Texas Pattern Jury Charge Committee, 1997-2000

TABLE OF CONTENTS

I. Introduction

II. Development of Residential Construction Defect Jurisprudence

III. It Was Time For Change

IV. What Now?

V. The "Menu" of Available Economic Damages

- **A.** Section 27.004(g)
- **B.** Section 27.004(f) Comment

VI. Reasonable Cost of Repairs Necessary To Cure Any Construction Defect

VII. Reasonable and Necessary Cost For Replacement/Repair of Damaged Goods

VIII. Reasonable and Necessary Engineering and Consulting Fees

IX. Reasonable Necessary Temporary Housing Expenses

X. Reduction in Market Value After Repairs ("Stigma")

XI. Reasonable and Necessary Attorney's Fees

XII. Closing Remarks

I. Introduction

This paper is my latest of a series of seminar presentations dedicated to helping Texas homeowners and their attorneys present their residential construction defect claims and deal with the Texas Residential Construction Liability Act ("RCLA") and the Texas Residential Construction Commission Act ("TRCCA"). Included is a discussion of the 2009 sunset of the controversial Texas Residential Construction Commission ("TRCC") and an overview of proving damages in residential construction defect cases. Additionally, a brief review of the history of residential construction litigation in Texas is included to provide context.

Texans, like most residents of other states, have always had a special relationship with their homes. It is their refuge. It is typically their largest consumer purchase. In the past 35+ years there has been a remarkable evolution of law impacting Texas homeowners – but for homeowners it has gone from good to bad. The erosion of rights for Texas homeowners for the last 18 years has been very intriguing. That trend of diminishing consumer protection started to change this year. Prior to this last legislative session, an extremely well-funded lobby for the homebuilders that contributed a substantial sum of money to key politicians had effectively worked the Texas Legislature. (Houston homebuilder and prolific political donor Bob Perry had contributed $486,000 to ten of the lawmakers on the Sunset Commission according to an article in the Houston Chronicle.) Those lobbying efforts resulted in some very favorable, "safe harbour" laws for Texas residential builders. Despite the avowed purpose of the builder lobbyists to foster "balance" in the resolution of construction disputes, builder advocates and lobbyists had, at nearly every legislate session since 1989, attempted to redesign the way residential construction defect claims are handled in Texas and further restrict homeowner rights. The prolonged and most often unproductive "SIRP" process homeowners had to endure before being allowed to initiate a legal action for damages was the direct result of the TRCCA enacted in 2003. SIRPs became a successful delaying tactic for certain builders who were attempting to defeat homeowners' resolve by engaging in the war of economic and emotional attrition. Additionally, as a result of the RCLA, the types of damages available today to most consumers in these cases has been drastically reduced from what was available prior to 1993. For this reason, it is critical for attorneys representing Texas homeowners to fully understand the current residential construction laws, procedures, and how to effectively prove the damages still available to homeowners.

II. Development of Residential Construction in Defect Jurisprudence

Prior to 1968, construction defect claims involving Texas homeowners were typically brought under the common-law theories of breach of contract, negligence, fraud, and breach of express warranties. The damages available to injured homeowners were the traditional damages available to Plaintiffs in other types of cases involving these same causes of action.

In 1968, the Texas Supreme Court established two independent implied warranties – good workmanship and habitability – that applied to homebuilders. *Humbler v. Morton*, 426 SW2d 554 (Tex. 1968) The new initial warranties required residential contractors in Texas to not only build homes that were suitable for habitation but also that were built to industry standards. The rationale for the creation of these two warranties was the same as other implied warranties – public policy required the two warranties due to disparate bargaining positions between the parties. The Court clearly recognized the superior knowledge and power of the homebuilders in these new home transactions.

The foundation of residential construction defect litigation fundamentally changed in 1973, when the Texas Legislature enacted the Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA"), TEX. BUS. & COM. CODE §17.41 *et seq*. This progressive legislation allowed homeowners to bring claims based not just on the traditional common-law theories, but also for alleged misrepresentations by a home builder or remodeler regarding the quality, characteristics, uses and benefits of the home or improvements, as well as for a breach of express or implied warranties. The statute specifically states common-law defenses do not apply to DTPA claims. The current version of §17.42 of the DTPA still declares any waiver by a consumer of the DTPA is "contrary to public policy", "unenforceable": and "void" except in very limited circumstances. More specifically, waiver is permitted only if: (1) the waiver is in writing and is signed by the consumer; (2) the consumer is not in a significantly disparate bargaining position; and (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services. The written waiver itself must also be: (1) conspicuous and in bold face type of at least 10 points in size; (2) identified by the heading "Waiver of Consumer Rights" or words of similar meaning; and (3) substantially following the words set out in the statute.

The evolution of the implied warranty of good workmanship continued with the Texas Supreme Court opinion in *Melody Homes v. Barnes,* 741 SW2d 549 (Tex. 1987). This decision expanded the implied warranty of good workmanship to remodelers of homes by applying the implied duty of good workmanship to all persons that repaired or modified goods or property. The Court also stated that public policy would prevent this implied warranty from being waived by the parties in their contract.

In 1989, the manner in which residential construction defect cases were handled started to change dramatically. In that year, as part of the tort reform movement, the Texas Legislature enacted the Residential Construction Liability Act ("RCLA"), TEX. PROP. CODE §27.001 *et seq*. The original version of the RCLA had a limited scope and focused on the builder's right to offer to "cure" any construction defect. Conceptually this made sense. Homes are our largest consumer purchase. When the homes are defective, the disputes can become very emotional and expensive. Therefore, encouraging repairs rather than litigation seemed logical. However, despite all the waiver limitations and other consumer protections continued in the DTPA, the RCLA boldly declared: "To the extent of conflict between this chapter and any other law, including the Deceptive Trade Practices – Consumer

Protection Act (Subchapter E, Chapter 17, Tex. Bus. and Com. Code) or a common-law cause of action, this chapter prevails." Tex. Prop. Code §27.002(b) The RCLA was the first statutory exemption from the DTPA. This dramatically altered the balance of power between the homeowners and homebuilders and the repercussions are still being felt by Texas consumers and families every day.

The RCLA set out additional procedural requirements for consumers before they could initiate litigation for construction defects. In 1993, the Legislature passed HB 1395 which substantially amended the RCLA. It stripped homeowners of their legal rights in a number of respects including, but not limited to, the following: (1) It created a limited menu of only economic damages the homeowner was entitled to recover in almost all situations except fraud. The definition of economic damages in the RCLA specifically excluded exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society. In the original version of the RCLA, a homeowner's recovery of damages was only limited when the owner "unreasonably" rejected a builder's offer of repair (or cash settlement proposal) or where the homeowner did not provide the builder a reasonable opportunity to repair pursuant to an accepted settlement offer. (2) It adopted common-law defenses to liability and provided that a builder was not liable for any percentage of damages caused by: (i) negligence of persons other than the builder or its agents/subcontractors; (ii) failure of the homeowner to mitigate damages or reasonably maintain the home; (iii) normal wear and tear; (iv) normal shrinkage due to drying or settlement of construction components; and (v) the builder's reliance on false or inaccurate written information from official government records. These undefined terms cause confusion and remain the subject of considerable debate.

In 2003, residential defect litigation again changed dramatically with the adoption of the Texas Residential Construction Commission Act ("TRCCA"), Title 16, TEX. PROP. CODE ANN. (Vernon 2003). This far reaching legislation added a government-managed inspection process that must typically be utilized before any person can seek damages by initiating a lawsuit or arbitration concerning residential construction defects. The State Sponsored Inspection and Dispute Resolution Process ("SIRP") results in an appointed, state-approved inspector issuing a report evaluating whether construction defects exist in a home and, if so, recommended repairs. The inspector's finding and recommendations are subject to an appeal by either the homeowner or the builder to an appeal panel at the Texas Residential Construction Commission. The inspector's findings create a rebuttable presumption as to the existence of construction defects and what constitutes a reasonable repair of those defects. Theoretically, the builder's RCLA offer of repair and settlement to the homeowner is tendered after the SIRP process is final. Section 27.004(b) provides that the contractor can make a written offer under the RCLA within 15 days after the date of a final non-appealable recommendation from the TRCC. In fact, this process is often not occurring as envisioned.

III. It Was Time For Change

At long last there appears to be a growing backlash to these builder protection acts that have made the playing field so uphill for Texas homeowners. In 2007 the Legislature amended the TRCCA to include standard enforcement and public membership provisions common to other Texas regulatory agencies. It granted additional enforcement tools, including more injunctive powers and more substantial fines to the TRCC against bad builders and their majority owners. The original statute gave the TRCC minimal enforcement authority against builders and their majority owners who violated the TRCCA or the TRCC rules and, as a result, very limited meaningful action has been taken to eliminate bad builders in Texas. It also required written disclosure requirements that must be in residential construction contracts that fall under the TRCC including TRCC content information, the builder's registration number and conspicuous notice if there is an arbitration clause. Additionally, the amendments required local municipalities to check a builder's registration with the TRCC before issuing building permits.

The size and budget of the TRCC was also substantially increased. The part-time, nine member Commission oversees the agency that has multiplied to almost 80 employees. In fiscal year 2007, the Commission operated on a budget of about $3.2 million, supported completely by registration and State Inspection fees paid by the residential construction industry and homeowners. For fiscal year 2008, the TRCC had a budget of about $10.6 million.

Despite these improvements to help add muscle to the TRCC, consumer advocates continue to insist the TRCCA and RCLA laws are still fundamentally flawed, unfair, and unnecessary.

On August 19, 2008, the Sunset Advisory Commission issued its recommendations regarding the TRCC and the TRCCA. According to the Sunset Staff Report, in 1977, the Texas Legislature created the Sunset Advisory Commission to identify and eliminate waste, duplication, and inefficiency in government agencies. The 12-member Commission is a legislative body that reviews the policies and programs of more than 150 government agencies every 12 years. The Commission questions the need for each agency, looks for potential duplication of other public services or programs, and considers new and innovative changes to improve each agency's operations and activities. The Commission seeks public input through hearings on every agency under Sunset review and recommends actions on each agency to the full Legislature. In most cases, agencies under Sunset review are automatically abolished unless legislation is enacted to continue them.

The Sunset Advisory Commission is comprised of the following members: Representative Carl Isett, Chair, Senator Glenn Hegar, Jr., Vice Chair, Representative Dan Flynn, Representative Linda Harper-Brown, Representative Lois Kolkhorst, Representative Ruth Jones McClendon, Senator Kim Brimer, Senator Robert F. Deuell, M.D., Senator Craig Estes, Senator Juan "Chuy" Hinojosa, Ike Sugg, Public Member, Charles McMahen, Public Member, and Joey Longley, Director.

In what has been said to be "unusually terse language," the Sunset Staff recommended **abolishing the Texas Residential Construction Commission and repealing the Texas Residential Construction Commission Act.** The staff report further stated, "Current regulation of the residential construction industry is fundamentally flawed and does more harm than good."

Regarding the State Inspection Process ("SIRP"), the staff report reflected: "**This lengthy and sometimes difficult process has been a source of frustration for homeowners trying to address defects with their homes. Despite changes last session ostensibly to strengthen the process, the Commission still has no real power to require builders to make recommended repairs."** Finally, the Sunset Staff Report made these comments on the TRCC staff and the limitations they were burdened with while trying to perform their jobs: "**Although agency staff work diligently to implement regulations and help consumers navigate the various processes for redressing complaints, good intentions are not a substitute for having adequate statutory tools."**

On September 8, 2008, the TRCC's News Release announced the Commission's Response to the Sunset Commission Report. As might be expected, the TRCC "adamantly disagrees with the Sunset Commission Staff recommendation to eliminate builder oversight in Texas." According to TRCC Chairman Paulo Flores, "Just because the Commission does not fit that staff's standard and somewhat restricted view of what a regulatory agency should look like it does not mean that the regulatory structure is fundamentally flawed….If there are flaws with the oversight mechanism, certainly none are irreparable, nor should anything but a reasonable effort be necessary to formulate solutions."

The TRCC offered the following suggestions:

- ✓ The Legislature could modify the TRCCA to more clearly define its legislative purpose.
- ✓ Grant the Commission's Executive Director the authority to declare an emergency to immediately dispatch a State Inspector.
- ✓ Establish a Residential Construction Public Counsel.
- ✓ Formalize the Commission's Ombudsman Program.
- ✓ Rename the State-sponsored Inspection and Dispute Resolution Process the State Inspection Program.
- ✓ Grant authority to the Commission to perform re-inspections and charge the builder/remodeler.
- ✓ Allow the Commission to conduct voluntary mediation.
- ✓ Create a recovery fund for consumers.

As the Sunset Staff Report accurately states: "Ultimately, the Legislature will need to decide the approach for overseeing this industry. This report presents an opportunity to have a more comprehensive discussion of dispute resolution and legal process available to homeowners and the regulation of the residential construction industry as a whole." This paper and presentation is an attempt to seize that opportunity for discussion of additional necessary change.

IV. What Now?

Clearly the "rules of the road" on handling residential construction defect claims have changed – but in what ways? As the 81st Legislature's session wound down, lawmakers did not act to save the beleaguered TRCC from the sunset process. On May 30, 2009, the Conference Committee Report was released on HB1959. Article 5 addressed the TRCC. Section 5.01 (a) provided that unless the TRCC was continued in existence by another Act of the 81st Legislature, Title 16 of the Property Code ("TRCCA") would expire on September 1, 2009 and the TRCC would have no responsibility or authority to regulate or take enforcement action against builders, third party warranty companies, or arbitrators. It also provided the parties to a request for state-sponsored inspection and dispute resolution ("SIRP") submitted to the TRCC before September 1, 2009, "may, but are not required to, continue to participate in the state-sponsored inspection and dispute resolution process, as it existed immediately before September 1, 2009 until January 31, 2010." It also sated the TRCC was to maintain existing contractual relationships with the third-party SIRP inspectors until February 1, 2010. Additionally, for purposes of Section 27.004 of the Property Code ("RCLA") for claims that were subject to the TRCC immediately before September 1, 2009 and for which a SIRP request was not filed, notice must be given as required by the RCLA and the RCLA deadlines apply. Finally the Conference Committee Report declared it was the intent of the Legislature that "the rights, duties, and obligations of the parties to litigation pending on September 1, 2009, or to a cause of action that accrues before September 1, 2009, are not substantively impaired by the expiration of Title 16, Property Code. A court shall exercise its equitable jurisdiction to effectuate that intent."

Until the TRCC's June 12, 2009 release of its general timeline and action plan for the implementation of the State's sunset provisions, the process for the dismantling of the TRCC was a bit murky. As stated by TRCC Executive Director Duane Waddill: **"We've been an experiment since our creation, and we'll be an experiment in our demise."** Once the agency closes its doors on August 31, 2010, TRCC spokeswoman Magelly Castiblanco said it's still unclear where the TRCC's data and records will go. "We had a staff meeting recently and that is a big question."

At its June 11, 2009 meeting, the TRCC decided that under Texas Government Code 325.017 it would not be accepting new inspection requests after August 31, 2009. TRCC Chairman Paulo Flores said, "The commission felt it necessary to implement a timeline regarding the State's sunset provisions. August 31,

2009 will be the last day the commission will receive new business, to ensure we have enough time to properly assess and complete the case work."

In other action at its June 11, 2009 meeting, the TRCC approved the following:

- All new homes and projects completed by August 31, 2009 must be registered;
- All new builder registrations and timely renewal registration applications will be accepted through August 31, 2009 – and they will be pro-rated;
- Inspection requests (SIRPs) will be scheduled as soon as possible following commission rules, policies and procedures; and
- Ombudsmen will actively process complaints and post-inspections through August 31, 2010.

So, as of September 1, 2009, Texas reverts to the pre-TRCCA law. The limited statutory warranties and building and performance standards created by §430.001 of the TRCCA are gone. The statutory warranty of habitability created by §430.002 also is gone as is exclusivity of the statutory warranties (§430.006). However, the *Humber* implied warranties of good workmanship and habitability are again available to homeowners for residential construction or residential improvements. Breach of these warranties constitute a violation of the DTPA.

Is it enough that the TRCC, long derided by many consumers and some state officials as the "builder protection agency," is now gone? Certainly it is an improvement that consumers are no longer forced into a cumbersome administrative process that critics charged took too much time, cost too much money, and rarely resolved the dispute, but is more change needed to level the playing field between homeowners and builders? Numerous consumer advocates including Alex Winslow, Executive Director of Texas Watch, who supported eliminating the TRCC, says the previous RCLA law offered inadequate consumer protection and he predicts further change: "We got the agency out of the way and now can start with a fresh slate in the next session. We can create a process or agency so that builders are held accountable and homes are built right the first time. The TRCC never really served those goals."

V. The "Menu" of Available Economic Damages

Given the difficult battle homeowners face in these cases, it is important for them to fully understand the menu of available economic damages.

A. Section 27.004 (g)

The RCLA has an exclusive, very limited list of damages available to most homeowners suffering with construction defects in their homes. The list is set out in §27.004(g). It states:

(g) Except as provided by Subsection (e), in an action subject to this chapter the claimant may recover only the following economic damages proximately caused by a construction defect:

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

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

(3) reasonable and necessary engineering and consulting fees;

(4) the reasonable expenses of temporary housing reasonably necessary during the repair period;

(5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure; and

(6) reasonable and necessary attorney's fees.

This limited "menu" results in certain homeowners burdened with construction defects not even being entitled to recover all their economic damages. For example, there are no "menu" damage items for the costs of moving and storage, pet or livestock boarding, or lost income from the interruption of an owner's home business during periods of temporary housing due to necessary repairs. Moreover, the RCLA currently prohibits the non-economic damage of mental anguish which is often suffered by homeowners in these cases. This has resulted in some persons questioning the fundamental fairness and constitutionality of the RCLA and, therefore, declaring additional change in the law is required!

B. Section 27.004 (f) Comment

In 2003, the RCLA was further amended to protect and shelter even the bad builder who makes an **unreasonable settlement offer** or **fails to make an offer at all.** More specifically, the RCLA was amended to state the following in §27.004(f):

(f) If a **contractor** fails to make a reasonable offer under Subsection (b), the limitations on damages provided for in Subsection (e) shall not apply.

This obviously requires a review of §27.004(e). It states:

(e) If a **claimant** rejects a reasonable offer made under Subsection (b) or does not permit the contractor or independent contractor a reasonable opportunity to inspect or repair the defect pursuant to an accepted offer of settlement, the **claimant**:

(1) may not recover an amount in excess of:

(A) the fair market value of the contractor's last offer of settlement under Subsection (b); or

(B) the amount of a reasonable monetary settlement or purchase offer made under Subsection (n); and

(2) may recover only the amount of reasonable and necessary costs and attorney's fees as prescribed by Rule 1.04, Texas Disciplinary Rules of Professional Conduct, incurred before the offer was rejected or considered rejected.

Section 27.004(f) makes absolutely no sense, cannot be logically defended, and must be changed. Currently, if the builder makes no RCLA settlement offer or an unreasonable offer, there is no negative consequence. Why should a builder acting in this unreasonable manner still be protected by the safe harbors of the RCLA? The only result under the RCLA for a builder who fails to make a reasonable settlement offer is that the limitations on the homeowner set forth in §27.004(e) do not apply. Clearly this builder friendly amendment was enacted to negate the *Perry Homes v. Alwatarri* case, 33 SW3d 376, (Tex. 2000). *Alwatarri* held that under the former language of the RCLA, if the builder failed to make a reasonable settlement offer, the limitations on damages for the homeowner were gone and available defenses to the builder were lost, as they should be.

VI. Reasonable Cost of Repairs Necessary to Cure Any Construction Defect

Section 27.004(g)(1) provides for the repair of the residence and related structures. This is always the key battle. It is not uncommon for homeowners to complain the repair offered, if any, by the builder is insufficient and is only a "patch job" repair. On the other hand, builders claim the homeowners' proposed repairs are excessive and constitute an unnecessary "Cadillac repair job." Note however, claimants are entitled under §24.004(g)(1) to the reasonable cost of repairs necessary to **cure** any construction defect. Therefore, a proposed repair by a builder to attempt a "fix" of a defect with a repair that might in the future repair the construction defect - such as a heaving foundation - is patently unfair and does not comply with the RCLA. Competent and credible engineers and construction experts are essential in proving the appropriate repair plan and cost of these damages.

VII. Reasonable and Necessary Cost For Replacement/Repair of Damaged Goods

Section 27.004(g)(2) allows for the replacement or repair of damaged personal property in the home caused by a construction defect. Quite honestly, this is usually a rare occurrence in most residential construction defect cases. However, personal property is occasionally damaged due to water leaks, flooding, or mold contamination. A fire due to defective wiring or appliances in the home is another example of a situation where there would be the potential for significant loss or damage to personal property.

To the extent the owner's home insurance carrier has not paid for those damages and has subrogation rights, the owner should provide appropriate opinion testimony from experts on the cost of repair or replacement of the damaged goods. The type of evidence required often depends on where the dispute is being tried. Is it in arbitration or at the courthouse? Many arbitrators will allow cost of replacement/repair by expert affidavits. For certain cases that type of evidence may save costs and be appropriate. The replacement cost presented by the homeowner should be the full cost of the personal property as opposed to a depreciated cost.

VIII. Reasonable and Necessary Engineering and Consulting Fees

Section 27.004(g)(3) provides for homeowners to recover the expense of their engineers and consultants. This is an important benefit of the RCLA to homeowners. Typically, residential construction cases with serious defects can involve significant engineering and other consultant fees. Often there are multiple engineers required (e.g. structural, geo-technical, mechanical) as well as construction experts from multiple trades and real estate value experts. It is essential the homeowner enlists the proper experts to perform the forensic process necessary to prepare the appropriate plan-of-repair and cost-of-repair analysis. Experts familiar with the residential construction standards, laws and litigation process should be used.

The appropriate proof of these fees again depends on the audience. If the dispute is in arbitration, often affidavits are allowed as proof from the various experts setting forth the background experience, specific work performed, total time and/or fees, and an opinion the amount constitutes reasonable and necessary fees in the specific geographic location. Alternatively, if the matter is before a judge or jury, an affidavit concerning cost and necessity of services pursuant to §18.001 of the Civil Practice & Remedies Code ("CPRC") or live testimony from the witnesses setting out these same factors will be required unless admissions/stipulations can be obtained from the opposing party. Section 18.001(b) of the CPRC provides: "Unless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary."

The affidavit must be made by the person who provided the service or the person in charge of records showing the service provided and charges made. (§18.001(c) CPRC) Section 18.002(a) and (b) of the CPRC provide the forms to be used. The party offering the affidavit must file it with the court clerk and serve a copy on all other parties at least 30 days before the day on which evidence is first presented at the trial. (18.002(d) CPRC) A party intending to controvert a claim reflected by the affidavit must file a counter affidavit with the clerk of the court and serve a copy of the counter affidavit on each party or party's attorney of record not less than 30 days after he receives a copy of the affidavit and at least 14 days before the day on which evidence is first presented at trial or with leave of the Court before

the commencement of evidence at trial. (18.002(e) CPRC) Finally, the counter affidavit must be made by a person qualified to testify in contravention and it must give reasonable notice of the objection. (§18.002(f) CPRC)

IX. Reasonable Necessary Temporary Housing Expenses

Section 27.004(g)(4) permits the recovery of "the reasonable expenses of temporary housing reasonably necessary during the repair period." This too can be a significant expense. For example in a serious foundation defect case it is not unusual for there to be interior piers needed as part of the repair. This often will require removal of all furniture and floor coverings so that the interior piers can be constructed. If the home has a slab-on-grade foundation this requires drilling through the concrete slab. It is a messy repair project that almost always requires the owners vacate the home. It is not unusual for the owners to be displaced for several months.

The reasonable expense of temporary housing should be for a comparable house if it can be located. Most often a rental house cannot be found for the relatively short period – so, alternatively, extended stay motels or corporate apartments are selected. Proof of the expenses typically is provided by the owner testifying as to the out-of-pocket expense for the temporary housing and the reasonableness of the expense compared to other facilities. If the selection or cost of the alternative housing is challenged, it may be necessary to have direct testimony from the temporary housing provider.

X. Reduction in Market Value After Repairs ("Stigma")

Section 27.004(g)(5) of the RCLA allows damages for "the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure." This damage, commonly called "stigma" damage, has been allowed in defective home cases for many years. The basic premise is that the pool of potential purchasers for a home that had suffered serious defects but was "fixed" will be less than a similar home that never suffered the defects. Therefore, the fair market value of the home is reduced.

Although the premise is obvious, legally sufficient proof is required. How is it best to present this appraisal evidence? The first consideration when answering this question is who is the audience? Is the fair market value evidence being presented to a jury, judge or arbitrator? In Texas, real estate appraisals prepared for a "fee or other valuable consideration" may be performed by realtors, appraisers, brokers or salespersons, provided that the "appraiser" is licensed by the State pursuant to the Texas Real Estate License Act, Article 6573a, Vernon's Texas Civil Statues, and/or the Texas Appraiser Licensing and Certification Act, 22 TAC §153 *et.seq.* (Tex. Admin. Code Title 22). The decision as to which of these experts to select typically depends on the facts of the particular case and the dollar amount involved.

Additionally, it should also always be remembered that the owners of the damaged home are legally entitled to testify to the value of their own home so long as they are clear the basis of their opinion is market value rather than the extrinsic value of the property to them. Even though the owners are not licensed real estate professionals or appraisers, this opinion testimony about the market value of their own home is permitted.

The next question to consider is whether the testimony by the witness on the market value of the property will be admitted. Clearly, appraisal testimony is opinion evidence and it rarely is based on the personal knowledge of the witness. When this type of evidence is presented in a jury trial, the trial judge is sometimes called upon to perform the *Daubert/Robinson* "gate-keeping" task. This is to insure the evidence presented to the jury meets a minimum reliability threshold. If the evidence is presented to an arbitrator, this same level of scrutiny probably will not occur.

In 1993, the U.S. Supreme Court in *Daubert v. Merill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 469 (1993) announced five factors for the courts to consider as gate-keepers on scientific testimony: (1) the testability of the theory; (2) whether the theory on technique has been subjected to peer review and publication; (3) the potential rate of error; and (4) the general acceptance of the theory or technique in the scientific community.

The U.S. Supreme Court next announced the trial court's gate-keeping role applied not only to scientific evidence but to all expert testimony. *Kumko Tire Co., Ltd. v. Carmichael*, 526 U.S. 1137, 119 S.Ct. 1167, 43, L.Ed.2d 238 (1999)

The Texas Supreme Court adopted the federal line of cases interpreting Rule 702 to apply to the admissibility of expert testimony in *E. I. Dupont de Nemours and Company, Inc. v. Robinson*, 923 SW2d 549 (Tex. 1995). The Texas Supreme Court expanded the scope of *Robinson* in *Merrill Dow Pharmaceuticals, Inc. v. Havner*, 953 SW2d 706 (Tex. 1997) and *Gammill v. Jack Williams Chevrolet, Inc.*, 972 SW2d 713 (Tex. 1998).

Generally, as long as the proponent of the fair market value opinion is able to substantiate the rationality and reliability of the opinion under *Daubert/Robinson*, it will be admitted. It is necessary the witness demonstrate he or she is rendering the opinion based on the observation of a specific piece of property and that he or she is familiar with the values of similar property.

Typically, a licensed real estate appraiser is asked to provide opinions based on the following three values:

1) AS-NORMAL: Provide a hypothetical value, based on the extraordinary assumption that no deficiencies or defects, structural or otherwise, exist, or ever existed within the subject property, as of the date of inspection.

2) AS-REPAIRED: Provide a value after recommended repairs have been made, or assuming repairs have been made, utilizing professional reports, as well as an applicable market stigma adjustment (if any). Historically, full disclosure of the deficiency and litigation history is required. The market (buyer), typically will have full knowledge as to the cause and extent of repairs, as well as the fact that there is a chance the repairs may not be permanent and additional foundation movement may occur. This as-repaired value assumes that unlimited lifetime warranties for the work performed are provided and fully transferable to a new owner.

3) AS-IS: Provide a depreciated value, as of the date of inspection, with known, existing structural deficiencies and/or construction defects.

Once the admissibility threshold is met the credibility of the witness to the fact-finder needs to be considered. A witness may be qualified to testify as an expert on the stigma to a home by education or by experience. However, other factors are critical in the selection of the appropriate witness. Degrees and credentials certainly may be impressive and important to the fact-finder. Nevertheless, the witness's credibility will always be impacted by other factors as well. The expert's ability to clearly communicate on direct testimony and to withstand cross-examination must be evaluated. Additionally, the expert's available time to dedicate to the project needs to be carefully reviewed.

XI. Reasonable and Necessary Attorney's Fees

Section 27.004(g)(6) of the RCLA allows for the recovery of the homeowner's attorney fees caused by a construction defect. Although technically not a damage, the ability to recover attorney fees in these cases is critical to the homeowner. Often the attorney fees in complex, residential construction defect cases can exceed or be close to the total cost of repair. The factually complicated and legally unsettled nature of these residential construction cases make them expensive. Attorney fees have been held by Texas Courts to be reasonable and necessary, even when the fees greatly exceed the actual damages awarded to the Plaintiff. In *Seabury Homes, Inc. v. Burleson*, 688 SW2d 712 (Tex. App,-Ft. Worth 1985, no writ), $15,000 in attorney fees was approved on a recovery of $2,000 in actual damages.

In construction defect cases where the RCLA does not control, there are other statutory grounds for attorney fees recovery by a prevailing Plaintiff. Fees may be recovered pursuant to the DTPA (Tex. Bus. & Com. Code Ann. §17.50(d)) the Fraud in Real Estate or Stock Transaction statute (Tex. Bus. & Com. Code Ann. §27.01(e))and Tex. Civ. Prac. & Rem. Code Ann. §38.001. To recover attorney's fees under §38.001: (a) the claimant must be represented by an attorney; (b) they must present the claim to the opposing party or to a duly authorized agent of the opposing

party; and (c) payment or the amount owed must not have been tendered before the expiration of the 30th day after the claim is presented. (Tex. Civ. Proc. & Rem. Code Ann. §38.002)

In a Texas State Court proceeding, attorney's fees are a fact issue to be determined by the jury. In *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 SW2d 812 (Tex. 1997) the Texas Supreme Court held in order to recover attorney fees under the DTPA, a Plaintiff must prove the amount of fees was both reasonable and necessary and that the jury must award the fees in a specific dollar amount, not as a percentage of the judgment. Although there are no cases on the award of attorney fees under the RCLA, the *Andersen* factors most certainly apply.

Andersen held factors that a fact-finder should consider when determining the reasonableness of a fee include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(2) the likelihood … that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Tex. Disciplinary R. Prof. Conduct 1.04, reprinted in Tex. Gov't. Code, Title 2, Subtitle G app. (State Bar Rules, Article X, Section 9). Attorney fees may be presented by affidavit. However, it often is better to offer live testimony to the trier of fact to elaborate on the *Andersen* factors and provide additional details on what transpired in the case.

XII. Closing Remarks

Residential Construction defect litigation is again in a period of significant change. The pendulum had swung hard in favor of the homebuilders due to favorable legislation that had been enacted since 1989. It appears the pendulum is beginning to

swing back in favor of Texas homeowners, as evidenced by the 2007 amendments to the TRCCA giving more muscle to the TRCC and the abolishment of the TRCC and the TRCCA this year. Most political observers had predicted the Texas Legislature and Governor would not be able to withstand the furious lobbying efforts by the highly influential Texas homebuilders. Those predictions were wrong and it was indeed time for change. Now the question remains – is there a need for more change? Consumer advocates and homeowners contend the answer is clearly yes and are organizing for the 2011 legislative session to make necessary changes to the RCLA.

Even though we are approaching almost two decades of having these builder protection acts on the books, there remain numerous unresolved and "developing" issues. It has even been said the TRCCA and the RCLA have "created many more questions than the statutes answered." Those of us who work in the trenches on these cases every day know how true that statement is. For this reason, pending further legislative or judicial interpretations (which will be limited since so many of these cases are resolved in arbitration), it is critical for attorneys representing either homeowners or builders to fully understand the current "menu" of damages available in most of these cases. Certainly, these disputes will continue to be expensive to litigate and the stakes are high. Hopefully these truisms will be recognized by the parties and result in expedited, reasonable resolutions.