

# Suing Builders: After TRCC RCLA Issues

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*CENTER FOR CONSUMER LAW*

*UNIVERSITY OF HOUSTON LAW CENTER*

*CONSUMER LAW BASICS – KNOW THE LAW!*

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- In the past 35+ years there has been a remarkable evolution of law impacting Texas homeowners –
  - .... But for homeowners, until this year, it has gone from good to bad.
  - In fact, the erosion of rights for Texas homeowners in the last 18 years has truly been extreme.

# Why?

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- Well funded lobbyists working the Texas Legislature to restrict homeowner's rights and radically redesign the way residential construction defect claims are handled
- Too few consumer advocates fighting the special interest legislation

**MONEY TALKS!**

# Erosion of Homeowner's Rights

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- 1968 – Humber v. Morton (TX 1968)
- 1973 – DTPA
- 1986 – Melody Homes v. Barnes (TX App. Ft. Worth, no writ)
- 1989 – RCLA
- 1993 – RCLA with Muscle
- 2000 – Perry Homes v. Alwattari (TX App. – From. Worth, pet. Denied)
- 2002 – Centex Homes et al v. Buecher (TX 2002)
- 2003 – TRCCA and RCLA Amendments
- 2005 – TRCCA and RCLA Amendments
- 2007 – TRCCA Amendments


**IT REALLY HAS BEEN THE END OF THE WORLD AS WE KNEW IT!**


# Development of Residential Defect Jurisprudence

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- Prior to 1968 – claims brought under common-law theories
  - Breach of contract
  - Negligence
  - Breach of express warranties
  - Fraud
- Post 1968 – *Humber* brought 2 new implied warranties:
  - Habitability
  - Good and Workmanlike Construction

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- 1973 – DTPA added:
    - Laundry list misrepresentation claims
    - Breach of Implied and Express Warranties
  - 1989 – RCLA passed:
    - Limited scope
    - Focused on builder's right to cure construction defects

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- 1993 – RCLA added muscle for builders:
    - Limited menu of economic damages
    - Eliminated mental anguish and other non-economic damages if the owner “unreasonably” rejected an offer of repair
    - Adopted common-law defenses
    - Established new statutory defenses

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- 2003 – TRCCA
    - State Sponsored Inspection and Dispute Resolution Process (“SIRP”)
  - 2005 – Effective 6/1/05
    - New statutory warranty standards



# IT WAS TIME FOR CHANGE

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- 2007 - New muscle for the TRCC
- 2008 – Sunset Advisory Commission Report
  - Recommended abolishment of TRCC and repeal of the TRCCA
- 2009 – 81<sup>st</sup> Legislative Response – SUNSET - Provisions of Title 16 expired 9/1/09



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RCLA Issues

Proving Menu Damages

# Menu of Available Economic Damages

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- Reasonable and necessary cost of repairs
- Reasonable and necessary cost for replacement or repair of damaged goods
- Reasonable and necessary engineering and consulting fees
- Reasonable expenses of temporary housing for a reasonably necessary period of time during the repair
- If the construction defect is a structural failure, stigma damages after the defect is repaired
- Reasonable and necessary attorney's fees

**BUT**

- **NOT Moving and Storage costs**
- **NOT Boarding for Pets or Livestock**
- **NOT Loss of Income from the interruption of a homeowner's home business during periods of temporary housing due to repairs**

**AND**

- **No Non-Economic Damages – Mental Anguish**

## More Builder Protection Added in 2003 Penalty: Failure to Make Reasonable Offer

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24.004 (f):

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

**NO NEGATIVE CONSEQUENCE  
FOR THE BUILDER – Makes No Sense**

# Penalty: Rejection of Reasonable Offer

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- 27.004(e): If a claimant rejects a reasonable offer or does not permit the 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; or
    - (B) the amount of a reasonable monetary settlement or purchase offer; and
  - (1) 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

# Reasonable and Necessary Cost for Repair of Residence & Related Structures

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- Section 27.004(g)(1) provides for the repair of the residence and related structures
- KEY BATTLE
- Builder's tend to offer "patch job"
- Builder's resist homeowners' proposals for complete repair – "Cadillac Job"
- Competent and credible experts essential in proving appropriate repair/cost

# Reasonable and Necessary Cost for Replacement/Repair of Damaged Goods

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- Section 27.004(g)(2) allows for replacement or repair of damaged personal property caused by a construction defect
- Owner should provide appropriate opinion testimony from experts
- Arbitrators often accept affidavits from qualified experts
- Full cost of replacement should be used instead of depreciated cost

# Reasonable and Necessary Engineering and Consulting Fees

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- Provided for in 27.004(g)(3)
- Essential homeowner enlists proper experts to perform the forensic process – often multiple trades
- May use CPRC 18.001 affidavit of reasonable and necessary services and costs
- Affidavit must be filed and served 30 days before trial
- Affidavits must be made by person providing service or person in charge of records
- Counter affidavits must be served not less than 30 days after service of affidavit and not less than 14 days before trial



# Reasonable and Necessary Temporary Housing Expenses

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- Provided for in 27.004(g)(4)
- Owners can often be displaced for several months
- Temporary housing should be for a comparable house
- If unavailable, extended stay motels or corporate apartments utilized
- Owner should testify to out-of-pocket expenses
- If selection or cost is challenged, have testimony from temporary housing provider

# “Stigma” – Reduction in Market Value After Repairs


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- Provided for in 27.004 (g)(5)
- Premise that pool of buyers will be less for a home with “fixed” serious construction defects than for a similar home
- Currently only applies to structural defects
- *Daubert/Robinson* applies to all expert testimony
- Who should testify?
  - Homeowners
  - Licensed appraisers or realtors
  - Credibility imperative
- Appraisals/market values should provide value in 3 scenarios:
  - As-Normal
  - As-Repaired
  - As-Is

# Reasonable and Necessary Attorney's Fees

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- Provided for in 27.004(g)(6)
- Critical for homeowners
  - Complex litigation → Costly fees
- Reasonable and necessary even when fees greatly exceed actual damages awarded
- Other statutory bases:
  - DTPA
  - Fraud in Real Estate or Stock Transaction
  - Tex. Civ. Prac. & Rem. Code Ann. 38.001

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- Fact issue - determined by the jury
  - Contingent cases fees must be specific dollar amount not percentage of judgment
  - Must be reasonable and necessary



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o *Anderson* factors for fact-finder:

- Time, difficulty and skill required
- Likelihood of preclusion of other employment
- Fees customarily charged
- Amount involved – results obtained
- Time limitations imposed by client/circumstances
- Nature and length of relationship with client
- Experience, reputation and ability of lawyer
- Whether fee is fixed or contingent

# Closing Remarks

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- In the last 2 decades the pendulum has swung hard in favor of builders ..... But in 2009 it was time for a change
- Is more change needed? – YES!
- Consumer advocates and homeowners organizing for the 2011 Legislative session to address RCLA
- TRCCA and RCLA “created more questions than the statutes answered.”
- Many cases resolved in arbitration so judicial interpretation is limited
- Stakes are high in these disputes and will continue to be expensive