

THE TRCCA, THE RCLA AND THE WINDS OF CHANGE

There's an old saying that goes, "If you don't like the weather in Texas, just wait a few minutes." As Texas builders have learned, this old saying also applies to the laws governing residential construction in Texas, and the winds of change are blowing once again.

In January 2009, the Texas Sunset Advisory Commission issued a Sunset staff review recommending the abolishment of the Texas Residential Construction Commission (TRCC) and the repeal of the Texas Residential Construction Commission Act (TRCCA). In accordance with the Sunset staff's recommendation, the legislature permitted the TRCCA to expire as of September 1, 2009. After that date, the TRCC will continue to operate in a "winding down" phase for one year, through August 31, 2010. During this one-year period, the TRCC will continue to exercise its statutory authority as necessary to complete its work, but will not accept new work that cannot be completed before it ceases all operations on September 1, 2010.

Perhaps most important, as of September 1, 2009, the Texas Residential Construction Liability Act (RCLA) is once again the primary framework for resolution of disputes between builders and homeowners over construction defects. This statutory and administrative shakeup will surely bring significant changes to the residential construction industry. As such, homebuilders should be aware of the potential differences that may apply to their contracts, depending on when those contracts were signed.

What to Expect for Contracts Signed after August 31, 2003 and before September 1, 2009

Residential construction transactions governed by contracts signed before September 1, 2009, are still governed by and must comply with the TRCCA. Further, such transactions remain subject to the statutory warranty and performance standards imposed by that law, despite the recent sunset. Some other important considerations arising from the sunset of the TRCCA include the following:

- The TRCC will not accept new builder registrations or renewal registration applications after August 31, 2009.
- While no new SIRP requests will be accepted after August 31, 2009, TRCC ombudsmen will actively process timely complaints and post-inspection actions through August 31, 2010. This means builders should respond to and complete any pending SIRP requests that were initiated prior to September 1, 2009.
- A construction defect claim asserted after August 31, 2009, therefore, is now governed principally by the RCLA, and no SIRP procedure is required.
- Even though the SIRP process is no longer available, any subsequent litigation under the RCLA will nonetheless be governed by the statutory warranty and performance standards set forth in Chapter 304 of the Texas Administrative Code.

What to Expect for Contracts Signed after August 31, 2009 and before September 1, 2010

Although the TRCCA itself has been repealed as of September 1, 2009, the statutory warranties and performance standards mandated by Chapter 304 of the Texas Administrative Code will continue to apply to contracts signed before September 1, 2010, unless the parties agree to adopt alternative warranty provisions. As a result, builders are advised to continue to offer the same or similar warranty coverage as the statutory warranty scheme mandated by Chapter 304 for these contracts. Indeed, the Texas Association of Builders has recommended a contract amendment that contains the same statutory warranty and performance standards for these “tweener” contracts. In addition, builders should also be aware that, as of September 1, 2009:

- Homeowners will no longer be required (nor able) to request a SIRP inspection before pursuing an action for damages against a builder, nor should the contracts refer to the SIRP process. Under the RCLA, homeowners will still be required to provide at least 60 days’ written notice with an opportunity to inspect and offer to repair and/or settle before filing a lawsuit or arbitration.
- Although builders will arguably still be statutorily required to provide the mandatory warranties set forth in Chapter 304 of the Texas Administrative Code, builders and homeowners are free to negotiate alternative warranty terms and coverages that are at least as restrictive. Your local HBA chapter may have recommendations, and is likely promoting the voluntary adoption of the same statutory warranty and performance standards during this period.
- All warranties in existence at the time of contract will continue to be effective, and will continue to be legally enforceable even after the TRCC is abolished and Chapter 304 of the Texas Administrative Code is repealed.
- Builders’ contracts will no longer have to include the current mandatory provisions set forth in Chapter 420 of the Texas Property Code. In order to avoid any potential enforceability issues that might arise, however, builders may choose to continue their compliance with Chapter 420 during the one-year winding down period. In this case, it would be advisable to add language notifying homeowners that the TRCC has been abolished, and will cease to exist on September 1, 2010. Your local HBA chapter may have a recommended addendum that will accomplish this notice for homes already under contract. In addition, builders are advised to continue complying with Chapter 420 regarding the requirement that arbitration clauses in construction contracts be conspicuous.

What to Expect for Contracts Signed After August 31, 2010

The transition to a post-TRCCA residential construction industry will be complete on August 31, 2010, when the TRCC turns out its lights and locks its doors for the last time. After that date, the statutory warranty and performance standards will still apply to those homes contracted before September 2009, and possibly September 2010, unless the parties agreed on alternative and not less restrictive warranty guidelines. After August 31, 2010, the warranty and

performance standards in Chapter 304 will no longer automatically apply to new home sales, and homebuilders should no longer include any reference in their contracts to the TRCC, the SIRP process, or the statutory warranty and performance standards. Homeowners will once again receive the implied warranties of workmanship and habitability by default. Because express warranties can once again be freely negotiated between the parties, builders may be well-advised to continue offering the same express warranty and performance standards in exchange for a waiver of all implied warranties, including good and workmanlike construction. Builders should be aware, however, that the effectiveness of such waivers may be limited. Although the implied warranty of good and workmanlike construction can generally be disclaimed by contract, the implied warranty of habitability can only be disclaimed in certain circumstances, such as when a purchaser buys a problem house with express and full knowledge of all defects affecting its habitability. Future case law will surely further define the rights of builders and homeowners in this regard, but it is likely that the implied warranty of habitability will survive. Finally, builders will also want to continue to ensure that their contracts clearly and conspicuously set forth any alternative dispute resolution mechanisms, such as arbitration and the waiver of a jury trial.

The RCLA – Back to the Future

As of September 1, 2009, disputes between homeowners and homebuilders are once again governed primarily by the RCLA for the first time since 2003. Unlike the TRCCA, the RCLA incorporates no state administrative procedure for receiving, processing, inspecting, and passing judgment on construction defect complaints, and has no mechanism for involving a neutral party in that process. Still, the RCLA does provide a framework for encouraging the parties to resolve such construction defect complaints before litigation can be initiated. In order to initiate a construction defect claim under the RCLA, a homeowner must send the builder a written demand (by certified mail) specifying the alleged construction defects in reasonable detail. After receiving the homeowner's demand, a builder has 35 days to perform an inspection, and 45 days to make a proposal of repair, monetary settlement, or both. If the homeowner accepts the builder's offer, the repairs must be completed within 45 days of the homeowner's acceptance. If the offer of repair or settlement is rejected, the homeowner is entitled to file a lawsuit or initiate an arbitration action against the builder on or after the 60th day after the initial written demand was given. Although it lacks the evidentiary presumptions afforded by the TRCCA based on SIRP findings, the RCLA still provides the builder with some incentive to make a reasonable offer, and the homeowner with incentive to accept same, by limiting the menu of damages available to any claimant that rejects a reasonable offer of repair and settlement.

Future Changes in the Law

In light of the recent sunset of the TRCCA, the immediate forecast shows decreased regulation in many areas of the industry, forcing homebuilders to adapt yet again to the ever-changing legal climate. But like the local weather, it's a safe bet that further changes to the laws governing residential construction in Texas are just over the horizon. The legislature's decision to repeal the TRCCA and abolish the TRCC was largely based on the Sunset Advisory Commission's findings that the TRCCA was not restrictive enough, that the SIRP process was too slow, and that the TRCC needed stronger regulatory and enforcement powers to adequately

protect consumers from potential harm. If that reasoning prevails, future legislation may one day attempt to succeed where the TRCCA failed. Whether such laws create a new regulatory agency, once again establish minimum warranty standards, adopt new requirements for builder registration or licensing, or impose new dispute resolution measures (such as mandatory mediation or arbitration of consumer complaints) remains to be seen.

For more information on the application of the RCLA, please see Chapter 27 of the Texas Property Code, or consult your legal counsel. For more information on pending or future legislation, contact your local chapter of the Texas Association of Builders. Better yet, get involved and support the TAB in its efforts to sponsor and influence effective legislation that will fairly address the concerns of builders and consumers alike.



Thomas R. Stauch and Matthew R. Mumm are attorneys at the law firm of Nowak & Stauch, LLP. The firm's website is www.ns-law.net. Please contact Tom or Matt if you have any questions on this topic or other issues related to residential construction.