

**The New Texas Residential Construction
Commission Act
and the Amended RCLA**

What You Need to Know

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In the past 30+ years there has been a remarkable evolution of law impacting Texas homeowners -

.... but for homeowners it has gone from good to bad.

In fact the *erosion* of rights for Texas homeowners in the last 10 years has truly been extreme.

WHY?

- Too few consumer advocates fighting the flood of change

PLUS

- Well funded lobbyists working the Texas Legislature

MONEY TALKS!

Erosion of Rights for TX Homeowners

- 1968 - Humber v. Morton (Tex. 1968)
- 1973 - DTPA
- 1986 - Melody Homes v. Barnes (Tex. App. - Ft. Worth 1986, no writ.)
- 1989 - RCLA
- 1993 - RCLA with Muscle
- 2000 - Perry Homes v. Alwattari (Tex. App. - Ft. Worth 2000, pt. denied)
- 2002 - Centex Homes et al v. Buecher (Tex. 2002)
- 2003 - TRCCA and RCLA Amendments

IT REALLY IS THE END OF THE WORLD AS WE KNOW IT!

TOP 10 SUGGESTIONS

1. Caveat Emptor: Buyer Beware!

Be very, very cautious.

For most homeowners, this is the single largest investment of their lives ...

BUT buyer is at a tremendous disadvantage!

2. Be proactive!

Investigate the Builder.

Look behind the sales talk and marketing.

Have they been involved in previous litigation?

Check with the BBB. Check with the TRCC.

3. Negotiate your contract!

Don't just accept the builder's form contract!

Greatest leverage is upfront...

BEFORE the contract is signed.

Get all promises in writing!

4. Be proactive!

Demand the list of Subs / Suppliers.

Take time to investigate them.

Again, have they been involved in previous litigation?

Check with the BBB. Check with the TRCC.

5. Stay visible at every phase!

Find the problems before they are covered up!

Hire your own appropriate construction experts.
Keep a close watch on the plans/specs/actual
"as built" construction.

6. Challenge the Builder!

Call Time-Out when a deficiency is discovered.

Fix problems or questionable building practices
sooner rather than later!

*Far easier and ...
Much less costly!*

7. Make your paper trail!

Use CMRRR on all correspondence

8. Know the law ...

...and your remaining rights

9. Pray, chant, read poetry, listen to jazz ...

Do whatever it is you do to find inner peace.

10. And (did I mention ...?)

BE PROACTIVE!

Residential Contracts

- Critically Important Topic
- Many homebuyers are clueless
 - ❖ Largest Single Investment of their Life
 - ❖ VERY Emotional
- Builders/Sellers pre-occupied with making the sale vs. explaining the process ahead
- LESSON –
 - ❖ Buyers need attorneys at the front-end

Residential Contracts – 14 Points

1. How long will it take to build my house?
2. What if it takes longer?
3. How much is it going to cost?
4. What is included in the price?
5. What can change the price?
6. What is an allowance?
7. What if I want to add something to the house?
8. What level of workmanship can I expect?

Residential Contracts – 14 Points

9. **When will I close?**
10. **Will I get a chance to see the house before I close?**
11. **If I have a problem with the house, what do I do?**
12. **How long will it take for the builder to respond?**
13. **What if we can't agree on what needs to be done to fix the house?**
14. **Who pays the costs and attorney's fees if there is a dispute?**



TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT

**HB 730
78th Legislative Session**

Texas Residential Construction Commission

COMMISSION*

Registration of Builders	Limited Statutory Warranty and Building and Performance Standards	State-Sponsored Inspection and Dispute Resolution Process	Certification of Arbitrators	Filing of Arbitration Awards	Task Force
<ul style="list-style-type: none"> • Person • Each Company • Background Checks • Exemptions <ul style="list-style-type: none"> - Roofers - Owners - Less than \$20,000 	<ul style="list-style-type: none"> • HUD Minimum • IRC • NEC • 1-2-10 years • Mold Reduction • Warranty of Habitability 	<ul style="list-style-type: none"> • 30 Days Notice to Builder • 15 Days to Appoint Inspector • 15 Days to Issue Report for Non-structural • 60 Days to Issue Report for Structural • 30 Day Panel Appeal 	<ul style="list-style-type: none"> • Voluntary • Minimum 5 Years • Continuing Education 	<ul style="list-style-type: none"> • If Filed with a Court within 30 Days • Voluntary Filing 	<ul style="list-style-type: none"> • Mold • Arbitration • Rainwater

*9 Members: 4 registered builders; 3 general public; 1 P.E. who practices in the area of residential construction; 1 either architect or inspector qualified per Chapter 427.

THE COMMISSION

- 9 members
 - 4 Registered Builders
 - 3 members of the general public
 - 1 Professional Engineer
 - 1 licensed architect or licensed inspector
- 6 year term
- Member or spouse cannot be an employee or paid consultant of a trade association

Current TRCC Membership

- **Patrick Cordero, Chair** (Midland, TX)
CEO, Strategic Abstract & Title Corporation
Owner Developmental Construction Firm
- **Art Cuevas** (Lubbock, TX)
President, Art Cuevas Construction
- **Paulo Flores** (Dallas, TX)
Attorney, Arbitrator, Mediator
- **John R. Krugh** (Houston, TX)
Senior Vice President and Corporate
Counsel, Perry Homes
- **Glenda C. Mariott** (College Station, TX)
Vice President, Mariott Homes
- **Scott M. Porter** (Kerrville, TX)
President, Porter Contracting Co.
- **Mickey R. Redwine** (Ben Wheeler, TX)
Owner and Chief Executive Officer,
Dynamic Cable Construction Company
- **Kenneth L. Davis, PE** (Ft. Worth, TX)
Vice President, Pate Engineers
Exp: Development, Infrastructure, Structural
& Construction Management
- **Lewis Brown** (The Woodlands, TX)
President, Brown's Inspection Service
- **WEBSITE:**
<http://www.trcc.state.tx.us>

INSPECTION PROCESS

DISCLOSURE AND ADMISSIBILITY

- a person submitting a request must disclose any inspection;
- failure to disclose = exclusion of person and materials in process or action.

REBUTTABLE PRESUMPTION

- Inspector's determination of defect and any method of repair;
- overcome by a preponderance of the evidence.
- Applies only between homeowner & builder.

INSPECTION PROCESS

Fees:

- Person submitting the request must pay for cost of inspection
- If the inspector finds for party submitting the request, the commission will order fees be reimbursed by builder

Condition to Action:

- Must complete process before initiating an action for damages
- Mixed claim for personal injury and/or property damage must be brought **WITH** construction defect action

INSPECTORS

Workmanship & materials:

- 5 yrs.in residential construction-minimum
- Certified as *residential combination inspector*
- Continuing education requirements

Structural:

- Structural engineer or architect
- 10 yrs in residential construction minimum
- Continuing education requirements per commission rules

DISPUTE RESOLUTION PROCESS

- Homeowner must give the builder 30 days notice of any construction defect; builder has right to inspect.
- Request must specify:
 - the details of the construction defect,
 - any out-of-pocket expenses, any reports;
 - any inspector's names and the fee for the inspectors.
- Copy of request must be sent to other party.

DISPUTE RESOLUTION PROCESS

- Filed request tolls the statute of limitations until the 45th day after the date of a final, nonappealable recommendation is issued.
- Builder has a reasonable right to inspect until the end of the process.
- Commission must appoint inspector within 15 days.

DISPUTE RESOLUTION PROCESS

- Parties are allowed to strike an inspector once.
- Inspector has
 - 15 days to issue a recommendation for a workmanship & materials issue.
 - 60 days to issue a recommendation for a structural issue.

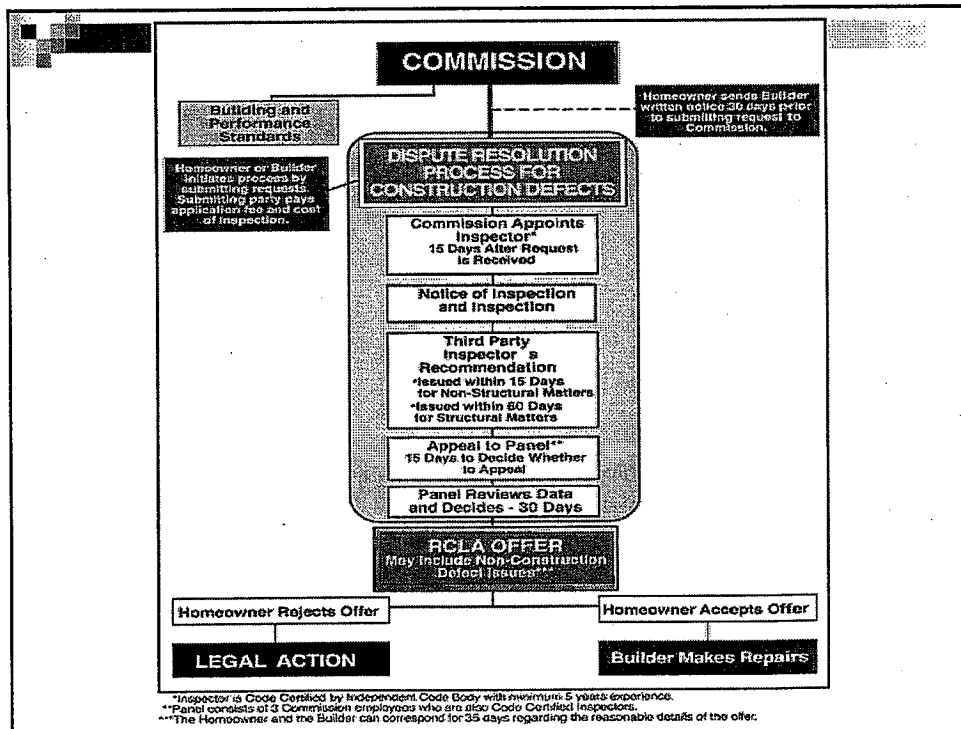
DISPUTE RESOLUTION PROCESS

- Recommendation addresses only the existence of a construction defect and the method or manner of repair
- Builder shall take reasonable steps *as soon as practicable* to remedy a defect that creates an imminent threat

DISPUTE RESOLUTION PROCESS

APPEAL:

- Either party may appeal
- Panel of state employed inspectors
- Paper review only - no hearing
- Issue findings of fact and a ruling within 30 days



LIMITED STATUTORY WARRANTY AND PERFORMANCE STANDARDS

WARRANTY PERIODS:

- 1 year for workmanship and materials;
- 2 years for plumbing, electrical & HVAC delivery systems;
- 10 years for major structural components.

IMPLIED WARRANTIES ARE GONE!!!

Section 430.006

The warranties established by the act supersede all implied warranties. The only warranties that exist for residential construction or improvements are warranties created by this chapter, other statutes expressly referring to residential construction or any express warranties.

WARRANTY OF HABITABILITY

- Builder's obligation to construct a home or home improvement that is
 - in compliance with the limited statutory warranty
 - safe, sanitary, and fit for humans to inhabit
- Direct adverse effect on habitable areas
- NOT discoverable by reasonable prudent inspection during the applicable warranty periods

EFFECT ON OTHER RIGHTS

- Creates a cause of action for breach of limited statutory warranty. Damages are limited to those in Section 27.004 of the Property Code.
- Breach of a limited statutory warranty or the statutory warranty of habitability by itself, shall NOT constitute a violation of the DTPA.

CRITICISMS

- TRCCA applied to claims “discovered” after 9/1/03
 - Not all Commissioners appointed
 - No office/ No Inspections/ No Set Fees
 - No Building Standards Established
- TRCC began taking claims June 2004
 - No standards in place until January 2005
 - Standards not in effect until June 2005 – almost 2 years after Agency first began taking claims

Comptroller’s Review of the TRCC January 2006

- 86% of those surveyed said Builder did not fix the defect identified
- Current Membership too heavily weighted towards the Construction Industry
- TRCCA has No Teeth
 - SIRP process time-consuming – Too many hurdles for homeowner
 - No authority to force Builder to make repairs
 - No authority to reprimand Builders who repeatedly perform below the standards

RCLA Amendments

- RCLA applies to arbitration (27.001(1))
- New Exceptions to the RCLA (27.002(d))
- Applies to injunctive/declaratory actions (27.003(a))
- New notice and offer of settlement provisions (27.004(b))
- Abatement/dismissal provisions (27.004(c) and (d))
- Stiffer penalties for rejecting "reasonable" offers (27.004(e))
- Lighter penalties for not making "reasonable" offers (27.004(f))
- Changes to the RCLA "Menu" (27.004(g))
- Elimination of the Damages Cap
- Builder's Conditional Offer of Purchase (27.0042)

RCLA Amendments: New Definitions

Sec. 27.001 Definitions:

- (1) "**Action**" means a court or judicial proceeding or an arbitration
- (6) "**Economic damages**" means compensatory damages for pecuniary loss proximately caused by a construction defect. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

RCLA Amendments: New Exceptions to the RCLA

- Violation of Tex. Bus. & Com. Code §27.01 (Fraud in Real Estate Transaction)
- Violation of Tex. Prop. Code Chapter 162 (Construction Trust Fund Statute)
- Wrongful abandonment of a residential construction project

RCLA Amendments: Changes to Notice and Offer of Settlement

- If homeowner completes the TRCC dispute resolution process, homeowner does not need to give RCLA notice
- When TRCCA applies, builder has 15 days after a final, non-appealable TRCC finding to make a RCLA offer under 27.004(b)
- When TRCCA does not apply, old RCLA timetables still control

RCLA Amendments: Changes to Notice and Offer of Settlement

- Offer can include repairs by contractor or third party at a reduced rate to homeowner (27.004(b))
- If homeowner believes offer is unreasonable, must notify contractor who has opportunity to make supplemental offer (27.004(b)(1) & (2))
- If TRCC applies and offer is accepted, contractor must engage the third-party inspector to inspect the work (27.004(l))

RCLA Amendments: Abatement and Dismissal of Actions

- If action must be filed to prevent running of SOL (27.004(c)):
 - If TRCCA applies, claimant must file TRCC claim concurrent with filing of action
 - If TRCCA does not apply, contractor has 75 days to inspect but only 60 to make an offer
 - Action is abated to “allow compliance”
- If action filed without notice but SOL not at issue = Action is DISMISSED (27.004(d))

RCLA Amendments: Penalty for Rejection of Reasonable Offer

27.004(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.

RCLA Amendments: Penalty for Failure to Make Reasonable Offer

27.004 (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.

RCLA Amendments: Changes to the Damages Menu

27.004 (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.

RCLA Amendments: Elimination of the Damages Cap

Former 27.004(i) limited damages to, "the greater of the claimant's purchase price for the residence or the current fair market value of the residence without the construction defects."



GONE!!

RCLA Amendments: Conditional Offer of Purchase

- Builder and homeowner must have a prior written agreement
- Cost of repair must exceed a pre-determined percentage of the current FMV without defects
- Only applies to homes purchased from the builder
- Home no more than 5 years old
- Builder must make election w/in 15 days after TRCC finding
- If builder makes election, must pay original purchase price and closing costs
- Homeowner may recover:
 - Attorney and expert fees
 - Reasonable moving costs
 - Reimbursement for permanent improvements
- Offer "that complies with this section" is reasonable absent clear & convincing evidence

What Claims Are NOT Covered by the TRCCA?

- Home built by an individual who intends to occupy for at least one year after completion
- Homeowner, real estate broker, agent or property manager who supervises or arranges for the construction of an improvement to a home owned by the homeowner
- Claims v. licensed construction professionals
- Not a "material improvement"
- Condos, tri-plex, quadra-plex

What Claims Are NOT Covered by the TRCCA?

- Claim solely for personal injury, wrongful death, survival, damage to goods
- Breach of an express, written, non-statutory warranty
- Claim arising in whole or in part from the acts of another person not in the builder's stream of liability
- Tex. Bus & Com. Code sec. 27.01
- Wrongful abandonment of project

What Claims Are NOT Covered by the TRCCA?

- Violation of construction trust fund statute
- Roof claims
- Claim arising in whole or in part from normal wear, tear, deterioration
- Claim arising in whole or in part from normal shrinkage of construction components
- Claims against non-registered builders (see 416.001)