COMMENT

THE SCOPE OF THE RESIDENTIAL CONSTRUCTION LIABILITY ACT IN TEXAS*

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I. INTRODUCTION

The Residential Construction Liability Act ("RCLA")[1] was enacted in 1989 to regulate defect claims against homebuilders or contractors in the construction, repair, or remodeling of homes.[2] The Texas Legislature submitted and enacted the RCLA to regulate the relationship between homeowners and homebuilders by facilitating fair and reasonable resolutions of conflicts that arise out of home construction and repair disputes.[3] Prior to the enactment of the

1. *See* TEX. PROP. CODE ANN. §§ 27.001-.006 (Vernon Supp. 1998).

2. *See id.* § 27.002(a) ("This chapter applies to any action to recover damages resulting from a construction defect . . . ."); William T. Little, *A Lawyer's Guide to the RCLA*, HOUS. LAW., Nov.-Dec. 1990, at 36, 36 (emphasizing that the RCLA "was specifically intended to apply to the construction defect claims against home builders that had previously been subject to the [DTPA]"). Refer to Part II.A.1 *infra* (indicating that the legislative intent behind the RCLA was to facilitate the settlement of construction disputes).

3. *See The Residential Construction Liability Act: Hearings on S.B. 1012, Before the Senate Jurisprudence Comm.*, 71st Leg., R.S., tape 2, side 1, at 1 (April 4,

RCLA, plaintiffs asserted home construction defect claims through the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA").[4] Although seemingly straightforward with regard to some of its provisions, commentators have observed that the RCLA is something of an enigma.[5]

This Comment discusses the scope of the RCLA in Texas. Part II outlines important provisions of the RCLA, explores the legislative history and intent of the RCLA, and explains traditional meanings and interpretations of the Act. Part III summarizes relevant provisions of the DTPA to provide a baseline against which one can measure the RCLA. In Part IV, this Comment examines the decisions and facts of *O'Donnell v. Roger Bullivant of Texas, Inc.*[6] and *Bruce v. Jim Walters Homes, Inc.*,[7] as well as their likely effects on future interpretations of the RCLA. Part V compares and contrasts parallel provisions of the DTPA and the RCLA. Furthermore, Part V considers the effect of *O'Donnell*, *Bruce*, and the RCLA on consumer rights in Texas and analyzes whether it is in the public's interest to afford special protections and limited liability to homebuilders. Finally, Part VI offers suggestions for change.

II. THE RESIDENTIAL CONSTRUCTION LIABILITY ACT

A. Legislative History and Traditional Interpretations

1. Proponents of the RCLA. The enactment of the RCLA was specifically intended to limit the liability of residential builders and contractors.[8] Numerous homebuilder lobby groups heavily supported it in an attempt to curtail what they perceived to be the expansive claims consumers could pursue under the DTPA.[9]

1989) (statement of Sen. Montford) (transcript available from Senate Staff Services office) [hereinafter *Hearings on S.B. 1012*, tape 2].

4. *See* TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987 & Supp. 1999). In Texas, it is implied that all contractors building houses warrant that the home is constructed in a good and workmanlike manner and is suitable for human habitation. *See* Humber v. Morton, 426 S.W.2d 554, 561 (Tex. 1968). The DTPA does not establish a warranty on its face, but applies to a breach of an implied or express warranty. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1997).

5. *See, e.g.*, Little, *supra* note 2, at 38 (stating that everyone will struggle with the RCLA until the courts provide more specific guidance).

6. 940 S.W.2d 411 (Tex. App.—Fort Worth 1997, writ denied).

7. 943 S.W.2d 121 (Tex. App.—San Antonio 1997, writ denied).

8. *See* TEX. PROP. CODE ANN. § 27.001 (Vernon Supp. 1998); *Hearings on S.B. 1012*, tape 2, *supra* note 3, at 2 (statement of Sen. John Montford); William T. Little & Stephen Paxson, *Builder Liability*, 56 TEX. B. J. 462, 463 (1993).

9. *See Hearings on S.B. 1012*, tape 2, *supra* note 3, at 2-4 (statement of Robert

Today, those pro-builder lobby groups that backed the RCLA are among the most powerful in Texas.[10] The original sponsor of the RCLA (shepherded through the Legislature as Senate Bill 1012), Texas State Senator John Montford, stated in the legislative hearings that "[t]he present Deceptive Trade Practices Act does not allow the builder to inspect or attempt to repair alleged construction defects even though the losses of both the builder and the owner can often be minimized if the builder is allowed to promptly inspect and repair the damage."[11] Senator Montford claimed that the RCLA would remedy inspection and settlement problems by requiring homeowners to give to homebuilders written notice of construction defects prior to filing suit, and by allowing the builder to inspect the property and offer to repair the premises.[12] Furthermore, Sen. Montford claimed that if the homeowner refused to allow the builder to make reasonable repairs, the RCLA would allow recovery for only the cost of reasonable repairs and would preclude the award of attorneys' fees.[13]

In addition to Sen. Montford's testimony in favor of the RCLA, Robert L. Bush, an attorney who frequently defends homebuilders, advocated its passage, stating that homeowners were exploiting the DTPA as a quick way to get large cash

L. Bush, Attorney). Robert L. Bush, an attorney who frequently represents homebuilders, testified in favor of the RCLA for the Home Owners Warranty Corporation ("HOW"), a company that provided warranties for new homes through homebuilders. *See id.* at 2 (statement of Robert L. Bush, Attorney). Bob Spies, an Arlington homebuilder and chairman of HOW, also testified for the enactment of the RCLA. *See The Residential Construction Liability Act: Hearings on S.B. 1012, Before the Senate Jurisprudence Comm.*, 71st Leg., R.S., tape 1, side 1, at 1-6 (April 4, 1989) (statement of Bob Spies, Chairman, HOW) (transcript available from Senate Staff Services office) [hereinafter *Hearings on S.B. 1012*, tape 1]. Terrance Cook, general counsel for HOW, also testified in favor of the RCLA and stated that it was "supported by the Texas Association of Builders." *Id.* at 5. (statement of Terrence Cook, General Counsel, HOW).

10. *See* Richard A. Oppel Jr., *Business Laments Setbacks*, DALLAS MORNING NEWS, June 5, 1997, at 1D (stating that Texans for Lawsuit Reform have contributed $1 million toward lobbying efforts in each of the last two years). Texans for Lawsuit Reform is a lobby group headed up by Richard Weekley, a developer and builder with David Weekley Homes. *See* Clay Robison, *Watchdogs Decry Money in House Races*, HOU. CHRON., Jan. 27, 1998, at 13A; *see also* Wayne Slater & Richard A. Oppel Jr., *Group Finds Cash no Key to Action*, DALLAS MORNING NEWS, May 30, 1997, at 1A (stating that Texans for Lawsuit Reform, headed by developer Richard Weekley, made $1 million in campaign contributions and operated with a $2 million lobbying budget).

11. *Hearings on S.B. 1012*, tape 2, *supra* note 3, at 1 (statement of Sen. Montford).

12. *See id.* at 2 (statement of Sen. Montford).

13. *See id.* (statement of Sen. Montford).

settlements from homebuilders.[14] Mr. Bush claimed that S.B. 1012 did not take away any homeowner's rights under the DTPA, but simply prevented homeowners from garnering an economic windfall by virtue of the fact that S.B. 1012 allowed the homebuilder a right to inspect the claimed defects and present a reasonable offer to repair them.[15] Mr. Bush indicated that the main purpose of including the inspection and repair provisions of S.B. 1012 was to facilitate and encourage reasonable dispute resolution between contractors and homeowners.[16]

The general counsel of Home Owners Warranty Corp. ("HOW"),[17] Terrence Cook, and a HOW chairman and Arlington homebuilder, Bob Spies, also testified in favor of S.B. 1012 because they felt that the DTPA encouraged increased litigation in construction defect cases instead of negotiation and alternative dispute resolution.[18] The proponents of S.B. 1012 implored its passage, claiming that defending expensive and complex DTPA claims was unduly burdensome on homebuilders.[19]

2. Opponents of the RCLA. Joe Longley, who led opposition to S.B. 1012, noted that the DTPA had a similar notice requirement and described the liability section and definitions of

14. *See id.* (statement of Robert L. Bush, Attorney) (stating that "the Deceptive Trade Practices Act is often used . . . frequently by plaintiff's [sic] who are trying to force the home builder or the contractors to pay a large cash settlement").

15. *See id.* (statement of Robert L. Bush, Attorney).

16. *See id.* at 4 (statement of Robert L. Bush, Attorney) (arguing that the RCLA "encourages homeowners and builders to operate in good faith to try to resolve construction disputes outside of the judicial arena").

17. HOW was championing the cause of S.B. 1012 because it originally had a provision that would allow homeowners to waive all implied warranties if the builder provided a comprehensive long-term express warranty. *See id.* at 1-2 (statement of Sen. Montford) (detailing how the express warranty provision of the original S.B. 1012 had been removed). Another proponent of S.B. 1012 admitted in earlier hearings that "builders [were] proposing that the law effecting applied warranties on both new construction and repairs be changed so that implied warranties of new construction [could] only be waived or limited if the builder provides a comprehensive long term written warranty" and that his company, HOW, was the dominant long-term written warranty provider in Texas. *See Hearings on S.B. 1012*, tape 1, supra note 9, at 4 (statement of Bob Spies, Chairman, HOW). HOW actually had a dominant, 70% share of the homeowner long-term written warranty market at the time S.B. 1012 was passed. *See id.* Accordingly, some jokingly referred to S.B. 1012 as a "homeowners warranty relief bill" during the legislative hearings. *See id.* (statement of Sen. Montford). However, the Legislature removed the implied warranty waiver portion of S.B. 1012 before it passed the RCLA. *See id.* at 2 (statement of Sen. Montford).

18. *See Hearings on S.B. 1012*, tape 1, supra note 9, at 2 (statement of Bob Spies, Chairman, HOW).

19. *See Hearings on S.B. 1012*, tape 2, supra note 3, at 2 (statement of Robert L. Bush, Attorney) (claiming that S.B. 1012 "restores some sense of balance to the procedure for dispute resolution between homeowners and contractors").

the RCLA as "limiting" and a "one way street" for homebuilders.[20] Mr. Longley asserted that perfect legislation was a rarity and questioned the wisdom of changing an effective law such as the DTPA because of a few remote cases of abuse.[21] Additionally, Mr. Longley characterized the DTPA as a fair piece of legislation that "has always treated everyone equally" and took into account those abuses that concerned the proponents of S.B. 1012.[22] Mr. Longley further asserted that the DTPA did not foreclose homebuilders from inspecting damaged homes,[23] and concluded that inspection rights should not be absolute because consumers should have a right to determine who is going to fix or repair their homes.[24]

Associate Justice Bob Gammage of the Court of Appeals in Austin, Texas,[25] also testified against the passage of Senate Bill 1012. Justice Gammage was involved with the passage of the DTPA,[26] and at the time of the RCLA's legislative hearings, was personally involved in a dispute with a homebuilder over construction defects in his recently built home.[27] Relying on his past and present experiences, Justice Gammage defended the DTPA as an effective law that protected homebuyers and expressed concern that S.B. 1012 would erode important consumer protections.[28] Justice Gammage was convinced that the

20. *See See Hearings on S.B. 1012*, tape 1, supra note 9, at 8 (statement of Joe Longley, President, Texas Trial Lawyers Association).

21. *See id*. at 9 (statement of Joe Longley, President, Texas Trial Lawyers Association).

22. *See id*. (statement of Joe Longley, President, Texas Trial Lawyers Association). For a discussion of the application of the DTPA to home construction defects, refer to notes 90-95 *infra* and accompanying text.

23. *See Hearings on S.B. 1012*, tape 1, *supra* note 9, at 14 (statement of Joe Longley, President, Texas Trial Lawyers Association) (asserting that, under the DTPA, the homebuilder would be able to inspect the premises via discovery motions after the plaintiff filed suit and could settle the claim at that time). Additionally, the DTPA allows for pre-suit notice and inspection. Refer to Part III.D *infra* (analyzing the notice, inspection, and mediation provisions of the DTPA).

24. *See Hearings on S.B. 1012*, tape 1, *supra* note 9, at 11 (statement of Joe Longley, President, Texas Trial Lawyers Association) (stating that "if you had it with somebody, a builder who has built a house that's not build [sic] in a good and workman like manner and you've reached the end of your rope . . . [i]t may be that you don't want to deal with that person anymore").

25. Justice Gammage also served on the Texas Supreme Court from 1991-1995. *See* R.G. Ratcliffe, *Gammage Leaving Bench at Texas Supreme Court*, HOUS. CHRON., Aug. 24, 1995, at 23A.

26. *See Hearings on S.B. 1012*, tape 1, *supra* note 9, at 20 (statement of Bob Gammage, Associate Justice, Texas Court of Appeals, Austin).

27. *See id*. (statement of Bob Gammage, Associate Justice, Texas Court of Appeals, Austin).

28. *See id*. at 21 ("You simply affect the construction industry and limit the rights of the consumer with this piece of legislation [Senate Bill 1012] as I

DTPA fostered the equitable and amicable resolution of his own claim against a homebuilder and lauded consumers' prerogative to file suit as a valuable means to facilitate settlement.[29]

3. Current Interpretations of the RCLA. The RCLA has rarely been an issue in Texas courts since its controversial passage[30] by the Texas Legislature.[31] Today, many view the RCLA as "provid[ing] significant benefits and protections to contractors involved in the construction, repair or remodeling of residences"[32] and as legislation "intended for the exclusive benefit of builders."[33] Even builders' advocates look upon the RCLA as an Act that runs "directly counter to the DTPA,"[34] and perceived it as being uncertain and problematic, especially in the manner in which it interacts with the DTPA.[35] These interpretations are somewhat different than the original intent of Sen. Montford—that the RCLA work "hand in glove" with the DTPA to effectively and fairly resolve disputes between homebuilders and homeowners.[36] One commentator summarized the quandry succinctly: "The legislative history of the RCLA indicates that it was a controversial proposal that was enacted only after its sponsor gave assurances that it was a limited response to a special problem."[37]

B. Important Provisions of the RCLA

1. Application. The RCLA applies to any action for damages that arises from residential construction defects.[38] Such

understand it . . . .").

29. *See id.*

30. *See* Little, *supra* note 2, at 38.

31. There have been only three cases that have involved interpretations of the RCLA: *In Re Kimball Hill Homes Texas, Inc.*, 969 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1998, no writ); *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121 (Tex. App.—San Antonio 1997, writ denied); and *O'Donnell v. Roger Bullivant, Inc.*, 940 S.W.2d 411 (Tex. App.—Fort Worth 1997, writ denied).

32. Little, *supra* note 2, at 40.

33. Little & Paxson, *supra* note 8, at 463.

34. *Id.*; *see also* Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH. L. REV. 1, 2-4 (1996) (discussing differences between the RCLA and the DTPA).

35. *See* Little & Paxson, *supra* note 8, at 463 (perceiving that "[t]he extent of the interaction between the RCLA and the DTPA is not yet clear . . ."); Summy & Sloan, *supra* note 34, at 4 ("[M]any of the RCLA's provisions remain problematic.").

36. *See* Debate on Tex. S.B. 1012 on the Floor of the Senate, 71st Leg., R.S., tape 1, side 1 (May 29, 1989) (tape available from the Senate Staff Services Office) [hereinafter *Debate on Tex. S.B. 1012*].

37. Little, *supra* note 2, at 38.

38. *See* TEX. PROP. CODE ANN. § 27.002(a) (Vernon Supp. 1998) ("This chapter

defects include any matter a consumer brings against a contractor regarding the design, construction, or repair of a new residence or an alteration to an existing residence.[39] The RCLA defines a contractor as

> a person contracting with an owner for the construction or sale of a new residence constructed by that person or of an alteration of or addition to an existing residence, repair of a new or existing residence, or construction, sale, alteration, addition, or repair of an appurtenance to a new or existing residence.[40]

The construction defect can include any damage to an appurtenance or real property to which the residence or appurtenance is affixed.[41]

2. Notice, Offer of Settlement, and Abatement. The RCLA requires that a claimant seeking damages from a contractor must give written notice, in reasonable detail, sixty days prior to filing suit.[42] "If the claimant fails to give the required notice, the trial court, after a hearing, must abate the suit."[43] "The purpose of the notice requirement is to encourage pre-suit negotiations to avoid the expense of litigation."[44] When the contractor receives pre-suit notice, it has thirty-five days to inspect the premises.[45] The contractor can request to inspect the premises in writing[46] and, within forty-five days after receiving notice of a claim, the contractor may make a reasonable offer to repair the damage or

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applies to any action to recover damages resulting from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods."); *In Re* Kimball Hill Homes Texas, Inc., 969 S.W.2d 522, 525-26 (Tex. App.—Houston [14th Dist.] 1998, no writ) (stating that "[t]he RCLA applies to 'any action to recover damages resulting from a construction defect,'" regardless of whether the plaintiff pleads it).

39. *See* TEX. PROP. CODE ANN. § 27.001(2).

40. *Id.* § 27.001(3).

41. *See id.* § 27.001(2).

42. *See id.* § 27.004(a); *Kimball Hill Homes*, 969 S.W.2d at 525 (holding that "the RCLA has a notice provision that is a mandatory prerequisite to filing suit").

43. *Kimball Hill Homes*, 969 S.W.2d at 525 (citing TEX. PROP. CODE ANN. § 27.004(d)). Abatement of a suit is essentially a "present suspension of all pleadings in a suit" and prohibits either of the parties from proceeding on any matter until the trial court has reinstated the suit. *See id.* at 527 (stating that "any action taken by the court or the parties during the abatement is a legal nullity"). Furthermore, failure of a trial court to grant proper mandatory abatement under the RCLA cannot be corrected upon appeal; therefore, mandamus relief is appropriate and available. *See id.* at 525.

44. *Id.* at 525.

45. *See* TEX. PROP. CODE ANN. § 27.004(a).

46. *See id.*

have an independent contractor repair the defect.[47] The contractor can also make a monetary settlement offer.[48] The parties can, however, waive or extend this forty-five day period through a written agreement.[49]

One of the reasons the RCLA is such a powerful tool for builders is due to the fact that it gives them the ability to trigger its protections when the plaintiff does not plead it. In *In Re Kimball Hill Homes Texas, Inc.*,[50] the plaintiffs asserted causes of action for conspiracy, common-law fraud, statutory fraud, breach of contract, and breach of warranty against Kimball Hill Homes because their homes "were constructed with 'substandard workmanship, poor quality materials and virtually no craftsmanship.'"[51] Despite the fact that the plaintiffs did not plead the RCLA, the court held that the Act was triggered because "[a] claim that exists solely by virtue of alleged construction defects clearly falls within the RCLA."[52] Therefore, if a plaintiff's claims arise from a construction defect in a residence, he or she is essentially forced to plead the RCLA and comply with its pleading requirements.[53] If the plaintiff fails to give the proper sixty-day pre-suit notice, the appropriate sanction is abatement of the suit without prejudice.[54] Finally, victims of residential construction defects cannot only be forced to plead the RCLA, but may also have all other claims arising out of the construction defects preempted by the Act.[55]

When the plaintiff gives proper pre-suit notice, the builder is required to tender a reasonable offer to the plaintiff.[56] As long

47. *See id*. § 27.004(b).

48. *See id*.

49. *See id*.

50. 969 S.W.2d 522 (Tex. App.—Houston [14th Dist.] 1998, no writ).

51. *Id*. at 524.

52. *Id*. at 526.

53. *See id*. Furthermore, in Texas, courts have consistently held that the underlying nature of a claim controls a matter and plaintiffs cannot, by artful pleading or other device, recast a claim in order to avoid the adverse effect of a statute. *See id*.; Mulligan v. Beverly Enterprises-Texas, Inc., 954 S.W.2d 881, 884 (Tex. App.—Houston [14th Dist.] 1997, no writ) (holding that the plaintiff could not avoid other statutory requirements by pleading under the DTPA).

54. *See* TEX. PROP. CODE ANN. § 27.004(d); *Kimball Hill Homes*, 969 S.W.2d at 526-27. Further, the suit can be automatically abated without action by the trial court beginning on the eleventh day after the date a plea in abatement is filed if the plea is verified, alleges that the proper party did not receive notice, and the claimant's affidavit evidence is uncontroverted. *See* TEX. PROP. CODE ANN. § 27.004(d)(1)-(2).

55. Refer to Part II.B.4 *infra* (addressing the preemption clause of the RCLA).

56. *See* TEX. PROP. CODE ANN. § 27.004(g).

as the homebuilder/defendant tenders a reasonable offer of settlement to the homeowner, the RCLA restricts the damages to: (1) the reasonable cost of repairs; (2) the reasonable expenses of temporary housing; (3) the reduction in market value if due to the construction defect; and (4) reasonable attorney's fees.[57] The determination of whether an offer is reasonable or unreasonable is likely made at trial.[58] If the contractor fails to make a reasonable offer within forty-five days after receiving the pre-suit notice letter, however, the builder waives the protections of the RCLA.[59] Also, if the homeowner unreasonably refuses to let the builder inspect the premises or rejects a reasonable offer to repair the premises, his or her claim is further limited to the cost of repairs necessary to cure the defect and reasonable attorneys' fees incurred up to the point at which the contractor made the reasonable offer.[60] As noted earlier, if the contractor does not receive pre-suit notice of a construction defect within the proper period or receives notice under a claim other than the RCLA, the contractor should request the homeowner to give proper notice pursuant to the RCLA or request the court to abate the suit and force the plaintiff to re-file.[61] Thus, situations of improper notice of a construction defect claim will essentially allow the contractor more time to remedy the defects than under the DTPA, giving it an advantage over the homeowner.[62]

Whether they are fair or not, the abatement, notice, and settlement provisions of the RCLA are catalysts to triggering the overwhelming advantages that the Act offers to builders.[63] These advantages include capped damages, the preemption of other claims arising from the construction defects, and expanded defenses for homebuilders.

57. *See id.* § 27.004(h).

58. *See* Little, *supra* note 2, at 39.

59. *See* TEX. PROP. CODE ANN. § 27.004(g) ("If a contractor fails to make a reasonable offer . . . the limitations on damages and defenses to liability provided for in this section shall not apply.").

60. *See id.* § 27.004(f).

61. *See In Re* Kimball Hill Homes Texas, Inc., 969 S.W.2d 522, 525 (Tex. App.—Houston [14th Dist.] 1998, no writ) (holding that lack of pre-suit notice for an RCLA action requires abatement); Summy & Sloan, *supra* note 34, at 11-12 (stating that if improper notice is given, a letter requesting proper notice under the RCLA would be appropriate).

62. *See* Summy & Sloan, *supra* note 34, at 12. Refer to Part III.D *infra* for a discussion of the notice, inspection, mediation, and settlement provisions of the DTPA.

63. *See* Little, *supra* note 2, at 40 (stating that builders must take affirmative actions in order to enjoy the benefits of the RCLA).

3. Damages. Claims for personal injury, survival, wrongful death, or damage to goods are exempted from the RCLA.[64] In Texas, personal injury claims usually include injury to the body, physical pain, loss of earnings, loss of earning potential, medical expenses, and mental anguish.[65] However, the RCLA definition of personal injury omits mental anguish.[66] This omission is ambiguous and, therefore, begs interpretation.

When analyzing new statutes, courts usually begin with an analysis of the statute itself,[67] and if the statute is clear and unambiguous, the court determines the intent of the Legislature by analyzing the plain and ordinary meanings of the words and terms used in the statute.[68] Because the Legislature specifically stated in the RCLA that mental anguish is not included in the definition of personal injury, and personal injury is exempted from the RCLA, it would appear, by implication and the common meaning of the words, that the legislature did not want mental anguish claims exempted from the RCLA.[69]

Although it is arguably clear the RCLA applies to claims for mental anguish resulting from construction defects, the application of the RCLA to claims that involve both personal injury and economic damages is less clear. Some commentators believe that a claim for the costs of repairs, coupled with one of the exempted actions for personal injury, wrongful death, or damage to goods, would exempt both actions from the RCLA because otherwise both claims that arose from the same incident would be subject to different legal standards.[70] Additionally, it is

64. *See* TEX. PROP. CODE ANN. § 27.002(a).

65. *See* Jamail v. Thomas, 481 S.W.2d 485, 489 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ refused n.r.e.).

66. *See* TEX. PROP. CODE ANN. § 27.002(b)(2).

67. *See* Cail v. Service Motors, Inc., 660 S.W.2d 814, 815 (Tex. 1983) (commenting that there is no need to use extrinsic aids and rules of statutory construction when a statute is unambiguous); Rough v. Ojeda, 954 S.W.2d 127, 130 (Tex. App.—San Antonio 1997, no writ) (declaring that the common, everyday meaning of a statute is superior to the use of any extrinsic sources).

68. *See* TEX. GOV'T CODE ANN. § 312.002(a) (Vernon Supp. 1998); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 352 (Tex. 1990); Connors v. Connors, 796 S.W.2d 233, 237 (Tex. App—Fort Worth 1990, writ denied).

69. *See* RICHARD M. ALDERMAN, ALDERMAN'S TEXAS CONSUMER & COMMERCIAL LAWS ANNOTATED 454 (1997) (commentary to TEX. PROP. CODE § 27.002); Summy & Sloan, *supra* note 34, at 7 (arguing that "a claim for mental anguish is seemingly within the ambit of the RCLA").

70. *See* ALDERMAN, *supra* note 69, at 454 (commentary to TEX. PROP. CODE § 27.002) ("The legislature has determined that these protections should not be applicable to cases involving personal injury claims, and to be consistent with that intent, claims for both personal injury and construction defects should also be exempt.").

also believed that if section 27.002 exempts any part of a suit, the entire claim is outside the scope of the RCLA.[71]

For example, suppose a construction defect causes a beam to fall, which injures the owner. The owner subsequently files suit for the costs of repair plus personal injury. Unless the personal injury claim is strictly mental anguish, the entire claim would be exempted from the RCLA.[72] Therefore, suits involving any exempted action would be outside the scope of the RCLA and the trial court would resolve the action by using other avenues such as the DTPA or the common law.[73] Because this premise cannot be easily derived from the common meanings of the words in the RCLA, however, other alternatives indicate that mixed claims could co-exist under the RCLA and other statutory and common law.[74] Because of this poor drafting, it appears that the recoverability of mental anguish claims under the RCLA is left strictly to the future interpretations of the courts.

Another uncertain aspect of the RCLA is the fact that it does not exclude or prevent mental anguish claims, but there is no provision providing for the recovery of those damages.[75] This omission indicates that even if a plaintiff can claim mental anguish damages, the RCLA protects builders by not allowing for recovery.[76]

Finally, the damages section of the RCLA appears to provide that the total damages awarded in an RCLA claim may not

71. *See id.* (observing that "[m]ental anguish claims included within another claim for personal injury *are* 'personal injury' claims exempted from this chapter").

72. *See id.*

73. *See id.* (arguing that mixed claims are clearly outside the scope of the RCLA).

74. *See* Little, *supra* note 2, at 38 (stating that other claims "would thus be governed by the DTPA or common law and would co-exist with the RCLA construction defect claim"); Summy & Sloan, *supra* note 34, at 7 (concluding that the "RCLA applies to any claim to recover damages resulting from a construction defect, even if the claim is joined with non-RCLA claims, such as claims for personal injury, survival, wrongful death, or damages to goods").

75. *See* Summy & Sloan, *supra* note 34, at 7-8. Messrs. Summy and Sloan observed:

> In other words, if a claimant makes a claim for damages involving a construction defect with respect to a residence and couples the construction defect claim with a claim for mental anguish, then the RCLA applies because mental anguish is excluded from the definition of "personal injury." It should be noted, however, that while Subsection 27.002(b)(2) appears to imply that mental anguish is covered by the RCLA, the damages available under the Act do not specifically mention mental anguish.

Id. (footnote omitted).

76. Refer to part V.A.4 *infra* (examining the possibility of recovering mental anguish damages under the RCLA).

exceed the purchase price of the house.[77] However, once again, the applicability of the purchase price cap is uncertain because it is poorly drafted and poorly organized. This disturbing limitation upon liability, as well as the poor statutory construction of the RCLA, is discussed later in greater detail.[78] Because the RCLA is untested and relatively new, these ambiguous damage provisions can only be resolved by a legislative overhaul or future judicial interpretation.

4. The Preemption Clause. The most important and controversial portion of section 27.002 is the preemption clause.[79] "To the extent of conflict between this chapter and any other law, including the Deceptive Trade Practices-Consumer Protection Act . . ., this chapter prevails."[80] This section, of course, indicates that if a claim is within the scope of the RCLA, the Act preempts any inconsistent causes of action.[81] However, the real question is whether the Legislature intended the words "any other law" to include the common law. Based on the previously mentioned plain and ordinary meaning test for statutory interpretation, it would appear that the phrase "any other law" would include all statutory and common laws.[82] In *Bruce*, the court interpreted "any other law" to include the common law, but decided that an action for common-law fraud did not conflict with the RCLA and, thus, could be pursued separately.[83] This interpretation may be correct and equitable from a policy standpoint, but is incorrect according to the statute's language. These controversial issues are discussed below in the analysis portion of this Note.[84]

5. Liability and Defenses. The "liability" section of the RCLA is ironically misnamed because rather than limiting any other defenses already available, it is extremely broad and affords homebuilders additional specific defenses to liability.

77. *See* TEX. PROP. CODE ANN. § 27.004(i) (Vernon Supp. 1998).

78. Refer to Part V.C *infra* (examining how the poor organization of the RCLA may preclude § 27.004(h) and (i) from ever being applicable).

79. *See* Little, *supra* note 2, at 38 ("The precise manner in which the RCLA and the DTPA interact is unclear and is obviously fertile ground for controversy.").

80. TEX. PROP. CODE ANN. § 27.002(a).

81. *See* Little, *supra* note 2, at 38; Summy & Sloan, *supra* note 34, at 6.

82. Refer to note 68 *supra* and accompanying text (describing the plain meaning test and applying it to the damages provision of the RCLA).

83. *See* Bruce v. Jim Walter Homes, Inc., 943 S.W.2d 121, 123 (Tex. App.—San Antonio 1997, writ denied).

84. Refer to Part V.D *infra* (analyzing the actual and likely effects of *Bruce* and *O'Donnell* upon RCLA jurisprudence).

Under the RCLA, contractors are not liable for any construction defects arising out of: (1) the negligence of a person not associated with the contractor; (2) the failure of homeowners to take action to mitigate damages or to reasonably maintain the residence; (3) normal wear and tear; (4) normal settlement or drying within the tolerance of building standards; or (5) the contractor's reliance on information about the residence that was obtained from official government records that could not have reasonably been known to be false.[85] In addition to providing these specific defenses to builders, the RCLA "does not limit or bar any other defense or defensive matter" that would be available in a construction defect claim.[86] Essentially, instead of expanding the liability of homebuilders, this section provides them with extra weapons to avoid liability.

6. Causation. Under the RCLA, the claimant must prove that the construction defect in question "proximately" caused any damages.[87] The Legislature added this section of the RCLA in 1993 to quell confusion regarding the appropriate standard of causation.[88] The DTPA only requires a more consumer friendly "producing cause" standard.[89] This provision of the RCLA is yet another example of how the RCLA provides stricter standards for homeowners, while providing greater protections for homebuilders.

III. THE DTPA

As indicated above, prior to the RCLA, consumers *did* have the statutory wherewithal to pursue suits for residential construction defects. Plaintiffs typically brought construction, remodeling, and repair defect claims dealing with residential housing as DTPA claims based on breach of the implied warranty

85. *See* TEX. PROP. CODE ANN. § 27.003(a)(1)-(5).

86. *Id.* § 27.003(b).

87. *See id.* § 27.004(h) (enumerating the "only" damages a plaintiff may claim); *id.* § 27.006.

88. Before the Legislature added § 27.006 in 1993, § 27.001(2) referred to "proximate cause" in regard to damage caused by a construction defect, while § 27.003(a) used the term "caused by," and § 27.002 prominently suggested that "resulting from" was the operative causation requirement. *See* Little, *supra* note 2, at 39 (referring to an old version of the RCLA and stating that it "contains vague and conflicting provisions about the standard of causation that applies to litigation under the Act . . . because the causation requirement is not clearly specified, the prospect of jury submission during an RCLA trial is fraught with uncertainty").

89. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 1999); *see also* ALDERMAN, *supra* note 69, at 458 (commentary to TEX. PROP. CODE § 27.006) ("[D]amages . . . must be 'proximately caused' by the conduct, while damages under the DTPA may be established under the lower standard of 'producing cause.'").

of suitability for human habitation.[90] The Legislature enacted the DTPA in 1973 to provide consumers an avenue to fight deception, fraud, and misrepresentation in the marketplace.[91] The DTPA was, ab initio, decidedly pro-consumer.[92] Under it, homeowners alleging faulty construction, remodeling, or repair of their homes could recover the maximum actual damages found by the trier of fact.[93] In cases involving knowing or willful violations of the DTPA by contractors, plaintiffs often received treble damages.[94] Additionally, the DTPA allows mental anguish damages and reimbursement for court costs and attorneys' fees.[95] The numerous parallels between the DTPA and RCLA beg the question: why does Texas need the RCLA?

A. General Principles and Legislative Intent

The legislative intent behind the passage of the DTPA in 1973 was to arm consumers with a remedy to fight deceptive

90. Refer to note 4 *supra* and accompanying text.

91. *See* TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon Supp. 1973) ("False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. . . ."); *see also* John L. Hill, *Introduction* to *Consumer Law Symposium*, 8 ST. MARY'S L.J. 609, 612 (1977) (illustrating how the then-recently enacted DTPA ended the caveat emptor consumer policy that dominated Texas law). Since its passage in 1973, see DTPA, ch. 143, 1973 Tex. Gen. Laws 322, the Texas Legislature has amended the DTPA in nearly every session. *See* Act of Apr. 24, 1975, ch. 62, 1975 Tex. Gen. Laws 149; Act of May 5, 1977, ch. 216, 1977 Tex. Gen. Laws 600; Act of June 13, 1979, ch. 603, 1979 Tex. Gen. laws 1327; Act of June 8, 1981, ch. 307, 1981 Tex. Gen. Laws 863; Act of June 19, 1983, ch. 833, 1983 Tex. Gen. Laws 4943; Act of June 12 1985, ch. 564, 1985 Tex. Gen. Law 2165; Act of June 11, 1987, ch. 280, 1987 Tex. Gen. Laws 1641; Act of June 8, 1995, ch. 414, 1995 Tex. Gen. Laws 2988.

92. *See* Hill, *supra* note 91, at 612 ("I realized that my first major task was to improve Texas law to better protect the consumer.").

93. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1); Kish v. Van Note, 692 S.W.2d 463, 466 (Tex. 1985); Leyendecker & Assocs. v. Wechter, 683 S.W.2d 369, 373 (Tex. 1984) (indicating that the DTPA permits plaintiffs to recover under whichever measure of damages gives the greatest recovery).

94. *See* Weitzel v. Barnes, 691 S.W.2d 598, 599 (Tex. 1985) (granting treble damages for defects in home); Brown Found. Repair & Consulting, Inc. v. McGuire, 711 S.W.2d 349, 350 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (awarding treble damages under a DTPA claim for faulty foundation repair); Cocke v. White, 697 S.W.2d 739, 741 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e) (awarding treble damages under the DTPA for defects in the roof, fireplace, and rear wall of the home).

95. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1), (d) (positing that "the consumer may recover damages for mental anguish" and "[e]ach consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees"); McKinley v. Drozd, 685 S.W.2d 7, 11 (Tex. 1985) (holding that a consumer is entitled to attorney's fees even if recovery is completely offset); Luna v. North Star Dodge Sales, Inc., 667 S.W.2d 115, 117, 119 (Tex. 1984) (declaring that damages for mental anguish and loss of the use of a car are recoverable under DTPA).

trade practices, misrepresentations, and unconscionable courses of action by sellers.[96] Before the DTPA, consumers had been strapped with causes of action which provided meager remedies that made most litigation economically impossible.[97]

The Legislature designed the DTPA to protect consumers from deceptive or misleading acts in the conduct of any trade or commercial activity.[98] The DTPA does not in itself, however, establish a warranty for goods or services, but is activated after a seller breaches an implied or express warranty or misrepresentation of a good or service.[99] Besides providing remedies for breaches of warranties, the DTPA contains an entire laundry list of specific unlawful and deceptive trade practices that are actionable under it.[100] Additionally, as a matter of public policy, a consumer cannot waive the DTPA unless specific guidelines are met.[101] Although it is well established in Texas case law that disclaimers of the implied warranty of good workmanship for the repair or remodeling of homes are ineffective, courts have not addressed the effect of similar disclaimers for new home construction.[102] Conversely, the builder-friendly RCLA does not have any specific provisions that prohibit disclaimers of implied warranties.[103] Therefore, because the

96. *See* Hill, *supra* note 91, at 613 ("The DTPA's most significant contribution . . . was in the area of remedies.").

97. *See id.* at 610 (emphasizing that the imbalance between recoveries and litigation costs made common-law remedies ineffective).

98. *See Hearings on S.B. 1012*, tape 1, *supra* note 9, at 20 (statement of Bob Gammage, Associate Justice, Texas Court of Appeals, Austin).

99. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(4) ("A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: . . . breach of an express or implied warranty . . . .").

100. *See id.* § 17.46(b). The laundry list of deceptive acts includes, but is not limited to: passing off goods or services as those of another; causing confusion regarding the source or certification of goods or services; using deceptive representations of the geographic origin of goods; representing that goods are original or new when they are not; advertising goods or services with the intent not to sell them as advertised; and representing that goods or service are of a particular quality or grade when they are not. *See id.*

101. *See id.* § 17.42. These guidelines are: (1) the waiver must be in writing and the consumer must sign it; (2) the consumer must not be in a significantly disadvantageous bargaining position; and (3) the consumer must be represented by counsel. *See id.* § 17.42(1)-(3).

102. *Compare* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982) (holding that builders could disclaim implied warranties), *with* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 355 (Tex. 1987) (overruling *Robichaux* to the extent that it conflicted with its *Melody* decision in connection with services to repair or remodel residences, but not the new construction of residences).

103. *See* Little & Paxson, *supra* note 8, at 463 ("The availability of common law defenses under the RCLA also reinforces the notion that implied warranties can be disclaimed.").

RCLA preempts the DTPA,[104] homebuyers can effectively and easily disclaim any causes of action based on implied warranties associated with the purchase of a new home.

B. Applicability

A consumer can maintain an action under the DTPA when any person uses a false, misleading, or deceptive act or practice that is: (1) enumerated in the laundry list of the DTPA and detrimentally relied on by the consumer; (2) in breach of an express or implied warranty; (3) an unconscionable act or practice that is the producing cause of economic damages; or (4) in violation of article 21.21 of the Texas Insurance Code.[105] The DTPA defines a "consumer" as an individual, partnership, corporation, or state agency that seeks or acquires, by lease or purchase, any goods or services.[106] A business that has assets of $25 million or more or a business that is controlled by a corporation with assets of $25 million or more does not have standing as a consumer.[107]

C. Damages

Generally, consumers who win a DTPA suit are awarded the economic damages found by the trier of fact.[108] The DTPA defines "economic damages" as a pecuniary loss, which includes costs of repair and replacement, but excludes any personal injury or exemplary damages.[109] However, a consumer who wins a suit under the DTPA can collect damages for mental anguish and three times the economic damages if the defendant committed the offense knowingly, and three times both the mental and economic damages if the defendant committed the offense intentionally.[110] Furthermore, plaintiffs who prevail on DTPA claims are entitled to all court costs as well as reasonable and necessary attorneys' fees.[111] To protect the defendant, the DTPA provides that any groundless action brought in bad faith for purposes of harassment results in an award of attorney's fees and court costs to the defendant.[112]

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104. Refer to Part II.B.4 *supra* (analyzing the preemption provisions of the RCLA).

105. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)-(4).

106. *See* TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon 1987).

107. *See id.*

108. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1999).

109. *See id.* § 17.45(11).

110. *See id.* § 17.50(b)(1).

111. *See id.* § 17.50(d).

112. *See id.* § 17.50(c).

D. Notice, Inspection, Mediation, and Settlement

The notice and inspection provisions of the DTPA are similar to those in the RCLA. Under the DTPA, a consumer must tender written notice to the defendant sixty days prior to filing suit.[113] The notice must specifically enumerate the complaint itself, the amount of attorneys' fees incurred to the point of notice, the amount of economic damages, and the amount of damages relating to mental anguish.[114] During the sixty-day period before which the potential plaintiff files suit, the defendant can request to inspect the goods that are the subject of the suit.[115]

The party that receives pre-suit notice can also tender a settlement offer to the consumer during the sixty-day pre-suit period.[116] The settlement offer must include an offer to pay the cash value of any damages claimed plus an additional amount of money to compensate the consumer for reasonable attorneys' fees incurred up until the date of the offer.[117] If both parts of the offer are not accepted within thirty days of the tender of such offer, the offer is deemed rejected.[118] Furthermore, if the consumer rejects the offer of settlement and the court determines the settlement offer is substantially the same as or more than the damages found by the trier of fact, the statute requires the court to limit the damages to the settlement offer or the court award, whichever is less.[119] In this situation, the attorneys' fees award is limited to the amount of reasonable and necessary attorneys' fees incurred until tender of the settlement offer.[120]

Under the DTPA, moreover, either party can compel mediation.[121] The purpose of the mediation chapter is to provide for the efficient and prompt settlement of DTPA claims. The mediation request must be made within ninety days of the complaint and the mediation itself must take place within thirty days of the court order compelling mediation.[122] The mediation

113. *See id.* § 17.505(a).

114. *See id.*

115. *See id.* ("During the 60-day period a written request to inspect, in a reasonable manner and at a reasonable time and place, the goods that are the subject of the consumer's action or claim may be presented to the consumer.").

116. *See id.* § 17.5052(a).

117. *See id.* § 17.5052(d)(1)-(2).

118. *See id.* § 17.5052(e).

119. *See id.* § 17.5052(g)(1)-(2).

120. *See id.* § 17.5052(h).

121. *See id.* § 17.5051(a).

122. *See id.* § 17.5051(a)-(d).

provision, added in the 1995 amendments to the DTPA, is limited to claims above $15,000.[123]

E. Defenses

The number of defenses in a DTPA action is sparse.[124] It is considered a defense if a seller reasonably relies on outside written information concerning its knowledge of certain goods and timely notifies the consumer of the information before the transaction is complete.[125] Additionally, if a defendant receives written notice from a consumer that specifically outlines the consumer's complaint, and the defendant pays the claim within thirty days, the defendant has an absolute defense to any DTPA claim based on that transaction.[126] All other defenses that may arise under the common law are generally not available to defendants in a DTPA action.[127]

IV. CASE RECITATIONS AND HOLDINGS

A. O'Donnell v. Roger Bullivant, Inc.

1. O'Donnell *and Its Holding.* In *O'Donnell*, the Court of Appeals in Fort Worth held that the RCLA's damage cap did not limit a homeowner's damages for deceptive trade practices, negligence, breach of warranty, gross negligence, breach of contract, and product liability claims when the homebuilder does not tender a reasonable settlement offer.[128] This decision is one of only three cases involving the application of the RCLA in Texas and will significantly influence all future applications and interpretations of the RCLA.

2. The Facts. In *O'Donnell*, the plaintiffs entered into a contract with a construction company, Bullivant, to repair

123. *See id.* § 17.5051(f) (preventing a party from compelling mediation if the amount of damages claimed is less than $15,000, unless the party requesting mediation agrees to pay the costs thereof).

124. *See* Little & Paxson, *supra* note 8, at 463 (characterizing the DTPA as a piece of legislation that "strips away common law defenses").

125. *See* TEX. BUS. & COM. CODE ANN. § 17.506(a)(1)-(3) (Vernon 1987).

126. *See* TEX. BUS. & COM. CODE ANN. § 17.506(d) (Vernon Supp. 1999).

127. *See* Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (holding that the DTPA is not a codification of the common law and, therefore, it is devoid of all common-law defenses).

128. *See* O'Donnell v. Roger Bullivant, Inc., 940 S.W.2d 411, 421 (Tex. App.—Fort Worth 1997, writ denied).

foundation problems in their home.[129] Bullivant installed cement pilings under the O'Donnell's home to remedy the problems, but this "repair" only worsened the foundation's condition.[130] Bullivant tried to fix the foundation problems again and caused additional foundation distress.[131] Finally, an independent inspector concluded that Bullivant's latest work rendered the foundation damage beyond correction and the house unmarketable.[132]

After trying to negotiate with Bullivant in an unsuccessful effort to settle the matter, the O'Donnells filed suit alleging deceptive trade practices, negligence, gross negligence, product liability, breach of warranty, breach of contract, and a declaratory judgment that the RCLA did not limit their claims.[133] Despite the fact that the house was worth $85,000 if it were in livable condition, Bullivant answered with a motion for summary judgment, asserting that the O'Donnell's recovery should be limited to the $45,500 purchase price of the home.[134] The trial court granted Bullivant the summary judgment, awarding only the $45,500 purchase price to the O'Donnells.[135] The appellate court reversed and remanded the trial court's decision.[136]

3. The Decision. In *O'Donnell*, the court first addressed the question of which of the three previously amended versions of the RCLA was applicable.[137] The court determined that the date of filing suit determined which version of the RCLA should apply and, therefore, the court applied the 1993 version of the RCLA.[138]

The court then determined that a suit over foundation repairs using concrete pilings was an "action to recover damages resulting from a construction defect"[139] because the pilings were

129. *See id*. at 413.

130. *See id*.

131. *See id*.

132. *See id*. (concluding "that the repairs done by Bullivant had not corrected the foundation distress, but had aggravated the once correctable conditions").

133. *See id*. at 413-14.

134. *See id*. at 420.

135. *See id*. at 414.

136. *See id*.

137. *See id*. at 417

138. *See id*. (noting that because the plaintiffs filed suit on October 20, 1993, the 1993 version of the RCLA applied). The differences in the 1997 and the 1993 versions of the RCLA would not have changed the outcome of the case because the only part of the RCLA that the Legislature changed in 1997 was the addition of the abatement section. *See* TEX. PROP. CODE ANN. § 27.004(d) (Vernon Supp. 1998) (adding a provision that allows the contractor to abate the suit if the consumer did not give proper notice under section 27.004(a)).

139. TEX. PROP. CODE ANN. § 27.002(a).

an "alteration or an addition" to the existing foundation and, therefore, within the scope of the RCLA.[140] After determining that Bullivant's work was the type of work within the ambit of the RCLA, the court turned to the question of whether Bullivant properly activated the portion of the RCLA that limits damages.

The main question in *O'Donnell* was whether the offer from Bullivant to the O'Donnells was reasonable enough to bring the action within the scope of the RCLA.[141] The plaintiffs argued that the damage cap did not apply because Bullivant: (1) failed to make a timely offer; and (2) failed to make a reasonable offer to repair the foundation damage.[142]

Specifically, the plaintiffs' first claim was that Bullivant's offer was not timely because it was not within the forty-five day limit the RCLA imposed.[143] Although Bullivant's offer was not within the forty-five day period, the court decided it was timely because in their notice and demand letter, the plaintiffs expressly gave Bullivant sixty days to respond to the claim.[144]

The plaintiffs also asserted that Bullivant's offer was not reasonable. The court agreed and concluded that Bullivant's offer, as a matter of law, was not reasonable, the O'Donnell's claims were not limited by the RCLA's damage cap, and the trial court erred in granting Bullivant's summary judgment and rejecting the O'Donnells' motion for partial summary judgment.[145]

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140. *See O'Donnell*, 940 S.W.2d at 417. The court concluded that § 27.002(a) was clear and unambiguous and, therefore, determined that the plain and ordinary meanings of the words used in the statute mirrored the intent of the Legislature. *See id*. at 417. The RCLA defines construction defect as "a matter concerning the design, construction, or repair of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance to a residence. . . ." TEX. PROP. CODE ANN. § 27.001(2). The court held that the foundation repair involving concrete pilings was a matter concerning the design or construction of an alteration to an existing residence because the pilings were physically attached to the slab and became part of it. *See O'Donnell*, 940 S.W.2d at 417.

141. *See O'Donnell*, 940 S.W.2d at 414.

142. *See id*. at 417.

143. *See id*. at 419. The RCLA states that a contractor can activate the protections of the damage cap by tendering a written settlement offer to the claimant(s) within 45 days after receiving notice. *See* TEX. PROP. CODE ANN. § 27.004(b).

144. *See O'Donnell*, 940 S.W.2d at 419. The RCLA states that "[t]he claimant and the contractor may agree in writing to extend the periods described by this subsection." TEX. PROP. CODE ANN. § 27.004(b).

145. *See O'Donnell*, 940 S.W.2d at 421. A letter the O'Donnells sent to Bullivant itemized all complaints and damages and demanded $125,000 in actual damages as well as $7,500 in attorney's fees. *See id*. at 418. Bullivant's response was a specific itemized offer to repair the damage at no cost to the O'Donnells. *See id*. In reaching its decision, the court did not define "reasonable" or determine what would have been reasonable in this case.

The court based its determination of "reasonable" on the affidavits of the house inspector and Mr. O'Donnell.[146] The inspector's affidavit alleged that the repairs Bullivant performed had not fixed the foundation problems, but had aggravated a once correctable condition.[147] In his affidavit, moreover, the inspector expressed serious doubt that the structure of the house could be restored and, thus, its habitability and marketability were in question.[148] The inspector also indicated that the process specified in Bullivant's latest offer to correct the "repairs" would not restore the home to its original condition.[149]

Mr. O'Donnell's affidavit placed the fair market value of the home before the repairs at $84,500.[150] He also claimed the home was now unmarketable because of the foundation damages Bullivant caused.[151] The court noted that Bullivant failed to contest the two affidavits or present any summary judgment evidence purporting that their offer was reasonable.[152] Therefore, the court ruled that Bullivant's offer was unreasonable and, therefore, inadequate to trigger the protections of the RCLA.[153]

Bullivant appears to be a logical, straightforward application of the law to the facts. Beyond its specific circumstances, however, the court did not define "reasonable offer" and thus, left nothing upon which future builders, homeowners, or courts could rely.

B. Bruce v. Jim Walters Homes, Inc.

1. The Facts. In *Bruce*, the plaintiffs asserted causes of action for common-law fraud, breach of contract, tortuous breach of contract, breach of warranty, and negligence due to alleged defects in a home Jim Walters Homes built for the plaintiffs.[154] In response, Jim Walters Homes filed a motion for partial summary judgment, contending that the RCLA was the only available cause of action as it preempted all others.[155] The plaintiffs

146. *See id.* at 420.
147. *See id.*
148. *See id.*
149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.*
154. *See* Bruce v. Jim Walters Homes, Inc., 943 S.W.2d 121, 122 (Tex. App.—San Antonio 1997, writ denied).
155. *See id.* Jim Walters Homes based its preemption claim on a section of the RCLA which states that in any "conflict between this chapter and any other law,

countered with the argument that the RCLA did not preempt their claim for common-law fraud because the Legislature intended the RCLA to regulate construction disputes, "not patent acts of deceit and fraud."[156] The Bruces also contended that the words "any other law" in the RCLA preemption clause did not include common-law fraud—if the Legislature wanted to preempt the common law, it would have specifically stated so.[157]

The trial court disagreed and granted summary judgment in favor of Jim Walters Homes on all of the Bruces' claims except for the RCLA claim.[158] The appellate court partially reversed, and held that the common-law cause of action for fraud did not conflict with the RCLA preemption clause, yet affirmed the remainder of the trial court's decision.[159]

2. The Decision. The suspect reasoning behind the appellate court's decision in *Bruce* suggests that a common-law fraud claim is independent of an RCLA claim for damages because the fraud claim arises out of an intentional misrepresentation and not a construction defect.[160] The court concluded that fraud actions were meant to regulate damages attributable to reliance upon intentional misrepresentations, while the Legislature enacted the RCLA to promote settlement between homeowners and contractors in the context of disputes over construction defects.[161] According to the appellate court, therefore, both the RCLA and common-law fraud claims were separate and a plaintiff can plead them together.[162] The court admitted that, contrary to the RCLA, common-law fraud allowed for exemplary damages.[163] Despite this difference in available damages, the court did not find a conflict between the two, but only recognized that the RCLA and common-law fraud were separate, distinct, and viable in a suit regarding residential construction defects.

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including the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code), this chapter prevails." TEX. PROP. CODE ANN. § 27.002(a) (Vernon Supp. 1998) (footnote omitted).

156. *Bruce*, 943 S.W.2d at 122.

157. *See id*.

158. *See id*. at 123-24 (noting the trial court's agreement with Jim Walters Homes's "contention that as long as the injury suffered results in any way from a construction defect, the RCLA is triggered and will control").

159. *See id*. at 124.

160. *See id*. at 123-24 ("[A] fraud cause of action and the RCLA do not regulate the same activity.").

161. *See id*. at 123.

162. *See id*. at 123-24.

163. *See id*. at 123.

The court asserted that common-law principles were preempted only when the Legislature clearly mandated it.[164] Strangely, the court held the RCLA's "any other law" preemption language clearly operated to exclude common-law claims, but preemption of the common-law fraud claim was not justified as the RCLA and fraud did not "conflict."[165] Therefore, the court held that the plaintiff did not trigger the preemptive language of the RCLA when it concurrently pled both common-law fraud and the RCLA.[166]

V. ANALYSIS

A. DTPA v. RCLA: Comparison and Contrast

1. Dispute Resolution. When the RCLA passed through the Texas Legislature in 1989, its main purpose was to supplement the DTPA by cultivating a better environment in which contractors and homebuyers could resolve differences and avoid costly litigation.[167] Ironically, the RCLA and the DTPA are actually similar with regard to the arenas of alternative dispute resolution available. Despite this similarity, there is a strong argument that the DTPA provides a better atmosphere for buyers and sellers to iron out differences than does the RCLA.

Another intended purpose of the RCLA was for it to follow the DTPA's lead in protecting consumers from deceptive and misleading trade practices. The RCLA, however, achieves just the opposite—it tilts the playing field in favor of homebuilders by providing numerous defenses and liability limits not available under the DTPA.[168] Unfortunately, it seems that the intent of the RCLA's framers simply served as camouflage for the underlying objective of insulating homebuilders from the kind of DTPA liability with which all other providers of products and services

164. *See id.* at 122-23 (citing Enos v. State, 889 S.W.2d 303, 305 (Tex. Crim. App. 1994)).

165. *See id.* at 123; *see also* TEX. PROP. CODE ANN. § 27.002(a) (Vernon Supp. 1998) (stating that "[t]o the extent of conflict between this chapter and any other law . . ., [the RCLA] prevails").

166. *See Bruce*, 943 S.W.2d at 124.

167. *See* Summy & Sloan, *supra* note 34, at 19 ("The purpose of the RCLA is to encourage negotiation and settlement of residential construction defect claims that may arise between a residential contractor and an owner.").

168. Refer to Parts II.B.3, II.B.5 *supra* and accompanying text (discussing the limitation of damages under the RCLA to the purchase price of the home and the availability of all common law defenses).

in Texas must deal.[169] If dispute resolution is a measure of effectiveness, the DTPA compares favorably to the RCLA. Contrary to popular belief,[170] the DTPA allows contractors to avoid extended liability through a right to inspect, make a settlement offer, and mediate the dispute.[171]

Both the RCLA and the DTPA require the claimant to notify the prospective defendant sixty days before filing suit.[172] If the defendant responds with a reasonable offer of settlement under the DTPA or the RCLA, the consumer may not recover an amount in excess of: (1) the amount tendered in the settlement offer; or (2) the amount of economic damages found by the trier of fact.[173] These notice and settlement provisions severely limit a claimant's ability to push frivolous claims upon homebuilders.

In the legislative hearings of the RCLA, proponents characterized the DTPA as a "draconian"[174] law that allowed consumers to abuse the system and obtain an economic windfall.[175] However, the DTPA has a protective provision that awards defendants the court costs and reasonable attorneys' fees for claims motivated by bad faith and harassment, but the RCLA does not.[176]

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169. Refer to Part V.B *infra* (elaborating how most other sellers of goods and services are subject to the DTPA).

170. *See, e.g.*, Summy & Sloan, *supra* note 34, at 2 (declaring that the DTPA does not provide a homebuilder an opportunity to inspect alleged construction defects and arrange for necessary repairs).

171. *See* TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon Supp. 1999) ("During the 60-day period a written request to inspect . . . may be presented to the consumer."); *id*. § 17.5051(a) (elaborating that "[a] party may, not later than the 90th day after the date of service of a pleading in which relief under this subchapter is sought, file a motion to compel mediation of the dispute").

172. *Compare id*. § 17.505(a) (stating that "a consumer shall give written notice to the person at least 60 days before filing the suit advising the person in reasonable detail of the consumer's specific complaint"), *with* TEX. PROP. CODE ANN. § 27.004(a) (Vernon Supp. 1998) (stating that "[b]efore the 60th day preceding the date a claimant seeking from a contractor damages arising from a construction defect files suit, the claimant shall give written notice . . . specifying in reasonable detail the construction defects that are the subject of the complaint").

173. *Compare* TEX. BUS. & COM. CODE ANN. § 17.5052(g) (stating that if a settlement offer is the same as or more than the damages awarded by the trier of fact, the consumer may recover only the amount of the settlement offer or the amount of damages found by the trier of fact, whichever is less), *with* TEX. PROP. CODE ANN. § 27.004(f) (establishing that if the claimant unreasonably rejects an offer of settlement or does not permit the contractor to repair the defect, then the claimant may only recover the reasonable cost of repairing the defect and the amount of reasonable and necessary attorneys fees incurred up until the time of the settlement offer).

174. *See* Little, *supra* note 2, at 37.

175. *See* Summy & Sloan, *supra* note 34, at 4 (characterizing the DTPA as a weapon that allows homeowners to obtain economic windfalls in depressed markets).

176. *See* TEX. BUS. & COM. CODE ANN. § 17.50(c).

Another difference between the settlement offer provisions of the RCLA and the DTPA is that the DTPA requires a settlement offer to be monetary,[177] yet the RCLA allows settlement offers to be either in kind or monetary.[178] The differences between the RCLA and the DTPA regarding inspection are also slight. Under the RCLA, the right of the homebuilder to inspect after receiving notice is absolute,[179] while the DTPA presents the potential defendant with the right to "*request* to inspect."[180] Moreover, the DTPA allows for either party to compel mediation in certain circumstances,[181] but the RCLA does not.

It seems that the DTPA is just as conducive to dispute resolution as the RCLA. Once again, the relationship between the two acts begs the question: why do we need the RCLA? The answer to this question lies at the points where the RCLA truly deviates from the DTPA. It is at these points where the true intent of the RCLA is most transparent.

2. Causation. To demonstrate causation under the DTPA, a plaintiff need only show that the conduct in question was a "producing cause" of the injury alleged.[182] The RCLA, however, requires one to meet a more stringent level of causation—that the conduct was a "proximate cause" of the damages.[183] In previous versions of the RCLA, there was not a causation section. The new "proximate cause" provision in the RCLA makes it more difficult for consumers to prove causation in construction defect cases than it would be under the DTPA.[184] By adding proximate cause to the RCLA in 1995, the Legislature has indicated that it plans to keep and strengthen the pro-contractor nature of that Act.

177. *See id*. § 17.5052(d).

178. *See* TEX. PROP. CODE ANN. § 27.004(g) (stating that if a contractor fails to make a reasonable offer under the RCLA, then the limitations and protections of the RCLA will not apply).

179. *See id*. § 27.004(a) ("During the 35-day period after the date the contractor receives the notice, and on the contractor's written request, the contractor *shall* be given a reasonable opportunity to inspect . . . ." (emphasis added)).

180. *See* TEX. BUS. & COM. CODE ANN. § 17.505(a) (emphasis added).

181. *See id*. § 17.5051(a).

182. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995).

183. *See* TEX. PROP. CODE ANN. § 27.006 (requiring that the claimant "prove that the damages were proximately caused by the construction defect").

184. *Compare* Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied) (stating that "producing cause" is an "efficient, exciting or contributing cause" and does not require a plaintiff to establish foreseeability, as does "proximate cause"), *with* Doe v. Boys Clubs, Inc., 907 S.W.2d 472, 477 (Tex. 1995) (recognizing that "proximate cause" consists of "cause-in-fact" and "forseeability").

3. Defenses. In addition to the more difficult causation requirements, the RCLA also benefits builders by providing for a greater number of defenses than does the DTPA. The RCLA specifically sets out new defenses for contractors[185] and does not bar any common-law defenses.[186] Conversely, the DTPA does not allow any defenses under the common law and limits defensive claims to a few, narrowly defined theories.[187]

4. Damages and the Stress of Homeownership. Another major contrast between the RCLA and the DTPA is the availability of damages for mental anguish. Personal injury damages are not generally available under the RCLA,[188] but the DTPA allows for mental anguish damages if the defendant knowingly deceived or misled the plaintiff.[189] Conversely, the availability of mental anguish damages under the RCLA is clouded in mystery.[190] As examined previously, the RCLA excludes claims for personal injury but omits mental anguish from the definition of personal injury.[191] Furthermore, mental anguish is not mentioned in the damages portion of the RCLA. Because the RCLA applies to "any action to recover damages resulting from a construction defect, except for a claim for personal injury,"[192] and mental anguish is not defined as a personal injury, it should be included in the scope of damages recoverable under the RCLA. Nevertheless, because the damages

185. *See* TEX. PROP. CODE ANN. § 27.003(a) (allowing specific defenses for negligence of a person other than the contractor, failure of a person other than the contractor to mitigate damage or maintain the residence, normal wear and tear, normal shrinkage due to settlement of the structure, and the contractor's reliance on information from official government records).

186. *See id.* § 27.003(b) ("[T]his chapter does not limit or bar any other defense or defensive matter or other defensive cause of action applicable to an action to recover damages resulting from a construction defect."). This provision operates simultaneously with § 27.002(a), which forecloses all other causes of action. Through these provisions, the RCLA works to expand the range of defenses available to builders while contracting the causes of action available to homeowners.

187. *See* TEX. BUS. & COM. CODE ANN. § 17.506 (Vernon 1987 & Supp. 1999) (listing defenses such as timely notice that the defendant relied on inaccurate information from government records, other sources, or a government agency test, provided that the defendant did not know of the inaccuracy); Little, *supra* note 2, at 36 ("Unlike the DTPA, the RCLA does not limit or bar any traditional common law defenses.").

188. *See* TEX. PROP. CODE ANN. § 27.002(a) (excepting personal injury claims).

189. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1).

190. *See* Little, *supra* note 2, at 38 (explaining that mental anguish damages are considered personal injury claims, and thus appear not to be recoverable under section 27.002 of the RCLA).

191. *See* TEX. PROP. CODE ANN. § 27.002(b)(2) ("'Personal injury' does not include mental anguish.").

192. *Id.* § 27.002(a).

portion does not mention mental anguish, it essentially means that mental anguish damages can be claimed, but not recovered.[193]

Because the RCLA is ambiguous, unclear, and untested in general,[194] certainly on the issue of mental anguish damages in particular, there is some thought that mental anguish claims can be tacked onto the RCLA through the DTPA.[195] Because the RCLA preempts any conflicting law,[196] however, courts are unlikely to follow this course.[197]

Assuming that the RCLA does effectively nullify any damage claim for mental anguish, what is the reasoning behind it? Is buying a house or having a home remodeled any less of a strain on a consumer's mental health than buying a car or another product or service covered by the DTPA?

Buying a home is usually the largest investment a person or family will make in their entire life.[198] Additionally, studies have proved that moving, buying a home, or having a house remodeled is one of the more stressful experiences that families endure.[199] Therefore, it seems that prohibiting mental anguish damages that arise from construction defects in a home is contrary to public policy.

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193. Refer to note 75-76 *supra* and accompanying text.

194. Refer to note 5 *supra* and accompanying text (noting that the terrain of the RCLA is largely unexplored).

195. *See* Little, *supra* note 2, at 38 (stating that a mental anguish claim under the RCLA "would thus be governed by the DTPA or common law and would co-exist with the RCLA construction defect claim").

196. *See* TEX. PROP. CODE ANN. § 27.002(a); Bruce v. Jim Walters Homes, Inc., 943 S.W.2d 121, 123-24 (Tex. App.—San Antonio 1997, writ denied) (explaining that RCLA preemption was not triggered because the fraud and RCLA claims were distinct causes of action and, thus, not in conflict).

197. *See* ALDERMAN, *supra* note 69, at 454 (commentary to TEX. PROP. CODE § 27.002) (asserting that tacking DTPA and RCLA claims would be unmanageable for the courts because there would be two standards of proof for one suit).

198. *See Hearings on S.B. 1012*, tape 1, *supra* note 9, at 9 (statement of Joe Longley, President, Texas Trial Lawyers Association) ("I think you all know that the largest single, highest priced item that any person in their life purchases as a general rule is their home. And . . . , that's why you need to take a very close meticulous look at what [the RCLA] attempts to do.").

199. The "Social Readjustment Rating Scale" assigns the assumption of a mortgage or borrowing of money for a major purchase 31 stress points, remodeling or building a home 25 stress points, and a change in residence 20 stress points. *See* STRESS AND COPING 14-15 (Alan Monat & Richard S. Lazarus eds., 1985) (citing T.H. Holmes & R.H. Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213, 213-218 (1967)). An accumulation of a high number of points increases the likelihood of serious illness. *See id.* at 14. By comparison, the scale ranked death of a spouse at 100 stress points, trouble with a boss at 23 stress points, and minor violations of the law at 11 stress points. *See id.*

Mental anguish "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea."[200] Knowingly rendering people's most important investment invaluable is an act that would unquestionably and foreseeably inflict mental anguish.[201] During the legislative hearings of the RCLA, Justice Gammage described his own frustrating personal experience with home construction defects:

> It's usually three to four years and sometimes longer before major structural defects are detectable, and [in] my situation we've been in the home slightly over three years when we realized that this dream house that we bought and invested [a] major portion of our income in and committed ourselves to paying for over the course of thirty years to house our four children and ourselves, . . . was breaking up into three large pieces and that our beautiful designer, eighteen foot vaulted ceilings had eighteen foot cracks in them . . . and when you put a third of your pay check [sic] every month into paying for that, and maintaining it, you can get rather angry, rather fast . . . .[202]

Therefore, when considering Justice Gammage's testimony and the psychological studies, the RCLA should allow, if not require, mental anguish damages that arise from construction defects.

In addition to the absence of mental anguish damages, another major difference between the RCLA and DTPA is the availability of other damages.[203] Probably the most blatant and egregious example of the Legislature tempering the RCLA to protect homebuilders is the purchase price damage cap. Specifically, the RCLA caps all recoverable damages at the purchase price of the home.[204]

For example,[205] suppose a family buys a home in 1985 for $75,000, and then an increase in property value and several

200. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

201. *Cf.* STRESS AND COPING, *supra* note 199, at 14-15 (listing stress levels of various life events).

202. *Hearings on S.B. 1012*, tape 1, *supra* note 9, at 20 (statement of Bob Gammage, Associate Justice, Texas Court of Appeals, Austin).

203. Refer to notes 188-97 *supra* and accompanying text (elaborating on the different types of damages available under the DTPA and RCLA).

204. *See* TEX. PROP. CODE ANN. § 27.004(i) (Vernon Supp. 1998) ("The total damages awarded in a suit subject to this chapter may not exceed the claimant's purchase price for the residence.").

205. The main premise of this example was drawn a lecture by Professor Richard Alderman, in his Texas Consumer Law Class Lecture at the University of Houston Law Center (Mar. 24, 1998).

home improvements appreciate its market value to $150,000 in 1996. In that same year, assume the family decides to add a room onto the house and hires a local contractor to perform this job.

In the process of the remodeling, the contractor damages the home's foundation. Consequently, water seeps into the house through the cracked foundation, which renders the home uninhabitable. Inspectors determine that the house is close to being irreparable. As a result, the owners send a complaint to the remodeling contractor demanding payment for the damages and the contractor responds by offering to repair the foundation and pay for interim relocation costs.[206]

Because the family does not have any faith in the ability of the contractor to perform quality work, they decide to reject the offer. Currently, if the court determines that the contractor's offer was reasonable, the case will fall under the scope of the RCLA. When the court makes this determination, it is likely that the family will be limited to recovering only the original $75,000 purchase price[207] even though the market value of the home is $150,000. The excess of the relocation costs, attorney's fees, and repair or replacement costs of the home over $75,000 will have to come out of the family's pocket. Assuming that the family business is conducted from home, furthermore, the shut down and relocation of the family business will result in more unrecoverable economic losses. Additionally, any mental anguish the family suffers will yield no recovery.[208] Even worse, if the cause of the construction damage was from an upstream supplier of raw materials or component parts, then the DTPA precludes the consumers from maintaining an action against that supplier.[209] The only entity the family can sue is the contractor.

Although there have not been many cases that address the RCLA, the likelihood of a similarly unfair and inequitable example occurring seems fairly substantial. Essentially, the RCLA damage cap allows contractors who perform substandard construction to destroy innocent homeowners with relative economic impunity.

206. The contractor is availing itself of the RCLA's protections by tendering a reasonable offer to the claimant. *See* TEX. PROP. CODE ANN. § 27.004(a)-(b).

207. *See id*. § 27.004(h)-(i).

208. Refer to Part II.B.3 *supra* (discussing the inability to recover mental anguish damages under the RCLA).

209. *See* Amstadt v. United States Brass Corp., 919 S.W.2d 644, 647 (Tex. 1996) (holding that, under the DTPA, the consumer can sue suppliers or manufacturers only if a misrepresentation from the supplier or manufacturer of component parts or raw materials reaches the consumer).

Conversely, the DTPA does not have a damage cap, and mental anguish damages are available to consumers.[210] Under the DTPA, a victorious plaintiff is also entitled to court costs and attorneys' fees.[211] Prior to the enactment of the RCLA, one of the biggest complaints from homebuilders was the excessive damage the DTPA afforded to plaintiffs.[212] Consequently, limited liability appears to be the real motivating factor behind the passage of the RCLA, not fostering better dispute resolution between contractors and homeowners.[213] Homebuilders claimed they needed liability limits because the treble damage and mental anguish provisions of the DTPA made the costs of doing business too high.[214] Presently, however, mental anguish damages are only available under the DTPA for knowing violations, and treble damages are only available for knowing or intentional violations.[215] In other words, builders will not be subject to treble damages or mental anguish claims for mistakes or defects made in good faith.[216] As long as builders correct known problems and do not intentionally or knowingly leave defects behind, they will not have to pay excessive damages under the DTPA. This burden is far from onerous or overbearing and will not result in increased costs to honest homebuilders. Additionally, almost all other providers of products and services in Texas live by this standard—why should homebuilders be treated differently?

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210. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1999) (providing that a consumer may collect mental anguish damages not to exceed three times the economic damages awarded).

211. *See id.* § 17.50(d) (allowing all successful plaintiffs to recover court costs and attorneys' fees).

212. Refer to notes 18-19 *supra* and accompanying text (recounting complaints that treble damages and damages for mental anguish are unduly burdensome to homebuilders).

213. It should be noted that at the time the Legislature enacted the RCLA, trebling actual damages was automatic for victorious plaintiffs in a DTPA action. However, subsequent amendments to the DTPA have substantially limited the availability of excessive awards for plaintiffs. *Compare* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1977) (stating that "each consumer who prevails may obtain three times the amount of actual damages"), *with* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1999) (stating that the consumer can obtain treble the amount of economic damages if the defendant's conduct was intentional). *See also* Woods v. Littleton, 554 S.W.2d 662, 670-71 (Tex. 1977) (expressing concern over the DTPA's provision of mandatory treble damages).

214. Refer to Part. II.A.1 *supra* and accompanying text.

215. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1). Before the most recent amendments to the DTPA, the trier of fact could award mental anguish damages despite the absence of a knowing or intentional violation. *See id.* § 17.50(b)(1)(A) (Vernon 1987).

216. *See id.* § 17.50(b)(1) (stating that only knowing or intentional violations will be subject to treble economic damages).

B. Why Limit Liability For Homebuilders?

As mentioned earlier, one of the most important financial moments of a person's life is when they purchase or rebuild their home, and the fact that homebuilders have limited liability under the RCLA poses many serious public policy concerns and questions. No other groups of merchants, manufactures, or service providers receive protections against the DTPA.[217] Lawyers, doctors, lenders, and other professionals are all potentially liable under the DTPA for misrepresentations concerning the goods or services they provide.[218] Why are homebuilders provided with these rights and protections while manufacturers of other consumer products and services are subject to the DTPA? This question is all the more salient when one considers the degree to which almost all consumers rely on the service homebuilders provide.

The family homestead provides shelter and occupies the centerpiece of family dreams and financial planning; it should engender more protections, not less.[219] Furthermore, consumers can easily inspect most products at the purchase stage, but homes are made up of thousands of component parts that can be hidden or latently defective.[220] Therefore, instead of stripping

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217. *See, e.g.*, Cain v. Pruett, 938 S.W.2d 152, 158 (Tex. App.—Dallas 1996, no writ) (awarding patrons of a fast food restaurant treble damages under the DTPA); Holland v. Hayden, 901 S.W.2d 763, 767 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (reforming an award of treble damages under the DTPA for a legal malpractice claim); Berry Property Management, Inc. v. Bliskey, 850 S.W.2d 644, 665-66 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.) (upholding an additional damage award under the DTPA against a property manager for a sexual assault that occurred on the premises); State Farm Fire & Cas. Co. v. Price, 845 S.W.2d 427, 438 (Tex. App.—Amarillo 1992, writ dism'd by agr.) (affirming an award of treble damages under the DTPA for a breach of contract claim against an insurance company).

218. *See* TEX. BUS. & COM. CODE ANN. § 17.49(c) (stating that professionals are only exempted for the rendering of a professional service if such service is based on opinion or judgment); Delp v. Douglas, 948 S.W.2d 483, 496 (Tex. App.—Fort Worth 1997, pet. granted) (asserting that an attorney's implied misrepresentation may form the basis of a DTPA claim). An express misrepresentation of fact not characterized as opinion or judgment, a failure to disclose information, an unconscionable act or course of action, and a breach of an express warranty that is not considered advice, judgment, or opinion are several ways by which consumers can hold professionals liable under the DTPA. *See id.* § 17.49(c)(1)-(4).

219. *See* Franklin v. Coffee, 18 Tex. 413, 416 (1857) (extolling the public policy rationale underlying the protection Texas provides to homesteads).

220. *See Hearings on S.B. 1012*, tape 1, *supra* note 9, at 20 (statement of Bob Gammage, Associate Justice, Texas Court of Appeals, Austin). Justice Gammage testified at the RCLA legislative hearings to explain consumers' disadvantages when purchasing a home:

> [O]ne of the problems that consumers have particularly when it come[s] to new home construction, [is] that they have to take the builder's word for it.

away consumers' rights, it makes more sense to provide additional protections to consumers buying or remodeling a home. In Texas, other areas of the law have recognized that homebuyers and homeowners need special protections. For example, Texas has long recognized an individual's home as a sanctuary, entitling homeowners to certain rights and protections outlined in the Texas Constitution.[221]

Additionally, Texas is one of the few states that allows for the protection of private property with deadly force.[222] Why would a state that places such high regard for homesteads and private property rights abrogate those principles by limiting liability for homebuilders and remodelers? The culprit of this contradiction in Texas policies is the strong developer and builder lobby group that shepherded the RCLA through the Texas Legislature in 1989.[223] The battle cry of the lobbyists in those legislative hearings was that the RCLA and the DTPA were supposed to work hand-in-glove as a great facilitator of compromise between home builders and homeowners.[224] It is true that the DTPA and the RCLA have similar dispute resolution provisions,[225] but because the RCLA inequitably limits the amount of damages that homeowners can receive from construction defect claims and

> They may have expertise . . . in a number of areas, but most of them are not involved in construction, most of them don't know good or bad construction when they see it . . . [, and] major structural defects generally don't manifest themselves right away . . . . [I]t's usually three to four years and sometimes longer before major structural defects are detectable . . . .

Id.

221. *See* TEX. CONST. art. XVI, § 50(a) (referring to the rights and protections that prohibit a forced sale of the family homestead except for tightly circumscribed reasons); TEX. PROP. CODE ANN. § 41.001(a) (Vernon Supp. 1998) (establishing the homestead as exempt from most forms of seizure); Renaldo v. Bank of San Antonio, 630 S.W.2d 638, 640 (Tex. 1982) (affirming a judgement in favor of a homestead against a bank's deed of trust); *Franklin*, 18 Tex. at 416 ("That the homestead exemption was founded on principles of soundest policy cannot be questioned. Its design was not only to protect citizens and their families, from . . . destitution, but also to cherish and support . . . those feelings of sublime independence . . . .").

222. *See* TEX. PENAL CODE ANN. § 9.42 (Vernon 1994) ("A person is justified in using deadly force against another to protect land . . . ."); Grant v. Hass, 75 S.W. 342, 346 (Tex. Civ. App. 1903) (acknowledging that the killing of one who enters another's premises at night, with the purpose and intent of stealing, is justified).

223. Refer to notes 29-32 *supra* and accompanying text (discussing the attempts of HOW, the Texas Association of Builders, and the Texans for Lawsuit Reform to influence legislators).

224. During the May 29, 1989, legislative hearings regarding the RCLA, Sen. Montford, its sponsor, stated that the DTPA and the RCLA were to work "hand in glove" to protect consumers. *See Debate on Tex. S.B. 1012*, *supra* note 36, tape 1 side 1 (statement of Sen. Montford).

225. Refer to notes 20-32 *supra* and accompanying text.

allows homebuilders an unlimited number of defenses,[226] the promises of the homebuilder lobby ring hollow at best. Additionally, the RCLA's preemption of the DTPA[227] and the stringent causation requirements of the RCLA[228] further indicate that the proffered reasons for passage of the RCLA were merely a smokescreen to hide a piece of legislation that would tilt the legal playing field in favor of the home building industry.

C. Application of the RCLA's Damage Cap.

As mentioned earlier, sections 27.004(i) and 27.004(h) of the RCLA seem to limit plaintiffs' damages to the recovery of an amount not in excess of the purchase price of the home.[229] Due to the poor drafting and construction of the RCLA, however, a plaintiff could argue that technically, it is impossible for contractors to activate sections 27.004(i) and 27.004(h).

As noted earlier, certain affirmative actions of the contractor are necessary to trigger the RCLA.[230] The contractor must make a reasonable offer to the consumer in order to engender the protections of the RCLA.[231] If the offer is considered reasonable and the plaintiff rejects it, section 27.004(f) limits the plaintiff to recovery of "the reasonable cost of repairs" and "reasonable and necessary attorney's fees and costs incurred before the offer was rejected or considered rejected."[232] If the offer is considered unreasonable, section 27.004(g) provides that the "limitations on damages and defenses to liability provided" by the RCLA "shall not apply."[233] If the plaintiff accepts an offer from the contractor, it is assumed that the claim is withdrawn. These sections are clear and seem to cover all contingencies of the settlement offer tendered, but neither refer to subsections 27.004(i) or 27.004(h). In fact, section 27.004(h) subordinates itself to section 27.004(f).[234] Therefore, logically, it is impossible to technically find a scenario in which the purchase price damage cap or section 27.004(h) is actually activated.

While, technically, these two sections of the RCLA cannot be activated, it seems clear that their presence has meaning.

226. *See* TEX. PROP. CODE ANN. § 27.003(b).
227. *See id*. § 27.002(a).
228. *See id*. § 27.006.
229. Refer to notes 77-78 *supra* and accompanying text.
230. Refer to notes 57-78 *supra* and accompanying text (discussing the pre-suit notice, settlement offers, and abatement provisions of the RCLA).
231. *See* TEX. PROP. CODE ANN. § 27.004(g).
232. *Id*. § 27.004(f).
233. *Id*. § 27.004(g).
234. *See id*. § 27.004(h).

Presumably, the drafters of the RCLA would not have included sections 27.004(i) or 27.004(h) if they did not intend those sections to be applicable in some manner. Furthermore, courts have considered, and are likely to continue considering, the damage cap's applicability as a whole, despite its faulty placement.[235] It is clear that the technical problems of the purchase price damage cap are attributable to poor drafting. However, the poorly drafted damage provision may arm otherwise over-matched plaintiffs with a logical and effective argument for a court not to apply the damage cap. At the very least, the provision should be deleted or the Legislature should redraft it in future sessions.

D. The Effect of Bruce *and* O'Donnell *on the RCLA*

The true meaning and interpretation of the RCLA in Texas is unclear and ambiguous at best. In both *O'Donnell* and *Bruce*, the courts' decisions were in favor of the plaintiff-consumers.[236] Additionally, the courts strictly stuck to the particular issues in both cases.[237] Because the courts did not venture far from the facts of each case, the guidance they provide for future RCLA cases is limited.

The Texas Supreme Court denied writs for both cases. Such denials were surprising as the RCLA is new, uncharted legislation. Usually, cases dealing with new and uncertain laws are prime candidates for review by higher courts so that guidance can be provided for lower courts.[238] By construing the RCLA in favor of the consumers in both cases, and by denying writ, the courts may be implying that the RCLA is a problematic piece of legislation that needs to be amended or repealed.

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235. *See, e.g.*, O'Donnell v. Roger Bullivant, Inc., 940 S.W.2d 411, 413, 420 (Tex. App.—Fort Worth 1997, writ denied) (inferring that a reasonable offer would trigger the RCLA's damage cap).

236. *See* Bruce v. Jim Walters Homes, Inc., 943 S.W.2d 121, 123-24 (Tex. App.—San Antonio 1997, writ denied) (determining that the RCLA did not preempt a claim for common-law fraud, and reversing summary judgement against the plaintiffs on that issue); *O'Donnell*, 940 S.W.2d at 421 (remanding the case to the trial court on issue of damages, which the trial court had erroneously limited to the purchase price of the home).

237. *See Bruce*, 943 S.W.2d at 124 (adjudicating only on the question of whether common-law fraud is preempted by the RCLA); *O'Donnell*, 940 S.W.2d at 421 (limiting its own analysis to the determination of whether Bullivant's offer was "reasonable," without offering a definition of "reasonable" for future cases).

238. *See, e.g.*, Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 716 (1986) (Stevens, J., dissenting) (explaining that appellate courts, in general, correct erroneous interpretations of law to give guidance to trial courts by "illustrating the proper application of a new legal standard").

In *O'Donnell*, the court did provide some guidance to future courts for the type of construction that is included within the scope of the RCLA.[239] The court defined the word "[a]lteration . . . as a 'change or modification made on a building that does not increase its exterior dimensions'"[240] and defined "[a]ddition . . . as a part added to or joined with a building to increase available space.'"[241] The O'Donnells' house was not a new residence; therefore, the type of work done on the house was required to meet the definition of either "alteration" or "addition" to fall within the ambit of the RCLA.[242] In analyzing the applicability of the RCLA to the O'Donnells' situation, the court used the common meanings of the words "alteration" and "addition" to determine that adding foundation pilings to a home is an "addition" or an "alteration to an existing residence."[243]

The repair of an existing residence is not covered in the definition of construction defect. Therefore, the court could have logically determined that the pilings put under the O'Donnell house were a repair, and not an addition to "increase available space" or an "alteration that does not increase exterior dimensions." It is logical to infer that pilings added to repair a foundation do not add to the house or alter its foundation.[244] Because the court broadly construed these definitions, however, it appears that it wanted to convey to future decision-makers that they should apply a broad and liberal standard when determining if the RCLA applies to a certain type of home construction.

In *O'Donnell*, the court was less helpful when it dealt with the main issue of the case—whether Bullivant's offer to repair was reasonable (or whether the O'Donnells' rejection of the offer was unreasonable) enough to allow the builder the privilege of utilizing the protections and defenses of the RCLA.[245] Since 1989, the evaluation of what is considered reasonable has been an important question for homeowners and homebuilders, the assumption being that because the RCLA itself offers no guidance, the courts would eventually clarify the issue.[246]

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239. *See O'Donnell*, 940 S.W.2d at 414-15 (classifying an addition or alteration as types of construction defects).

240. *Id.* at 417 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 63 (1981)).

241. *Id.* (quoting WEBSTER'S DICTIONARY, *supra* note 241, at 24).

242. *See id.*

243. *See id.*

244. Clearly, pilings placed under a house do not increase the available space of the home. Further, because the pilings are separate from the foundation, classifying them as an alteration is not necessarily an obvious conclusion.

245. *See O'Donnell*, 940 S.W.2d at 421.

246. Refer to note 73 *supra* and accompanying text (asserting that reasonability

One of the differences between the RCLA and the DTPA is that the RCLA allows for an offer to be in-kind,[247] while the DTPA specifies that settlement offers be reduced to money.[248] Additionally, the RCLA states that "offer[s] may include either an agreement by the contractor to repair or have repaired . . . any construction defect described in the notice and shall describe in reasonable detail the kind of repairs which will be made."[249] The RCLA further provides that if the "contractor fails to make a reasonable offer under this section, or fails to make a reasonable attempt to complete the repairs specified in an accepted offer under this section . . . the limitations on damages and defenses to liability provided for in this section shall not apply."[250] However, the RCLA does not define what "reasonable" means, nor does it specify how many chances the contractor has to repair the damages. In *O'Donnell*, the contractor (Bullivant) attempted to repair the damages before receiving a complaint letter.[251] After the first repair attempt failed, the O'Donnells sent a complaint letter and Bullivant responded to this complaint by sending an offer to the O'Donnells.[252] The offer specifically outlined every step and procedure that Bullivant would take to repair the damaged foundation.[253] Despite the fact that the letter appeared to meet the requirements the RCLA laid out for an offer to repair, the court found it unreasonable.[254]

The court relied on the specific facts and circumstances of *O'Donnell* to determine whether the offer was reasonable.[255] The expert testimony that the foundation was not correctable, the fact that Bullivant had already tried to fix the foundation once, and the Bullivant's failure to offer controverting summary judgment evidence were the main facts that made the Bullivant offer unreasonable.[256] However, the court specifically avoided

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standards for the RCLA will be determined at trial).

247. *See* TEX. PROP. CODE ANN. § 27.004(b) (Vernon Supp. 1998) ("The offer may include . . . an agreement by the contractor to repair or to have repaired by an independent contractor . . . any construction defect . . . .").

248. *See* TEX. BUS. & COM. CODE ANN. § 17.5052(d)(1)-(2) (Vernon Supp. 1999) (providing that offers of settlement must include an offer to pay the value of the claim for damages and compensation for attorney's fees).

249. TEX. PROP. CODE ANN. § 27.004(b).

250. *Id.* § 27.004(g).

251. *See* O'Donnell v. Roger Bullivant, Inc., 940 S.W.2d 411, 413 (Tex. App.—Fort Worth 1997, writ denied).

252. *See id.* at 418.

253. *See id.* at 418-19 (noting that Bullivant offered to perform such work free of charge).

254. *See id.* at 421.

255. *See id.* at 420 (relying on the affidavit of the inspector and O'Donnell).

256. *See id.* (stating repeatedly that "Bullivant did not attempt to establish with

mentioning why Bullivant's offer was not reasonable, why the O'Donnell's rejection of the offer was reasonable, or what would constitute a reasonable offer.

The tentativeness of the *O'Donnell* court allows the RCLA to continue to be ambiguously interpreted and raises doubts about whether the purchase price cap of the RCLA will be upheld in cases in which reasonable offers are made. In the future, courts should note that even though the RCLA allows for offers to be in-kind, that does not mean that in-kind offers are acceptable for homeowners. Also, if the contractor already made one failed attempt to repair a construction defect or if the damages are uncorrectable, then a reasonable offer may have to be monetary in nature. Fortunately, even though the *O'Donnell* court did not provide much guidance for the future, it did construe the unclear portions of the RCLA to the advantage of the homeowner.[257]

Finally, there are two other points in *O'Donnell* that may help plaintiffs, defendants, and courts navigate the RCLA. The first is that a contractor's settlement offer can be extended through a written agreement with the homeowner.[258] Apparently, this provision of the RCLA is as straight-forward as it appears. Secondly, the year in which a suit is filed will determine the correct version of the RCLA to apply.[259]

In *Bruce*, the court also appeared to interpret the RCLA to the advantage of the homeowner by allowing a claim of common-law fraud to override the RCLA's preemption clause.[260] The court provided some guidance when it held that the RCLA preempts other common-law causes of action as long as they arise from a "construction defect."[261] In *Bruce*, the court stated that conflicting claims arising out of a construction defect will be preempted;[262] however, its decision to allow the common-law fraud claim reveals an unwillingness to subject consumers to the RCLA's stiff limitations.

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summary judgement evidence that its section 27.004(b) offer of repair was reasonable").

257. *See id.* at 421 (reversing the trial court and granting partial summary judgment to the O'Donnells on the issue of the applicability of the RCLA's damage cap).

258. *See id.* at 419.

259. *See id.* at 417.

260. *See* Bruce v. Jim Walters Homes, Inc., 943 S.W.2d 121, 124 (Tex. App.—San Antonio 1997, writ denied).

261. *See id.* at 123-24 (finding that the RCLA preempted appellants' remaining common-law causes of action).

262. *See id.* at 123.

The RCLA provides that in the event of "conflict between this chapter and any other law," the RCLA will prevail.[263] On its face, the words "any other law" are clear, unambiguous, and indicate that the RCLA trumps all claims, whether statutory or common-law.[264] However, although in *Bruce* the court seemed to agree with this construction, it held that the RCLA does not preempt claims for common-law fraud because those claims do not arise from the construction defect.[265] The court seems to ignore the fact that section 27.002 provides for an unqualified "any other claim," and not "any other claim arising from a construction defect." The court's analysis in *Bruce* is, therefore, somewhat questionable.

The common-law fraud claim was still based on the construction defect and the plaintiffs' could not assert it unless the house was defective. A court could also construe the breach of contract and warranty claims to be claims based upon a contract or a warranty separate from the construction defect, so why can't they determine these claims to be separate and distinct? Moreover, if the framers of the RCLA wanted common-law fraud claims to co-exist with the RCLA, they simply could have provided for it. Because the RCLA was enacted to limit claims against homebuilders, presumably, it was intended to supplant all other laws and claims. Therefore, from a pure construction standpoint, the result in *Bruce* is arguably incorrect and suspect; from a policy perspective, however, it is both equitable and welcomed. The result stands as a victory for consumers because it opens the door to argue that a plaintiff can plead other claims alongside the RCLA.

Although *Bruce* and *O'Donnell* each cast doubt and fail to remove the ambiguity that surrounds many sections of the RCLA, they do clarify some issues. Fortunately, they also imply that the RCLA should be construed in favor of homeowners whenever possible.

VI. CONCLUSION AND SUGGESTIONS FOR CHANGE

A. Proposed Amendments to the RCLA

1. Generally. Texas courts have adjudicated three cases that invoke the RCLA.[266] This paucity of guidance makes it

263. TEX. PROP. CODE ANN. § 27.002(a) (Vernon Supp. 1998).

264. Refer to note 83 *supra* and accompanying text (indicating that the common or plain meaning of a statute is a superior means of construction if the statute is clear and unambiguous).

265. *See Bruce*, 943 S.W.2d at 123 (asserting that fraud arises from a misrepresentation and not the construction defect).

266. Refer to note 46 *supra* and accompanying text.

difficult to predict just what the RCLA means to thousands of Texas homeowners. The original intent of the drafters of the RCLA—to provide a positive atmosphere for the resolution of disputes between contractors and homebuyers—is easily achieved through the DTPA.[267] The RCLA does not benefit consumers in any way; it only helps contractors by limiting their liability and expanding their defenses.[268] Because the RCLA is not living up to its original intention, and the DTPA allows for consumers and homebuilders to adequately resolve any disputes, the RCLA should be substantially amended or repealed. Furthermore, the amendment or repeal of the RCLA is justified by the fact that the Legislature enacted it only to benefit a powerful lobby.[269] Barring a repeal of the RCLA, the following sections discuss the provisions that should be changed and how these sections should be amended to better achieve the initial goals of the RCLA.

2. Causation. The first part of the RCLA that should be amended is the causation provision.[270] Subsection 27.004(h) currently states that "the claimant may recover only the following damages *proximately caused* by a construction defect . . . ."[271] This provision should be replaced with: "the claimant may recover the following damages that a construction defect is a producing cause of" so that homebuyers can enjoy the same causation requirement as the DTPA provides. Similary, the Legislature should either amend subsection 27.006[272] of the RCLA to reflect a causation standard of "producing cause," or delete it completely. This section serves no real purpose except to restate the Act's causation requirement.

3. Damages. The next and probably most important section of the RCLA that needs to be amended is the section that addresses the damages plaintiffs can recover. First, a mental anguish damage element should be added to section 27.004(h). Subsection 27.004(h) of the RCLA currently allows damages for: (1) the reasonable cost of repairs necessary to cure any construction defect the contractor failed to cure; (2) the reasonable expenses of temporary housing; (3) the reduction in market value due to structural failure; and (4) reasonable

267. Refer to notes 112-26 *supra* and accompanying text.
268. Refer to notes 102-08 *supra* and accompanying text.
269. Refer to notes 20-32 *supra* and accompanying text.
270. *See* TEX. PROP. CODE ANN. § 27.004(h) (Vernon Supp. 1998).
271. *Id.* (emphasis added).
272. *See id.* § 27.006 (requiring a claimant to show proximate causation).

attorneys' fees.[273] Defects in a home can lead to significant mental anguish.[274] The new damage element under subsection 27.004(h)(5) should read: "Damages for mental anguish determined by the trier of fact, if the defendant knew or should have known about the existence of the construction defects complained of." This revision will allow for homeowners to recover for these damages as well as protect the contractor if the construction defect was an innocent mistake.

As mentioned earlier, subsection 27.004(i) apparently caps all damage provisions in the RCLA.[275] This clause should be deleted entirely or revised to provide that a plaintiff can recover damages for the total of "the fair market value of the home, reasonable attorneys' fees, and damages for mental anguish accrued under subsection 27.004(h)." The limitation of damages to the purchase price of the home in the RCLA is an inequitable concept,[276] and this revision will allow homeowners to recover what they are justly entitled to, and no more.

Furthermore, sections 27.004(f) and 27.004(g) need to specifically refer to any damage cap that might remain in the RCLA. As shown previously,[277] the RCLA currently does not provide for the technical activation of these provisions. By providing that each provision of the RCLA dealing with damages is subordinate to a fair and equitable damage limit, both consumers and contractors can readily ascertain their liabilities and rights.

Also, the following sentence should be added under section 27.004(b): "If damages caused by a construction defect are uncorrectable or there have been prior unsuccessful attempts to correct the construction defect, an offer of settlement will not be deemed reasonable unless it is reduced to a monetary award." This addition will keep contractors from harassing homeowners and delaying suit by sending numerous, unacceptable in-kind offers. It will also provide a more serious and fertile atmosphere for quick and efficient resolution of these disputes. Moreover, it is more equitable and consumer friendly than the current provision because it forces contractors to tender serious offers for repair or to pay the injured homeowner damages.

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273. *See id.* § 27.004(h)(1)-(4).

274. Refer to notes 223-39 *supra* and accompanying text.

275. Refer to note 92 *supra* and accompanying text (stating that the damages allowed under the RCLA are limited to the purchase price of the house).

276. Refer to notes 234-39 *supra* and accompanying text.

277. Refer to notes 241-46 *supra* and accompanying text (discussing the technical downfalls of the purchase price damage cap).

4. Preemption. The RCLA is in dire need of several changes to clarify some of the many ambiguous terms and concepts in its preemption clause so builders and homeowners will have adequate notice of their rights and duties. In subsection 27.002, the phrase "including common-law actions arising from the construction defect" should be added to the current preemption provision that states "[t]o the extent of conflict between this chapter and any other law."[278] This amendment would clarify the fact that the RCLA preempts all common-law causes of action that conflict with it.

5. Dispute Resolution. One of the main reasons the Legislature enacted the RCLA was to promote dispute resolution. Those provisions have yielded no discernable advantage over the DTPA. Consequently, the following changes should make the RCLA comply more closely with the stated intent of the drafters.

First, the Legislature should add a subsection to the RCLA that would compel mediation prior to the time the plaintiff has filed suit. Second, the Legislature should add a provision to subsection 27.004 that provides: "On a finding by the court that an action or offer of settlement under this section was groundless in fact or law, brought in bad faith, or brought for the purpose of harassment, the court shall award to the non-moving party reasonable and necessary attorneys' fees and court costs." This sanction subsection will provide additional assurances that both homeowners and contractors will have adequate incentives to resolve their disputes in an amicable and timely manner. It will also provide homeowners with rights that are reciprocal to those of the contractors.

B. Conclusion

The *Bruce* and *O'Donnell* decisions will not shed a great deal of light on how courts should interpret the RCLA in the future, but they seem to be a step in the right direction. Both decisions liberally construe ambiguous portions of the RCLA to the benefit of homeowners. However, the limited liability and generous defense portions of the RCLA inevitably yield inequitable results. Homebuilders are not different than other service or product providers and, therefore, should not enjoy the protections the RCLA provides. Moreover, if one maintains that the builder deserves a different standard, the prevalence and importance of the products and services they provide augurs in favor of a

278. TEX. PROP. CODE ANN. § 27.002.

heightened standard. If the RCLA is repealed and the DTPA is once again allowed to govern disputes between homeowners and homebuilders, it would certainly *bring* the atmosphere of equitable dispute resolution and fair results promised under the RCLA. Failing repeal, if the Legislature amends the RCLA by adding any of the suggestions in this Comment, the original intent of the RCLA's framers will finally be met.

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