TEXAS RESIDENTIAL CONSTRUCTION CLAIMS: WINDING BACK THE CLOCK

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I. Introduction

Undoubtedly, with the demise of the Texas Residential Construction Commission Act (TRCCA), the clock on how residential construction disputes are resolved has been wound back. Most homeowners would say that is good news! The experiment of the TRCCA failed. The financial harm it caused countless consumers was devastating. Now the question remains – is it time to turn the clock back even further?

This paper is my latest of a series of seminar presentations dedicated to helping Texas homeowners and their attorneys present their residential construction defect (a/k/a "broken house") claims. For the past two decades I have expressed my opinions on how to best cope with the Texas Residential Construction Liability Act (RCLA). This was the original "builder protection act." For the last seven years it has also been necessary to evaluate the second "builder protection act" – the TRCCA. Fortunately, with the 2009 Sunset of the Texas Residential Construction Commission (TRCC) and the expiration of the controversial TRCCA, that portion of this paper has been removed. Finally, I have again included an overview of proving damages in residential construction defect cases as well as a brief review of the history of residential construction litigation in Texas 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 20 years has been very intriguing.

This trend of diminishing consumer protection has started to change. Prior to this last legislative session, an extremely well-funded lobby for the homebuilders, contributing substantial sums of money to key politicians, effectively influenced our Texas Legislature. 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.

Thankfully, the prolonged and often unproductive "SIRP" process homeowners had to endure before being allowed to initiate a legal action is no longer necessary. This "SIRP delay" was the direct result of the TRCCA first enacted in 2003. That statute expired in 2009 when the Legislature failed to take the action necessary to keep it on the books. Sadly, 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 have 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. Evolution of Residential Construction 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 implied 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 – they were "gap fillers" and 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 stated common-law defenses do not apply to DTPA claims. Importantly, 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.

Despite this clear language of the DTPA, some counsel for residential builders have tried to rely on boiler plate "As Is" or "Waiver of Reliance" contractual provisions to further evade consumer protections. While the Texas Supreme Court appears to be trending toward barring fraud claims in commercial transactions when the parties previously agreed in writing that they were not relying upon each other (see *Forest Oil Corp. v. McAllen,* 268 S.W.3d 51 (Tex. 2008)), that reasoning should not spill over into consumer transactions. The line of cases preceding *Forest Oil* starts with *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.,* 896 S.W.2d 156 (Tex. 1995). In *Prudential*, a case involving the purchase of a commercial building in Austin containing asbestos, the Texas Supreme Court held the buyer's agreement to purchase the Jefferson Building "As Is" precluded an argument that Prudential caused any alleged damages. *Id.* at 161. The Court, however, held an "As Is" agreement does not preclude a fraudulent inducement claim (*Id.* at 162) even in commercial transactions.

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