

- SUBJECT:** Modifying the Residential Construction Liability Act
- COMMITTEE:** Civil Practices — committee substitute recommended
- VOTE:** 9 ayes — Bosse, Janek, Alvarado, Dutton, Goodman, Hope, Nixon, Smithee, Zbranek
0 nays
- WITNESSES:** (*On original version:*)
For — Robert Bush; Stephen Paxson

Against — John Cobarruvias; Wendy Jones; Brent Lemon; Mark McQuality; Anne Stark, Cheryl Turner
- BACKGROUND:** The Residential Construction Liability Act (RCLA), chapter 27 of the Property Code, was enacted in 1989. It specifies procedures for homeowners and contractors in actions to recover damages resulting from construction defects. Under the RCLA, in order for a homeowner to recover damages, the homeowner must provide notice to the builder and give the builder an opportunity to offer to settle the claim. Failure to give notice allows a court to abate the homeowner's claim.

If the homeowner unreasonably rejects a settlement offer, the homeowner may not recover more than the reasonable cost of repairs to cure the defect. If notice is given, the homeowner may recover the cost of repairs, the cost of temporary housing during the repair period, any reduction in market value due to a structural failure, and reasonable attorney's fees. The total damages awarded may not exceed the purchase price for the home.
- DIGEST:** CSHB 1455 would make numerous changes to the RCLA, including:
- increasing the total damage cap to the greater of the purchase price or the current fair-market value of the residence without the construction defect;
 - requiring all construction contracts after September 1, 2000, to include a detailed notice of the homeowner's rights and responsibilities under the RCLA;
 - allowing homeowners to recover the cost of engineering or consulting

- fees required to evaluate and cure the construction defect;
- requiring assignees of the homeowner to provide notice to the contractor and providing that failure to do so would relieve the contractor of liability for the cost of repairs made by the assignee;
 - allowing a court to abate a homeowner's suit if the homeowner failed to give the contractor a reasonable opportunity to inspect the property;
 - requiring the contractor's offer of settlement to be sent by certified mail;
 - if the homeowner rejected an offer of settlement, limiting recoverable damages to reasonable cost of offered repairs or the amount of a reasonable monetary settlement offered;
 - requiring homeowners, at the request of a contractor, to provide any evidence depicting the nature and cause of the defect and the extent of the damage that would be discoverable under the rules of civil procedure;
 - explicitly stating that the RCLA does not create a cause of action;
 - providing a procedure for mediation of RCLA disputes;
 - applying the provisions of the RCLA to subsequent purchasers;
 - expanding the RCLA to include repairs to existing homes;
 - expanding the definition of contractor to include any owner, officer, director, shareholder, partner, or employee of the contractor;
 - explicitly stating that the contractor would retain rights of contribution from a subcontractor if the contractor provided written notice; and
 - prohibiting frivolous suits under the RCLA and establishing sanctions for such suits.

CSHB 1455 would take effect September 1, 1999, and would apply only to construction contracts entered into on or after that date. The notice to homeowners regarding rights and responsibilities under the RCLA would be required in all construction contracts after September 1, 2000.

**SUPPORTERS
SAY:**

The RCLA creates a framework for the prompt resolution of construction defects by encouraging settlement of claims before they reach the court system. CSHB 1455 would make numerous changes to the RCLA to resolve questions that have arisen since the last update of the statute in 1993.

Among the most significant changes would be those dealing with repairs on existing homes. CSHB 1455 explicitly would allow the RCLA to cover repairs of such homes and would expand the total damage award to consider the current fair-market value of the home without the defect. This change was in response to *O'Donnell v. Bullivant*, 940 S.W.2d 411 (Tex. App. - Fort

Worth, 1997), in which the owner of an older house that had suffered severe damage as a result of repairs was able to recover only the purchase price of the home, which was far below the current fair-market value before the damage was done. In addition, CSHB 1455 would allow the cost of repairs to include the cost of consulting or engineering fees.

The new notice required to be included in all construction contracts should help clear up any confusion about homeowners' rights and responsibilities in dealing with RCLA claims, particularly in regard to the contractor's rights to inspection and the offer of settlement.

New mediation procedures would help to ensure an opportunity for contractors and homeowners to resolve their difference before the matter became entangled in the courts. Resolving such issues before they reach that stage would help to save both sides money and legal fees and would allow homeowners to get necessary repairs made as quickly as possible.

CSHB 1455 also would resolve issues relating to contribution and indemnity claims with subcontractors. Without such protections, contractors often are prevented from making reasonable offers by their insurance companies, because of the possibility that such offers could void contribution rights against subcontractors.

CSHB 1455 would make it clear that the RCLA is not a cause of action in itself. If contractors failed to live up to their responsibilities under the RCLA, homeowners would have some recourse in common-law causes of action. This would resolve an issue raised in *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121 (Tex. App. - San Antonio, 1997).

This bill was drafted with input from homeowners and contractors and represents a continued balancing of interests in the RCLA, without favoring either side in such disputes. The goal of the RCLA continues to be the prompt resolution of suits over construction defects.

OPPONENTS
SAY:

The RCLA is an unfair law that deprives homeowners of their rights to use the Deceptive Trade Practices Act (DTPA) or other common-law causes of action. No changes to the act made by CSHB 1455 could remedy the problems created by having this act on the books.

The RCLA was designed to ensure that claims for construction defects were handled under the strict damage limits of the act and not under the possible treble-damage provisions of the DTPA, to which many such claims had been subject to before 1989. While the original intent of the law was to ensure that builders made a prompt effort to remedy any construction defects, the effect has been that builders assert that the only claims valid for construction defects fall under the provisions of the RCLA. Unwary homeowners who fail to comply with the numerous deadlines or provisions found in the RCLA could lose the right to recover a significant portion of the damages to which they normally would have been entitled without the RCLA.

While extending damages to the fair-market value of the property would be a positive step, the RCLA should be amended to allow homeowners to recover reductions in the market value caused by defects other than structural failures. Such defects can impair the value of the home significantly, but the RCLA prohibits such damages.

The RCLA does nothing to help mass groups of homeowners harmed by defective products installed by builders. Many such claims are underway now, but since the RCLA is designed to accommodate single claims, there is no way for homeowners to have these similar problems remedied all at once, nor is there any incentive for builders to stop using such products.

NOTES:

The committee substitute added provisions that would:

- require homeowners to provide evidence of the defect to the contractor only at the contractor's request, instead of including such evidence in the notice;
- add engineering and consulting fees to the cost of repairs;
- state that contractors retain rights of contribution from subcontractors when they have provided written notice;
- specify that the RCLA does not create a cause of action; and

- require inclusion of a disclosure statement in all residential construction contracts.

The companion bill, SB 506 by Harris, passed the Senate on May 4.

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HB 1742 by Bosse, which contained several provisions included in CSHB 1455, passed the House in the 75th Legislature in 1997, but died in the Senate Jurisprudence Committee.