

The Importance of Notice under the Texas Residential Construction Liability Act

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The Texas Residential Construction Liability Act (RCLA) – Chapter 27 of the Texas Property Code – applies to claims in which there is physical damage to residential property – a residence, real property, or an improvement – arising from a construction defect. Under the RCLA, a construction defect is defined as a matter concerning the design, construction or repair of a new residence or a matter concerning the alteration of or repair or addition to an existing residence in which a person has a claim against a contractor. Contractor is defined as a builder of a new residence or any person contracting with a homeowner for the construction of, an alteration of, or addition to an existing residence or for repair of a new or existing residence. If a subrogated insurer fails to provide the contractor with written notice and opportunity to inspect and offer to repair before performing repairs, the contractor is not liable for the cost of any repairs. However, the RCLA does not apply to a claim for damage to goods/personal property.

At least 60 days before a homeowner files suit against a contractor to recover damages arising from a construction defect, the homeowner must provide notice of the claim to the contractor by certified mail, return receipt requested, at the contractor's last known address, specifying in reasonable detail the construction defects that are the subject of the complaint. After the contractor receives the written notice, it has 35 days to inspect the property and may make a written offer of settlement within 45 days after receipt of the written notice. The offer may include either an agreement by the contractor to repair the defect or to have the defect repaired by an independent contractor partially or totally at the contractor's expense or at a reduced rate to the claimant. There are additional deadlines in place depending on whether the settlement offer is accepted or rejected.

In a recent opinion issued by the Houston (14th) Court of Appeals, Certain Underwriters at Lloyds, London sued a builder in the name of its insured/the homeowner after a plumbing failure in an upstairs bathroom caused significant water damage at the home, both to the structure itself and to household goods, clothing, and personal effects. *Vision 20/20, Ltd. v. Cameron Builders, Inc.*, 14-15-01011-CV, 2017 WL 2656524 (Tex. App.—Houston [14th Dist.] June 20, 2017, no pet. h.). As detailed in the court's opinion, the expert hired by Lloyds reported that the water damage was the result of the failure of a water supply line that was improperly routed and installed. The failure occurred in December 2011, and the builder had conversations with the homeowner about the water damage in December 2011 and January 2012. After completion of all remediation and repair efforts at the home, Lloyds sent a settlement demand letter to the builder for the cost of repairing the home and for the value of damaged personal property. The builder denied the claim, so Lloyds filed suit with or in the name of the homeowner.

The builder filed a third-party claim against the plumber who installed the supply line and a motion for summary judgment asserting, among other things, that the provisions of the RCLA barred the claims against it. As I would expect, since Lloyds failed to provide the builder with the required written notice and opportunity to inspect and offer to repair before performing repairs, the trial court granted summary judgment on the claims for damages to the structure but denied summary

judgment on the claims related to personal property. The homeowner/Lloyds non-suited its claims related to personal property (I assume this part of the case was settled) and appealed the summary judgment.

The primary argument on appeal was that definition of “construction defect” as used in the RCLA does not include any damages to the home caused by the failed supply line beyond repair of the supply line itself. The RCLA definition of construction defect states that the term “may include any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.” The argument focused on the word “may” in this part of the definition, asserting that the Texas legislature intended the inclusion of physical damages to be discretionary, depending on the particular circumstances of a case.

The court of appeals rejected this argument by applying rules of statutory construction and concluding that the legislature intended to enlarge the definition of construction defect by providing the list including physical damage. According to the court, construing the RCLA to exclude physical damage to a residence proximately caused by a construction defect would be contrary to the very purpose of the statute.

The other argument on appeal was that the builder needed to show that it was prejudiced by the lack of pre-repair notice and that the builder failed to demonstrate any prejudice. Without really getting into the merits of this argument or addressing the initial conversations the homeowner had with the builder about the water damage in December 2011 and January 2012, the court of appeals stated:

... [the builder] did not receive the required notice and was not provided an opportunity to inspect the residence and make an offer to fix the problem [The homeowner/Lloyds] concedes it did not provide the required notice. Without the opportunity to inspect and investigate the nature and cause of the defect and the nature and extent of necessary repairs, [the builder] was prejudiced in determining whether it might be liable for the damages and whether to offer to repair the damages or make a monetary offer of settlement as permitted under the RCLA.

Accordingly, the court of appeals affirmed the trial court’s summary judgment.

A subrogated insurer with a claim against a contractor arising out of a residential construction defect (a term that is broadly defined by statute and Texas courts) needs to comply with the written notice and opportunity to inspect and offer to repair requirements of the RCLA before any repairs are performed. Otherwise, the contractor will not be liable for the cost of any repairs.