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FIXIN' WHAT'S BROKE

RCLA Mandates Recovery Guidelines

By Judon Fambrough

Low interest rates fueled all-time record new home sales and residential remodeling expenditures over the past couple of years. Texans who purchase new homes or remodel or repair existing ones must realize that traditional laws governing recoveries, including the Deceptive Trade Practices Act, do not apply to construction defects.

Instead, homeowners must comply strictly with pretrial guidelines mandated by the Residential Construction Liability Act (RCLA) or face dismissal of their lawsuits. The latest amendment to the act, effective Sept. 1, 2003, made sweeping changes to the pretrial requirements.

The Texas Residential Construction Commission (the commission) is the cornerstone of the new legislation. The nine-member commission appointed by the governor is charged with implementing, overseeing and administering nearly every aspect of the new law.

The commission's most challenging task is creating and adopting two warranties covering all residential construction and repair work statewide. The first warranty, known as the limited statutory warranties and building and performance standards (hereafter referred to as limited statutory warranties), sets the minimum standards for all new home construction as well as home improvements and repairs.

The limited statutory warranties cover workmanship and materials for one year; plumbing, electrical, heating and air conditioning for two years; and structural components for ten years. The second warranty, that of habitability, covers anything having a "direct, adverse effect on the habitable areas of the home. . . ." This warranty ensures the home or home improvements are safe, sanitary and fit for humans to inhabit.

The two new warranties, once adopted, supersede all prior implied warranties applicable to residential construction and improvements. The warranties cannot be waived, but the contract between the homeowner and builder may be more stringent.

The new statute applies to those who for compensation construct, supervise or manage the construction of a new home; those who materially improve a home (other than repairing or replacing a roof on an existing home); or those who improve the interior of an existing home at a cost exceeding \$20,000.

Beginning March 1, 2004, all Texas builders must obtain a certificate of registration from the commission. Builders must register each new home with the commission after the title is transferred to the buyer. Likewise, each home repaired or improved must be registered after the contract is signed or the work begins.

If a dispute arises involving a construction defect (as defined by the statute), the owner or builder may initiate a procedure known as the state-sponsored inspection and dispute resolution process. The process begins with the homeowner submitting a request to the commission within two years after discovering the defect but not later than 30 days after the warranty expires.

The commission appoints a third-party inspector who examines the alleged defect(s) and renders a recommendation. The recommendation addresses only the alleged construction defect(s) based on the applicable limited statutory warranties adopted by the commission. It addresses only the method or manner of repair, not the monetary amount needed to remedy it.

If a structural defect creates an imminent threat to the inhabitants' health or safety, the builder must take reasonable steps to cure the defect as soon as practical. Otherwise, the owner may correct the defect and recover reasonable costs from the builder along with any attorneys' fees and associated expenses.

Either the owner or builder may appeal the third-party inspector's recommendation to a panel of three state inspectors employed by the commission. The panel may approve the third party's recommendation, reject or modify it, or return the matter for further consideration.

Once the panel's decision becomes final, dissatisfied owners may file a lawsuit against the builder or its warranty company to recover economic damages. However, a judicial presumption exists that the panel's decision is correct.

The 2003 amendment describes the use of arbitration. Although the procedure is unclear, it is apparently designed to correct past abuses of binding arbitration clauses in building contracts. The commission will maintain and update a list of certified arbitrators and make the list available to the public.

If an award concerning a residential construction defect is issued by a certified arbitrator after Jan. 1, 2004, and filed in a court of competent jurisdiction, several items regarding the award must be filed with the commission. Confidentiality is no longer an option.

Status of Former Statute

The procedure for settling disputes under the RCLA prior to Sept. 1, 2003, remains in place with modifications. The procedure, described in Chapter 27 of the Texas Property Code, must still be used to rectify construction defects occurring prior to Sept. 1, 2003, and possibly until the commission adopts the new warranties.

Under Chapter 27, the owner must send a demand letter to the builder at least 60 days prior to initiating any legal action, which includes compelling mediation or arbitration when the claim exceeds \$7,500. The letter must describe the alleged construction defect in reasonable detail.

The contractor may ask the owner to provide evidence of the nature and cause of the alleged construction defect and the nature and extent of needed repairs. These help the contractor assess potential liability.

Also, the contractor may ask to inspect the property. The owner must comply or face a trial delay until the inspection is completed.

After a determination under the new statute becomes final and no longer

appealable or after receiving the demand letter from the owner under the former statute, the contractor may submit a written settlement offer. The offer may be:

- an agreement to repair all or a part of the defect,
- an offer to have all or a part of the defect repaired by an independent contractor or
- a monetary payment to correct the defect.

The owner may accept the offer or advise the contractor why the offer is unacceptable. The offer is deemed rejected if not accepted within 25 days. If the owner accepts an offer for repairs, they must be completed in a workmanlike manner within 45 days unless delayed by the owner or circumstances beyond the contractor's control.

The act penalizes owners who, in bad faith, reject a reasonable offer or who do not allow the contractor a reasonable opportunity to make repairs. Likewise, the contractor is penalized for failing to attempt reasonable repairs, to complete repairs in a good and workmanlike manner or to make a reasonable monetary settlement. The penalties impact the amount of recovery ultimately afforded the owner.

Recoveries Under RCLA

If a settlement cannot be reached under either the new statute or under Chapter 27, the statute specifies the economic damages that can be recovered.

These include the reasonable costs of the repairs needed to correct the defect, costs of repairing or replacing the damaged goods and reasonable and necessary

engineering and consultant fees. Also covered are reasonable expenses for temporary housing during the repairs, reduction in current market value caused by a repaired structural failure and reasonable and necessary attorney fees.

Builders and remodelers are not liable for the percentage of damages caused by negligence of someone other than the contractor, its agent, employee or subcontractor. Likewise, they are not responsible for the failure of someone other than the contractor, its agent, employee or subcontractor to take reasonable action to mitigate damages or to maintain the residence.

Builders and remodelers cannot be held liable for normal wear and tear, normal shrinkage caused by drying or settlement of construction components within building standards tolerance and the contractor's reliance on false or inaccurate third-party written information obtained from official government records. The latter applies when the contractor did not know or could not have reasonably known the information was inaccurate.

Limits on Recovery

For construction defects occurring prior to Sept. 1, 2003, the statute limits recoverable damages, including the owner's attorney fees, to the greater of the:

- owner's purchase price for the residence or
- current market value of the residence without the construction defects.

Under these guidelines, homeowners get to keep the residence plus recoup the

entire purchase price or the fair market value of the home.

For contracts entered after Sept. 1, 2003, the owner and contractor may agree for the contractor to repurchase the residence when the costs of repairs exceed a stipulated percentage of the fair market value of the home without the construction defect. The repurchase price must include the original purchase price, closing costs and costs of transferring title to the contractor. The agreement is void when the residence is more than five years old or when the contractor elects to repurchase more than 15 days after the panel's decision becomes final and unappealable.

Even if the contractor elects to repurchase, the owner may still recover reasonable and necessary attorney and expert fees, reimbursement for permanent improvements after the date of the original purchase and reasonable moving costs.

The statute requires specific language to be placed next to the signature lines in all construction, repair or remodeling contracts. The notice, printed in 10-point boldface type, briefly summarizes the procedure for rectifying any complaint arising from a construction defect under the contract. The contractor faces a \$500 fine for failing to insert this notice in addition to any other remedies available under the act. 📌

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