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## Unlicensed to Drill: Proposed Renovations to the Texas Residential Construction Commission Act.

Justin M. Jackson

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## UNLICENSED TO DRILL: PROPOSED RENOVATIONS TO THE TEXAS RESIDENTIAL CONSTRUCTION COMMISSION ACT

JUSTIN M. JACKSON

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### I. INTRODUCTION

The United States construction industry has experienced a period of dramatic growth over the past ten years.<sup>1</sup> In fact, construction is the largest industry in the United States, and some regard the industry as the engine of the nation's economy.<sup>2</sup> The importance of the construction in-

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1. See *ABC's 2001 Construction Economic Outlook*, TEX. CONSTR., Jan. 2001, at 53 (quoting ABC national president Henry Kelly as saying "[t]he U.S. construction industry will ease into its 10th straight year of expansion in 2001").

2. See *id.* (reporting ABC president Henry Kelly's comment that "the construction industry has been the engine of the U.S. economy" and that the industry is dependant on sound state policies for continued growth); Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform In a Transactional System*, 1998 WIS. L. REV. 463, 465 (relating that the construction industry in the United States "accounts for annual expenditures of half a trillion dollars per year and directly employs one of every twenty workers, represents as much as thirteen percent of the gross national product, and touches the lives of every citizen").

dustry in Texas cannot be overstated.<sup>3</sup> Only the unavailability of unskilled labor can slow the growth of the construction industry in Texas.<sup>4</sup> As such, Texas has welcomed the construction boom with open arms, and has enacted statutes to accommodate further industry growth.<sup>5</sup>

Texas's first legislative response came in the form of the Residential Construction Liability Act (RCLA).<sup>6</sup> The RCLA alleviated liability for builders<sup>7</sup> incurred under the Deceptive Trade Practices Act (DTPA),<sup>8</sup> by placing damage caps on construction defect claims.<sup>9</sup> The RCLA was thus a reaction to construction industry claims that the DTPA was used as a sword to litigate against builders.<sup>10</sup> In 2003, the Texas Legislature continued to legislate in favor of builders by passing the Texas Residential Construction Commission Act (TRCCA).<sup>11</sup> The TRCCA provides a limited

3. See D. Ann Shiffler, *Texas Enters Year 2000 Full Stride*, TEX. CONSTR., Jan. 2000, at 13 (stating that “[c]onstruction will be the fastest growing sector in Texas over the next five years,” that the rate of construction job growth has doubled that of the overall job growth rate across the state during the previous five years, and that Texas ranks first in the nation in construction job creation).

4. See *id.* (quoting Tim Rooney, president of Manhattan Construction, as saying that skilled craft and management labor is the “scarcest resource” in the industry).

5. TEX. PROP. CODE ANN. § 27 (Vernon 2000 & Supp. 2004); TEX. PROP. CODE ANN. § 430 (Vernon 1995 & Supp. 2004).

6. TEX. PROP. CODE ANN. § 27 (Vernon 2000 & Supp. 2004).

7. See Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH L. REV. 1, 19 (1996) (commenting that “[t]he 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”); TEX. RESIDENTIAL CONSTR. COMM’N, MISSION STATEMENT, at <http://www.trcc.state.tx.us/brochures/CommissionStratPlan.pdf> (asserting that the TRCCA aims to “[p]rovide Texas homeowners and the residential construction industry an opportunity to resolve differences through a neutral dispute resolution process and ongoing education”). Alternative dispute resolution saves money for companies, as evidenced by a study conducted by the Center for Public Resources which observed that \$200 million were saved among 652 companies over a five-year period. See Charles Silver, *Symposium: What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2104-05 (2002) (stressing that ADR “saves money” and that the aggregate \$200 million saved translated into an “average cost savings of more than \$300,000 per company”).

8. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 2002 & Supp. 2004).

9. TEX. PROP. CODE ANN. § 27.003 (Vernon 2000 & Supp. 2004).

10. See Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH L. REV. 1, 4 (1996) (asserting that “homeowners frequently used [the DTPA] ‘as a sword to obtain an economic windfall’”); Richard Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 280-81 (1999) (mentioning that an attorney representing homebuilders believed “homeowners were exploiting the DTPA as a quick way to get large cash settlements from homebuilders”).

11. TEX. PROP. CODE ANN. § 430 (Vernon 1995 & Supp. 2004).

warranty on all new homes and requires homeowners to engage in mandatory dispute resolution before initiating any legal action.<sup>12</sup> Some commentators praised the TRCCA as a fair and necessary response to the industry's growing litigation problem,<sup>13</sup> while consumer advocates decried the erosion of homebuyer protections.<sup>14</sup>

The construction industry may be a welcome boost to the Texas economy, but consumer protection cannot be neglected for the sake of the economy. The consumer purchase of a new home is no small undertaking. For many Americans, a new home purchase represents the largest and most significant transaction of their lifetime.<sup>15</sup> Aside from monetary investments, home buying involves an intangible emotional component.<sup>16</sup>

12. *Id.*

13. See John Torigian, *Texas Legislature Regulates Homebuilders*, 67 TEX. B.J. 26, 26 (2004) (portraying the TRCCA as "simplif[ying] the dispute resolution process while leaving open the door to the court-house at the conclusion of this process"); Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 307 (1999) (recognizing that "[h]omebuilders claimed they needed liability limits because the treble damage and mental anguish provisions of the DTPA made the costs of doing business too high"); Melissa Ludwig, *Agency Would Referee Home Building Fights, Bill Awaiting Governor's OK Is Meant to Settle Disputes Before Binding Arbitration*, AUSTIN AM.-STATESMAN, June 14, 2003, at F1 (opining that home builders praise the Act as an "unbiased way of resolving homeowner complaints" and that the Act provides "builders more incentive to fix problems to avoid costly arbitration and litigation").

14. See *Builder's Protection Act?: Homeowners Need More Than Plan Provides*, DALLAS MORNING NEWS, Feb. 13, 2003, at 24A (noting that consumer groups worry that the Commission will become a hurdle for homeowners and that the review process will effectively wear down most homeowners); see also, William M. Coats, *The Winds of Austin*, TEX. CONSTR., Dec. 2003 (expressing that the home registration fee "may seem like a slap in the face to homeowners who will now have to pay to have the right to a prompt suit and implied warranties taken away from them"); Purva Patel, *Consumer Groups Skeptical of New Law: Industry-Created Legislation Creates Dispute Resolution*, HOUS. CHRON., Aug. 8, 2004, at D1, available at WL 83656245 (quoting Cheryl Turner, a consumer attorney in Dallas, as declaring that the TRCCA has "just created another layer of bureaucracy and expense for homeowners").

15. See, e.g., Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 304 (1999) (asserting that "[b]uying a home is usually the largest investment a person or family will make in their entire life"); David Becka, *A Close-to-Home Issue; Building Standards and Disclosures Important to Frisco Residents*, DALLAS MORNING NEWS, May 27, 2004, at 8B (asserting that a home purchase "may well be the biggest purchase and investment of a lifetime"); Bill Murphy, *Getting to the Bottom of Things; Veteran Battles Homebuilder; VA Investigates Possible Foundation Design Flaws*, HOUS. CHRON., Nov. 30, 2001, at 37 (quoting Sascha Pech as emphasizing that their new home purchase was the "biggest investment [they had] made, . . . and it [was] not holding up").

16. See Sharlene A. McEvoy, *Caveat Emptor Redux: "Psychologically Impacted" Property Statutes*, 18 W. ST. L. REV. 579, 588 (1991) (asserting that "[t]he purchase of a home is a major emotional commitment as well as a demanding financial one"); Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36

But when the dream of new homeownership<sup>17</sup> turns into a nightmare because of defective construction, does the TRCCA provide consumers an adequate remedy?

This Comment will dissect the TRCCA's dispute resolution process, and will present a number of recommended changes necessary to represent both consumer and builder interests. This Comment also aims to expose some of the unintended side-effects of the mandatory alternative dispute resolution (ADR) process employed by the TRCCA in construction defect cases. Generally speaking, encouraging out-of-court settlements for construction defect disputes is a positive step for both the industry and consumer.<sup>18</sup> Correspondingly, there a number of other problematic provisions within the TRCCA; involving monetary, time, and public policy considerations. For example, to initiate ADR under the TRCCA, a homeowner must pay the Texas Residential Construction Commission (Commission)<sup>19</sup> between \$350 and \$450 to cover the state recommended inspector.<sup>20</sup> The TRCCA's preliminary process could take up to 150 days to finish, which substantiates the concern that the TRCCA works against homeowners.<sup>21</sup>

In addition, the TRCCA adopts the restrictive damages provisions of the RCLA, which discourages homeowners from pursuing legal action by limiting their recovery.<sup>22</sup> The legislature should mitigate these restrictions by allowing homeowners to recover exemplary damages against

HOUS. L. REV. 277, 304 (1999) (claiming that "studies have proved that moving, buying a home, or having a house remodeled is one of the more stressful experiences that families endure").

17. See Sean M. O'Brien, *Caveat Venditor: A Case for Granting Subsequent Purchasers a Cause of Action Against Builder-Vendors for Latent Defects in the Home*, 20 IOWA J. CORP. L. 525, 526 (1995) (commenting that "[f]or many people, the American dream is to own a home" and that this dream is "shattered when serious defects, not discernible to the buyer at the time of purchase, manifest themselves").

18. See Aric J. Garza, *Resolving Public Policy Disputes in Texas Without Litigation: The Case for the Use of Alternative Dispute Resolution by Governmental Entities*, 31 ST. MARY'S L.J. 987, 990 (2000) (indicating that, "by using ADR processes, courts operate more efficiently, disputants and the state save money, and parties are more satisfied with the outcome, thereby decreasing repeat litigation").

19. TEX. PROP. CODE ANN. § 401.002(5) (Vernon 1995 & Supp. 2004).

20. *Id.* § 426.004; see also TEX. RESIDENTIAL CONSTR. COMM'N: HOW TO FILE AN SIRP REQUEST, at [http://www.trcc.state.tx.us/Complaints\\_SIRP/HowToFileSIRP.htm](http://www.trcc.state.tx.us/Complaints_SIRP/HowToFileSIRP.htm) (last visited Jan. 25, 2005) (documenting that the requesting party must pay \$350 for materials and workmanship inspections and \$450 for structural issues).

21. See Purva Patel, *Consumer Groups Skeptical of New Law: Industry-Created Legislation Creates Dispute Resolution*, HOUS. CHRON., Aug. 8, 2004, at D1, available at WL 83656245 (calculating that the TRCCA process "can take up to 150 days").

22. See TEX. PROP. CODE ANN. § 27.003 (Vernon 2000 & Supp. 2004) (outlining the recovery limitations placed upon homeowners).

knowing or willful offenders.<sup>23</sup> It is equally important to note that the Commission itself is composed of a disproportionate number of builder-affiliated individuals.<sup>24</sup> The Commission should constitute more of a public presence, instead of a builder represented majority, in order to ensure impartiality in the creation of the new statutory warranty provisions.<sup>25</sup>

One seemingly pro-consumer addition is the TRCCA requirement that all builders obtain state licensing.<sup>26</sup> However, the provisions of the TRCCA allow almost anyone to become a registered builder.<sup>27</sup> Furthermore, there is no testing or showing of proficiency in the trade.<sup>28</sup> The TRCCA should include a provision for the testing of all builders in Texas before they receive their license. Builders should demonstrate basic trade proficiency before they are deemed worthy of undertaking the great responsibility of constructing homes for Texans.<sup>29</sup> In sum, the TRCCA

23. *Id.* §§ 27.003-.0031. Builders not only have protection under the damages provisions of the RCLA in Section 27.003, but they also have protection against actions that are “groundless and brought in bad faith for purposes of harassment,” under Section 27.0031. *Id.* Homeowners should have protection of their own in the form of punitive damages against homebuilders who repeatedly violate the provisions of the TRCCA; they should not have protection merely against economic damages, which simply places them in the position they originally contracted for. *See* TEX. PROP. CODE ANN. § 27.001 (Vernon 2000 & Supp. 2004) (defining economic damages as “compensatory damages for pecuniary loss proximately caused by a construction defect”).

24. *See* TEX. PROP. CODE ANN. § 406.001 (Vernon 1995 & Supp. 2004) (requiring that the Commission represent four registered builders, three members of the public, one licensed engineer who practices residential construction, and one architect who practices residential construction). Arguably, the architect and engineer, who practice residential construction, are tied directly to builders’ interests and bias the Commission six members to three in favor of builders.

25. *See id.* § 406.001(a)(1)(3)(4) (requiring that the Commission consist of four builders, one engineer, and an architect or building inspector).

26. *See id.* § 416.001 (requiring all builders to register with the TRCCA).

27. *See id.* § 416.005 (establishing the eligibility of licensed builders, such that they must be at least 18 years of age, citizens of the United States or lawfully admitted aliens, and must satisfy the Commission as to their honesty and trustworthiness). Also, the TRCCA requires a fee not to exceed \$500 and a renewal fee not to exceed \$300. *Id.* § 416.004; *see also* Purva Patel, *Splintered Hopes: Crooked Contractors Leave Clients in Shambles*, HOUS. CHRON., Aug. 8, 2004, at D1 (warning that even some builders believe it is “too easy to register”).

28. *See* Purva Patel, *Splintered Hopes: Crooked Contractors Leave Clients in Shambles*, HOUS. CHRON., Aug. 8, 2004, at D1 (contrasting the TRCCA, which does not require “showing any proficiency in the trade,” with North Carolina, which requires builders to pass an exam in order to meet licensing requirements).

29. *See* A. Scott McDaniel, *The Good, the Bad, and the Unqualified: The Public Interest and the Unregulated Practice of General Contracting in Oklahoma*, 29 TULSA L.J. 799, 801-02 (1994) (explaining that, “[a]lthough consumers seeking the service of a general contractor are interested in the quality of the service, they often do not have the expertise to

continues to tilt the playing field in favor of builders, and amendments, such as those suggested in this Comment, would serve to provide consumers proper remedies in the event of defective construction.

This Comment argues that the TRCCA, through a combination of the previously mentioned problems, inadvertently perpetuates substandard building practices in Texas. Part II of this Comment briefly examines the history of new home construction disputes in Texas, including *caveat emptor*,<sup>30</sup> the implied warranty,<sup>31</sup> DTPA,<sup>32</sup> RCLA,<sup>33</sup> and the TRCCA.<sup>34</sup> Part III analyzes the effects of the RCLA provisions on construction defect cases. Next, Part IV specifies the complaint procedure provided by the TRCA. Part V then critiques some of the internal provisions of the TRCCA and Part VI recommends the changes that are necessary to satisfy both the builder and consumer concerns. Finally, Part VII concludes with a brief summation of the effects of the TRCCA and offers additional policy rationale for amending the TRCCA.

## II. BACKGROUND FROM CAVEAT EMPTOR TO THE DECEPTIVE TRADE PRACTICES ACT

Prior to 1968, *caveat emptor* generally governed real property transactions in Texas, unless vendors failed to disclose known dangerous conditions.<sup>35</sup> The doctrine of *caveat emptor* assumed that the buyer and seller

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judge the quality of the service, or the qualifications of the provider"). Also, more stringent licensing standards will "provide consumers at least a minimal standard on which to rely prior to entering into a construction contract." *Id.* at 802. Without such standards, Texas homebuyers blindly sign away a significant investment.

30. See BLACKS LAW DICTIONARY 215 (7th ed. 1999) (defining the Latin term *caveat emptor* as: "let the buyer beware"). The doctrine is based on the theory "that purchasers buy at their own risk." *Id.*

31. See Charles L. Armstrong, Note, *Who Pays the Price for Defective Home Construction? A Note on Buecher v. Centex Homes*, 53 BAYLOR L. REV. 687, 688 (2001) (recalling that in 1968, through *Humber v. Morton*, the Texas Supreme Court "created the implied warranty of habitability and good and workmanlike construction in new home sales"). Public policy considerations in support of implied warranties include: "Protecting consumers from inferior products and poor workmanship, allocating the cost of latent defects to sellers, and ultimately encouraging sellers to provide better quality goods and services." *Id.* at 701. These are essentially the same public policy considerations at stake under the TRCCA.

32. See generally TEX. BUS. & COM. CODE ANN. § 17.46 (2004) (providing remedies for aggrieved consumers).

33. TEX. PROP. CODE ANN. § 27 (Vernon 2000 & Supp. 2004).

34. *Id.* § 430.

35. See *Graham v. United States*, 441 F. Supp. 741, 743 (N.D. Tex. 1977) (describing *caveat emptor* as applied to contracts for the sale of land as "the legacy of the common law").

dealt at arm's length and that they enjoyed equal bargaining power.<sup>36</sup> This presumption arose due to the nature of home building in the United States in the pre-war era. Prior to World War II, consumers would purchase a piece of property and then contract with a builder to have their home built.<sup>37</sup> There was a more intimate relationship between the consumer and the builder, and bargaining power was more or less equal.<sup>38</sup> As these relationships changed, however, courts recognized the weaknesses of these assumptions and the scales began to tip in favor of consumers.<sup>39</sup> Following World War II, developers mass-produced homes on large tracts of land.<sup>40</sup> The new home purchase evolved into a disparate arrangement between the mass-production developer and the individual consumer.<sup>41</sup> In *Humber v. Morton*,<sup>42</sup> the Texas Supreme Court

36. See *Humber v. Morton*, 426 S.W.2d 554, 557 (Tex. 1968) (noting that *caveat emptor* emphasized the arm's length relationship of the buyer and seller).

37. See Wendy A. Gable, Comment, *Constructing a Solution to California's Construction Defect Problem*, 30 McGEORGE L. REV. 299, 305 (1999) (describing how the practice of mass-producing homes after World War II resulted in "unequal bargaining power between buyer and seller").

38. *Contra* Lynn Y. McKernan, Note, *Strict Liability Against Homebuilders for Material Latent Defects: It's Time, Arizona*, 38 ARIZ. L. REV. 373, 373 (1996) (intimating that, since World War II, "[i]nexperienced and unsophisticated home buyers struggled against builders for the recovery of damages under the existing legal doctrines of the day, including caveat emptor, merger, and lack of privity of contract").

39. See *id.* (declaring that "courts and legislatures have since changed these outmoded views of homebuilder liability by modifying, amending, and even overruling previous law, so as to meet the needs of our time"). Over time, courts gradually recognized the implied warranty on residential construction. See, e.g., *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108 118-19 (1884) (recognizing the implied warranty under a bridge construction contract); *Humber v. Morton*, 426 S.W.2d 554, 555 (Tex. 1968) (citing *Wintz v. Morrison*, 17 Tex. 372 (1856) and examining implied warranties); *Loma Vista Dev. Co. v. Johnson*, 177 S.W.2d 225, 227 (Tex. Civ. App.—San Antonio 1943, writ granted), *rev'd on other grounds*, 180 S.W.2d 922 (Tex. 1944) (analyzing the concept of implied warranties in home construction). See generally WALTER H. E. JAEGER, WILLISTON ON CONTRACTS § 926A (3d ed. Jaeger) (suggesting that "[i]t would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry building that has become perceptible over the years").

40. See Roger V. Peel, *The Expanding Scope of Liability in the Home Construction Enterprise*, 5 LAND & WATER L. REV. 637, 637 (1970) (asserting that, following World War II, the market evolved into a continuous "assembly line, large scale production of residential homes"); see also Melissa C. Tronquet, Comment, *There's No Place Like Home . . . Until You Discover Defects: Do Prelitigation Statutes Relating to Construction Defect Cases Really Protect the Needs of Homeowners and Developers?*, 44 SANTA CLARA L. REV. 1249, 1253-54 (2004) (reporting that "the dramatic increase in housing construction following World War II led to both a change in attitude toward buyer/seller relationships and, unfortunately, a decline in the quality of new homes").

41. See Howard R. Fine, *The Implied Warranty of Habitability in the Sale of New Homes: Disclaiming Liability in Illinois*, 1987 U. ILL. L. REV. 649, 652 (1987) (noting that the modern home buyer "typically sign[s] a sales contract on the basis of viewing a model,



responded to these market changes and created an implied warranty for new homes, and thus overruled the doctrine of *caveat emptor*.<sup>43</sup> This implied warranty assured consumers that construction would be performed in a good and workmanlike manner, even in the absence of express warranty, and that new homes were impliedly suitable for human habitation.<sup>44</sup> The pro-consumer trend continued in 1973 with the passage of the DTPA, in which consumers gained advantages over contractors when they filed law suits concerning defective residential construction.<sup>45</sup> Some of these advantages included a relaxed causation requirement, the recovery of attorney's fees, and potential treble damages.<sup>46</sup> Generally speaking, the DTPA provides a cause of action for false, misleading, or deceptive practices in the context of any trade or commerce.<sup>47</sup> In line with the pro-consumer spirit of *Humber*, the DTPA cause of action also extended to contractor breaches of either express or implied warranties.<sup>48</sup> Whether the DTPA fostered the reasonable resolution of residential construction claims is uncertain;<sup>49</sup> however, the contentious atmo-

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[and that] the purchaser has no opportunity to inspect the home for defects and in fact must rely on the superior skill and knowledge of the builder-vendor”).

42. 426 S.W.2d 554 (Tex. 1968).

43. See *Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968) (holding that an implied warranty of habitability applies to new homes, and noted that, “[i]f at one time in Texas the rule of caveat emptor had application to the sale of a new house by a vendor-builder, that time is now past”).

44. See *Centex Homes v. Buecher*, 95 S.W.3d 266, 269 (Tex. 2002) (expounding upon the implied warranty accompanying newly constructed homes).

45. See Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH L. REV. 1, 2 (1996) (noting that since 1973, “consumers have maintained an advantage over contractors in disputes concerning residential construction defects”); Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 291 (1999) (stating that “[t]he DTPA was, ab initio, decidedly pro-consumer”).

46. See Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 291 (1999) (explaining the advantages of the DTPA for homeowners filing suit against builders). See generally *Jim Walter Homes, Inc. v. Chapa*, 614 S.W.2d 838 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (representing a typical DTPA claim for defective construction).

47. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 2004).

48. *Humber*, 426 S.W.2d at 555.

49. Compare Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 316 (1999) (declaring that the DTPA “provide[d] a positive atmosphere for the resolution of disputes between contractors and homebuyers”), with Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH L. REV. 1, 2 (1996) (declaring that “the DTPA impeded the reasonable resolution of residential construction liability defect claims arising from construction or repair”).

sphere surrounding the DTPA merely foreshadowed a power shift to builders.<sup>50</sup>

### III. CONSTRUCTION DEFECT CASES UNDER THE RCLA

The Texas Legislature adjusted the playing field in favor of builders when it enacted the Residential Construction Liability Act (RCLA) in 1989.<sup>51</sup> Yet, the original intent of the RCLA was to provide an “appropriate balance” between the residential contractor and owner, with respect to the resolution of construction disputes.<sup>52</sup> First, the RCLA specifically preempts DTPA causes of action where there are conflicts between the two statutes.<sup>53</sup> Also, the RCLA implements a notice requirement that requires homeowners to inform contractors of the defects in writing before filing suit.<sup>54</sup> On request of the contractor, the RCLA further requires homeowners to provide evidence of the nature and cause of the defects and any other information showing the repairs necessary to cure the defect.<sup>55</sup>

The RCLA also significantly raises the bar on causation, requiring a plaintiff to prove that the damages were proximately caused by the con-

50. See Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH L. REV. 1, 3 (1996) (illustrating that, “[f]rom the time it was enacted, the DTPA impeded the reasonable resolution of residential construction liability defect claims arising from construction or repair”).

51. See Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 300 (1999) (asserting that the RCLA “tilts the playing field in favor of homebuilders by providing numerous defenses and liability limits not available under the DTPA”).

52. See Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH L. REV. 1, 2 (1996) (stating that the Act was “enacted ‘to provide a fair and appropriate balance [with respect] to the resolution of construction disputes between a residential contractor and owner’” (quoting HOUSE COMM. ON BUS. AND INDUSTRY, BILL ANALYSIS, TEX. H.B. 1395, 73d Leg., R.S. (1993))). *But see* Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 300-01 (1999) (contending 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 in Texas must deal”).

53. TEX. PROP. CODE ANN. § 27.002(b) (Vernon 2000 & Supp. 2004); *see also* A. Michael Ferrill & Charles A. Japhet, *Deceptive Trade Practices-Consumer Protection Act*, 51 SMU L. REV. 909, 932 (1998) (recognizing that the RCLA “specifically preempts application of the DTPA where the two statutes conflict”).

54. TEX. PROP. CODE ANN. § 27.004(a) (Vernon 2000 & Supp. 2004); *see also* *The Residential Construction Liability Act*, 63 TEX. B.J. 713, 713 (2000) (noting that “the RCLA requires that you provide notice and an opportunity to cure the defect before filing a lawsuit for damages”).

55. TEX. PROP. CODE ANN. § 27.004(a) (Vernon 2000 & Supp. 2004).

struction defect.<sup>56</sup> On the other hand, the DTPA only requires a plaintiff to prove that the defect was a producing cause.<sup>57</sup> Proximate causation requires a showing that the defect was the cause in fact of the damages, that the damages were a foreseeable result of the defect,<sup>58</sup> and that there were no independent causes.<sup>59</sup> This contrasts with a producing cause which, in essence, is proximate causation without foreseeability.<sup>60</sup>

56. *Id.* § 27.006; see also Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 290 (1999) (observing that the RCLA requires a claimant to “prove that the construction defect in question ‘proximately caused any damages’”).

57. See Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 316 (1999) (contrasting the different levels of causation between the DTPA and the RCLA).

58. See Fred S. Wilson, *Wrongful Adoption: A Guide to Impending Tort Litigation in Texas*, 24 ST. MARY'S L.J. 273, 305 (1992) (describing that Texas courts recognize “that proximate causation consists of two elements, cause in fact and foreseeability”). To be precise, “causation in fact requires a determination that ‘but for’ a party’s negligent act, no harm would have occurred.” *Id.* And, “foreseeability is a determination that an individual of ordinary intelligence would anticipate the possible injuries that could result from his negligent conduct.” *Id.*

59. The court in *Biaggi v. Patrizio Rest., Inc.* expounded upon the concept of independent causes:

To establish new and independent cause, the movant must establish that an intervening force was not foreseeable as a matter of law. The Texas Supreme Court has adopted the following factors for use in determining whether an intervening force constitutes a superseding or new and independent cause:

- (1) the fact that the intervening force brings about harm different in kind from that which would otherwise have resulted from the actor’s negligence;
- (2) the fact that the intervening force’s operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the force’s operation;
- (3) the fact that the intervening force is operating independently of any situation created by the actor’s negligence, or, on the other hand, is or is not a normal result of such a situation;
- (4) the fact that the operation of the intervening force is due to a third person’s act or to his failure to act;
- (5) the fact that the intervening force is due to a third person’s act which is wrongful toward the other and as such subjects the third person to liability to him;
- (6) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

*Biaggi v. Patrizio Rest., Inc.*, 149 S.W.3d 300, 306 (Tex. App.—Dallas 2004, pet. filed).

60. See *Doe v. Boys Clubs, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (stating that proximate cause consists of both cause-in-fact as well as foreseeability); *Mackie v. McKenzie*, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied) (declaring that a “producing cause” is an “efficient, exciting or contributing cause” and does not require foreseeability, as does a “proximate cause”); *Teague v. Bandy*, 793 S.W.2d 50, 57 (Tex. App.—Austin 1990, writ denied) (holding that a producing cause is “akin to the tort concept of factual causa-

Equally important are the damages provisions, which severely restrict a plaintiff's ability to recover damages.<sup>61</sup> Without hope for an adequate recovery, homeowners who would have sued under the recovery provisions of the DTPA may now remain sidelined or forced to pursue other means of dispute resolution, since the odds and magnitude of any recovery are so diminutive.<sup>62</sup> For example, a contractor has no liability for "any percentage of damages" when the homeowner fails to "take reasonable action" to mitigate damages or fails to maintain the residence.<sup>63</sup> Also, damages caps are invoked when the homeowner rejects a reasonable settlement offer from the contractor.<sup>64</sup> In these situations, the homeowner may not recover more than the contractor's last settlement offer or a reasonable offer to purchase back the home, and attorney's fees are limited to those incurred before the reasonable offer was rejected.<sup>65</sup> Unfortunately for the homeowner, courts have not yet provided clear guidance with regard to what constitutes a reasonable offer despite the statute's ambiguous language.<sup>66</sup>

The 2003 enactment of the TRCCA brought a litany of changes to the RCLA. For example, before amendment of the RCLA in 2003, homeowners were not burdened by damage caps when a builder failed to make

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tion because it lacks the element of foreseeability imposed by the standard of proximate causation").

61. TEX. PROP. CODE ANN. § 27.003 (Vernon 2000 & Supp. 2004).

62. *See generally id.* § 27.001(6) (delineating that recovery does not include "exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society").

63. *Id.* § 27.003(a).

64. *Id.* § 27.004(e).

65. *Id.*

66. TEX. PROP. CODE ANN. § 27.004 (Vernon 2000 & Supp. 2004). The language of the statute, in Section 27.004 of the Texas Property Code, explains the ramifications of both rejecting and failing to make a reasonable offer of settlement. *Id.* The few cases that have heard the issue of determining the confines of a reasonable offer have not provided any guidance for future claimants. *See Perry Homes v. Alwattari*, 33 S.W.3d 376, 383 (Tex. App.—Fort Worth 2000, pet. denied) (citing as "some" evidence of an unreasonable offer, the court explained that the offer required the homeowner to initially pay 40% of the costs, with a promise of future reimbursement, and for the homeowner to release all adverse claims against the builder); *O'Donnell v. Roger Bullivant of Tex., Inc.*, 940 S.W.2d 411, 420-21 (Tex. App.—Fort Worth 1997, writ denied) (holding that, since "Bullivant did not file any summary judgment evidence to controvert Bitting's and O'Donnell's affidavits," the offer was unreasonable "as a matter of law"); *Fontenot v. Kimball Hill Homes Tex., Inc.*, No. 14-03-00347-CV, 2004 Tex. App. LEXIS 1208, at \*7 (Tex. App.—Houston [14th Dist.], Feb. 10, 2004, no pet.) (mem. op.) (finding that since the homeowners did not contest the evidence supplied by Kimball Hill, the court "consider[ed] Kimball Hill's offer to repair reasonable").

a reasonable offer.<sup>67</sup> However, under the 2003 amendment, even when a contractor does not make a reasonable settlement offer, the homeowner may only recover costs of repair, engineering and consulting fees, costs of temporary housing, reasonable attorney's fees, and the home's reduction in market value.<sup>68</sup> Further, this recovery is only available when the defect is structural.<sup>69</sup> In fact, due to another 2003 amendment, the only way the restrictive damages provisions will not apply is in the highly unlikely situation where a contractor refuses to perform repairs under an accepted offer.<sup>70</sup> Clearly, by limiting the potential recovery available to plaintiffs, the provisions within the RCLA, including recent amendments, are intended to discourage rather than encourage homeowners to file a cause of action against contractors.

In addition, the contractor has yet another tool at his disposal: Compelled mediation.<sup>71</sup> Compelled mediation is available, upon motion by the claimant or contractor, when the damages sought exceed \$7,500, and the motion is filed within ninety days of filing any cause of action.<sup>72</sup> In light of these advantages, the RCLA seemingly provided contractors adequate protection from construction defect claims.<sup>73</sup> Nevertheless, the Texas Legislature pressed for the passage of the TRCCA in September of 2003.

#### IV. THE TRCCA: ANOTHER HOME-RUN FOR HOME BUILDERS

One goal of the TRCCA was to simplify the dispute resolution process and to implement uniform state performance standards for residential

67. See *Perry Homes*, 33 S.W.3d at 384 (holding that "the effect of a contractor's failure to make a reasonable settlement offer is that the contractor loses the benefit of all limitations on damages and defenses to liability provided for in section 27.004"); *O'Donnell*, 940 S.W.2d at 421 (finding that the builder "failed to make a reasonable offer as a matter of law and [that] the damage cap does not apply"). However, subsection (g) of the old RCLA was amended to provide an elimination of the damage caps only when a "contractor refuses to initiate repairs under an accepted offer." TEX. PROP. CODE ANN. § 27.004(q) (Vernon 2000 & Supp. 2004).

68. See TEX. PROP. CODE ANN. § 27.004(g) (Vernon 2000 & Supp. 2004) (explaining the potential recovery for homeowners even when the builder fails to make a reasonable offer).

69. *Id.*

70. See *id.* § 27.004(q) (stating that the damages caps do not apply when a builder refuses to conduct repairs under an accepted agreement).

71. See *id.* § 27.041(a) (defining the situations where a contractor may compel mediation).

72. *Id.*

73. See TEX. PROP. CODE ANN. § 27.031 (Vernon 2000 & Supp. 2004) (protecting builders from bad faith or harassment driven claims).

construction.<sup>74</sup> Procedurally, however, the TRCCA creates additional roadblocks for the homeowner to successfully pursue a cause of action against a contractor.<sup>75</sup> The TRCCA requires the use of a newly formed alternative dispute resolution process before taking legal action.<sup>76</sup> To initiate the dispute resolution process the homeowner must, in writing, notify the builder of all alleged defects at least thirty days before submitting a request to the Commission.<sup>77</sup> On receipt of the notice, and upon written request, the contractor receives a thirty-five day period to inspect the property, determine the nature as well as the cause of the defect, and to evaluate any repairs necessary to cure the defects.<sup>78</sup> The contractor also has forty-five days from the date of notice, or fifteen days from a final determination made by a state-sponsored inspector, to make a reasonable settlement offer.<sup>79</sup> Once the homeowner receives the offer, he has twenty-five days to reject it or accept it.<sup>80</sup> If an offer is not accepted within twenty-five days, it is considered rejected.<sup>81</sup> At this point, if the homeowner considers the offer unreasonable, he must inform the contractor in writing and with sufficient detail why the offer is unreasonable.<sup>82</sup> Once this response is received, the contractor receives an additional ten days to make a “supplemental” written offer.<sup>83</sup> Thus, instead of encouraging a contractor to submit a reasonable offer the first

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74. See John Torigian, *Texas Legislature Regulates Homebuilders*, 67 TEX. B.J. 26, 26 (2004) (portraying the TRCCA as “simplif[ying] the dispute resolution process while leaving open the door to the courthouse at the conclusion of this process” and as providing for the adoption of new building performance standards in new buildings).

75. See TEX. PROP. CODE ANN. § 426.005(a) (Vernon 1995 & Supp. 2004) (making the dispute resolution process a condition precedent to filing suit). Importantly, the dispute resolution process does not foreclose the possibility of litigation. See *id.* (noting the possibility of initiating an action). It does, however, present several problems. First, a homeowner cannot avoid the process before initiating litigation. *Id.* Second, the process requires between \$350 and \$450 from the homeowner to pay for the state-approved inspector. TEX. PROP. CODE ANN. § 426.004(a) (Vernon 1995 & Supp. 2004). Further, the process can take up to 150 days to complete. See Purva Patel, *Consumer Groups Skeptical of New Law: Industry-Created Legislation Creates Dispute Resolution*, HOUS. CHRON., Aug. 8, 2004, at D1, available at WL 83656245 (calculating that the process “can take up to 150 days”). Finally, if a reasonable settlement offer is rejected, subsequent recovery in court is limited to the reasonable offer, without recovery for attorney’s fees incurred thereafter. TEX. PROP. CODE ANN. § 27.004(e) (Vernon 2000 & Supp. 2004).

76. TEX. PROP. CODE ANN. § 426.005(a) (Vernon 1995 & Supp. 2004).

77. *Id.* § 428.001(c).

78. *Id.* § 27.004(a).

79. *Id.* § 27.004(b).

80. *Id.*

81. TEX. PROP. CODE ANN. § 27.004(i) (Vernon 2000 & Supp. 2004).

82. *Id.* § 27.004(b).

83. *Id.*

time, the TRCCA encourages haggling and delay by allowing for a second offer submission.<sup>84</sup>

Once the thirty day notice period expires and no satisfactory resolution has been reached between the homeowner and builder, the homeowner must submit a request to the Commission that specifies and details the defect, declares out-of-pocket expenditures incurred in connection with the defect, and includes evidence indicating the nature and cause of the defect, including the repairs necessary to cure the defect.<sup>85</sup> These notice provisions ask a frustrated homeowner to outline the details of a defect that may remain hidden to the eyes of a layman.<sup>86</sup> This requirement is likely challenging, considering most first-time homebuyers and members of the general public lack knowledge or experience in ascertaining and detailing home defects.<sup>87</sup> The contractor maintains the right to inspect the property, upon proper written request, any time prior to the conclusion of the dispute resolution process.<sup>88</sup> Along with this right comes the builder's right to document any construction defects and the home's condition.<sup>89</sup>

Within fifteen days of the receipt of a request, a third-party inspector must be appointed by the Commission to inspect the property.<sup>90</sup> The party initiating the request incurs a fee, established by the Commission, for utilizing the inspector.<sup>91</sup> Currently, the fee is \$350 for materials and workmanship inspections<sup>92</sup> and \$450 for structural inspections,<sup>93</sup> and only "[i]f the inspector finds for the party" submitting the request,<sup>94</sup> or if the Commission finds a financial inability,<sup>95</sup> may reimbursement or waiver of

84. *See id.* (allowing a contractor to make a supplemental offer).

85. *Id.*

86. *See* Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 505 (emphasizing that a "homeowners' lack of technical expertise may place them at a real or perceived disadvantage in negotiations with builders").

87. *See* Joseph C. Brown, Jr., *The Implied Warranty Of Habitability Doctrine In Residential Property Conveyances: Policy-Backed Change Proposals*, 62 WASH. L. REV. 743, 747 (1987) (concluding that "ordinary home purchasers are practically forced to rely on the skill, knowledge, reputation, and integrity of builder-vendors"). Regardless, "often in completed houses structural defects are difficult even for experts to discover." *Id.* at 746.

88. TEX. PROP. CODE ANN. § 428.002(a) (Vernon 1995 & Supp. 2004).

89. *Id.* § 428.002(b).

90. *Id.* § 428.003(a).

91. *Id.* § 426.004(a).

92. TEX. RESIDENTIAL CONSTR. COMM'N: HOW TO FILE AN SIRP REQUEST, at [http://www.trcc.state.tx.us/Complaints\\_SIRP/HowToFileSIRP.htm](http://www.trcc.state.tx.us/Complaints_SIRP/HowToFileSIRP.htm) (last visited Jan. 25, 2005).

93. *Id.*

94. TEX. PROP. CODE ANN. § 428.004(d) (Vernon 1995 & Supp. 2004).

95. *Id.* § 426.004(b).

this expense occur.<sup>96</sup> The inspector has fifteen days to issue its recommendation if the dispute relates to workmanship and materials.<sup>97</sup> If the dispute involves alleged structural defects, then the inspector has thirty days to inspect the home and sixty days from the date of assignment to issue a recommendation, unless either the inspector or party involved in the dispute requests additional time.<sup>98</sup> Once the inspector's recommendation is made, either party may pursue an appeal within fifteen days from its issuance.<sup>99</sup> The executive director, upon appeal, must form a panel consisting of three state inspectors to review the recommendation.<sup>100</sup> The panel must rule on the appeal within thirty days.<sup>101</sup> The ruling may "approve, reject, or modify" the inspector's recommendation,<sup>102</sup> which may result in remanding the dispute and requiring the inspector to conduct further action.<sup>103</sup> This provision generates the risk that the process will run for an excessive period of time, potentially beyond 150 days, all before a homeowner may properly file suit.<sup>104</sup> The final recommendation derived from the inspection process is a rebuttable presumption, which can be overcome by proving "by a preponderance of the evidence that the recommendation or ruling is inconsistent with" building standards.<sup>105</sup>

The composition of the Commission itself is questionable. The TRCCA calls for four builders, three members of the general public, one licensed engineer, and one licensed architect.<sup>106</sup> With six of the nine Commission members directly connected to the construction industry, the power of the Commission is arguably not aligned with consumers.<sup>107</sup> In

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96. *See id.* § 426.004(b) (stating "[the] commission shall adopt rules permitting waiver or reduction of the inspection expenses for homeowners demonstrating a financial inability to pay the expenses"); *id.* § 428.004(a) (stating "[i]f the dispute involves workmanship and materials in the home of a nonstructural matter, the third-party inspector shall issue a recommendation not later than the 15th day after the date the third-party inspector receives the appointment from the commission").

97. TEX. PROP. CODE ANN. § 428.004(a) (Vernon 1995 & Supp. 2004).

98. *Id.* § 428.004(b).

99. *Id.* § 429.001(a).

100. *Id.* § 429.001(b).

101. *Id.* § 429.001(c)(3).

102. TEX. PROP. CODE ANN. § 429.001(c)(2) (Vernon Supp. 2004).

103. *Id.*

104. *See Purva Patel, Consumer Groups Skeptical of New Law: Industry-Created Legislation Creates Dispute Resolution*, HOUS. CHRON., Aug. 8, 2004, at D1, available at 2004 WL 83656245 (calculating that the process "can take up to 150 days").

105. TEX. PROP. CODE ANN. § 426.008(a) (Vernon 1995 & Supp. 2004).

106. *Id.* § 406.001(a)(1)-(4).

107. *See Patricia Duffy, Note, The Economic Loss Rule and Florida's Exception for General Contractors*, 46 FLA. L. REV. 775, 798 (1995) (stating that "[i]n the typical construction setting, there is a 'closed loop' of people dealing with each other, usually includ-



fact, the TRCCA exercises little regulatory power over builders, except that it is empowered to sanction builders for egregious behavior and requires a builder to obtain licensing from the Commission.<sup>108</sup> Licensing is simple, however. In order to act as a builder in Texas, a person must be 18 years or older, a United States citizen, pay a \$125 fee, and demonstrate integrity to the satisfaction of the Commission.<sup>109</sup> Another key function of the TRCCA is that it acts to supersede all implied warranties,<sup>110</sup> except the implied warranty of habitability.<sup>111</sup> In lieu of implied warranties, the TRCCA is empowered to enact limited statutory building performance standards.<sup>112</sup> The limited warranty periods include: "one year for workmanship and materials; two years for plumbing, electrical, . . . and air-conditioning delivery systems; and [ten] years for major structural components. . . ." <sup>113</sup>

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ing the owner, contractor, subcontractors, and architects or engineers"). Arguably, the architect and engineer, who practice residential construction, are tied directly to builders' interests and bias the Commission six members to three, in favor of builders. *See Construction Law: "Design-Build" Relationships Emerge*, 61 TEX. B.J. 530, 530 (1998) (reporting that "there is a big move toward 'alternative delivery systems' for public sector construction, which represents a large portion of construction in the state"). While bias is objectively apparent to a certain degree, it is uncertain the extent to which this bias actually favors builders, and if the composition of the Commission, in fact, works against the public's interest. A move towards shifting the composition of the Commission would, however, presumably improve the public perception of the Commission.

108. *See* TEX. PROP. CODE ANN. §§ 418.001(1)-(11) (Vernon 1995 & Supp. 2004) (outlining the "[g]rounds for disciplinary action"). The only regulatory power the Commission has over builders is in the form of sanctions or monetary penalties against builders who: fraudulently obtain their builder registration; misappropriate funds; name a false consideration in a construction contract; unlawfully discriminate, publish misleading or false advertisements; fail to honor a check sent to the Commission; fail to pay any administrative fines or penalties assessed by the Commission; fail to pay judgments that arise from a construction defect; fail to register a new home; fail to remit the registration fee for the home; and, fail to pay a homeowner an amount which has been ordered by the Commission to reimburse the homeowner under Section 428.004(d). *Id.*; *see also* John Torigian, *Texas Legislature Regulates Homebuilders*, 67 TEX. B.J. 26, 28 (2004) (explaining the powers the Commission has over builders who violate the Act).

109. TEX. PROP. CODE ANN. § 416.005(2) (Vernon 1995 & Supp. 2004). Also, the TRCCA requires a filing fee not to exceed \$500 and a renewal fee not to exceed \$300. *Id.* §§ 416.004(a)(1)-(2).

110. *Id.* §§ 416.004(a)(1)-(2).

111. *Id.* § 430.002(a). In *Centex Homes v. Buecher*, the Texas Supreme Court decided that, except under limited circumstances, the implied warranty of habitability could not be waived. *Centex Homes v. Buecher*, 95 S.W.3d 266, 268 (Tex. 2002); *see also* Toni Scott Reed, *Construction and Surety Law*, 57 SMU L. REV. 759, 761 (2004) (providing a more detailed analysis of *Centex Homes v. Buecher*).

112. TEX. PROP. CODE ANN. § 430.001(a) (Vernon 1995 & Supp. 2004).

113. *Id.* § 430.001(b)(1)-(3).

## V. WHAT'S WRONG WITH THE PROCESS?

A relatively new movement in the legal field has encouraged alternative dispute resolution (ADR), rather than the full-fledged legal combat of the past.<sup>114</sup> ADR represents “a collection of techniques designed to take disputes out of court and settle them more quickly and economically . . . .”<sup>115</sup> This movement seeks to reduce the costs of litigation;<sup>116</sup> however, these are not the only potential benefits of ADR.<sup>117</sup> The ad-

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114. See Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 1-2 (1987) (commenting that “ADR advocates assert boldly that ADR can ‘dispense better justice’ than ordinary litigation and that ADR is qualitatively superior to conventional case processing”). This “movement,” however, is not new within the construction industry. See Deborah S. Griffin, *Retrospective on Alternative Dispute Resolution*, 21 CONSTR. LAW. 46, 46 (2001) (arguing that “ADR has become a way of life for the construction bar—so much so that it is hard to imagine or remember construction law practice without it”); Kenneth R. Harney, *New Approach Seeks to Crimp Builder Lawsuits*, CHI. TRIB., June 23, 2002, at C2 (noting that the National Association of Home Builders is encouraging all states to enact pre-litigation statutes for claims involving construction defects); Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 68 (1996) (indicating that “no sector has demonstrated more creative zeal in developing and utilizing alternatives to court” than construction). In fact, California, Colorado, Nevada, and New Jersey have statutes similar to the TRCCA. CAL. CIV. CODE §§ 895-945.5 (Deering 1990); COLO. REV. STAT. §§ 13-20-801 – 13-20-804 (2003); NEV. REV. STAT. 40.600 (2003); N.J. STAT. ANN. §§ 46:3B-1 – 46:3B-20 (West 2003). These statutes, like the TRCCA, have not been extensively tested in court, and the benefits of these statutes have not yet materialized. See Melissa C. Tronquet, Comment, *There’s No Place Like Home . . . Until You Discover Defects: Do Prelitigation Statutes Relating to Construction Defect Cases Really Protect the Needs of Homeowners and Developers?*, 44 SANTA CLARA L. REV. 1249, 1272 (2004) (declaring that “the newness of the statutes, particularly the fact that they have not yet been extensively tested in court or otherwise, makes it difficult to determine whether the statutes will generate any meaningful benefits”).

115. Frank E. A. Sander & Stephen B. Goldberg, *Making the Right Choice*, 79 A.B.A. J. 66, 66 (1993).

116. See Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1073 (1984) (stating that “[t]he movement promises to reduce the amount of litigation initiated, and accordingly the bulk of its proposals are devoted to negotiation and mediation prior to suit”). A reduction in litigation would greatly benefit the construction industry. See Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, WIS. L. REV. 463, 475 (1998) (contending that “[d]espite the commitment of many contractors to alternative methods, litigation continues to be a significant drain on industry resources”).

117. See James F. Henry, *Some Reflections on ADR*, 2000 J. DISP. RESOL. 63, 64 (2000) (articulating that the early days of ADR focused on the cost-cutting benefits of ADR, whereas, more recently, parties have become aware of a number of additional benefits such as: control; the positive levels of success; the retained and reconstructed relations between parties; the expeditious nature of ADR; and the ability of ADR to handle high-volume conflicts).

vantages, of course, must be balanced with the disadvantages.<sup>118</sup> The TRCCA is apparently the product of this movement, since it aims to reduce litigation and attempts to promote an atmosphere conducive to settlement through a state-sponsored dispute resolution process.<sup>119</sup> The process embodied in the TRCCA most closely resembles what is known as “pre-dispute nonbinding arbitration.”<sup>120</sup> The recommendation made by a third party inspector is ultimately only a rebuttable presumption.<sup>121</sup>

On its surface, the TRCCA system presents a number of problematic considerations. While the system does not foreclose litigation to interested parties,<sup>122</sup> it indeed raises substantial barriers to potential litigants in the form of time<sup>123</sup> and money.<sup>124</sup> Likewise, the negotiation and set-

118. Compare Robert F. Cochran, Jr., *ADR, the AGBA, and Client Control: A Proposal That the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183, 195 (1999) (observing that ADR is generally “not open to the public” and that privacy is an important advantage), with Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 584-85 (1997) (expressing that “critics charge that ADR’s processes are secret” and that it “deliver[s] a skewed brand of justice that flouts structural safeguards, commercializes dispute resolution, exploits inequality of bargaining power, and ultimately fails to provide adequate remedies for weaker parties, such as women, minorities, and those with less economic power”).

119. See Scott Summy & John D. Sloan, Jr., *The Texas Residential Construction Liability Act: Framework for Change*, 27 TEX. TECH L. REV. 1, 19 (1996) (acknowledging that “[t]he 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”). Also, the state web-site for the TRCCA declares that the mission statement for the Commission is to “[p]rovide Texas homeowners and the residential construction industry an opportunity to resolve differences through a neutral dispute resolution process and ongoing education”). TEX. RESIDENTIAL CONSTR. COMM’N, MISSION STATEMENT, at <http://www.trcc.state.tx.us/brochures/CommissionStratPlan.pdf>.

120. See Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357, 357 (2002) (defining “[a]rbitration [as] a form of private dispute resolution, whereby parties agree to have a neutral third party resolve their dispute”). Pre-dispute nonbinding arbitration is where the “award of the arbitration panel is not binding and does not preclude either of them from later seeking a court remedy. However, a party cannot go to court until the arbitration proceeding is completed—i.e., it must exhaust its arbitration remedy before going to court.” *Id.* at 361.

121. TEX. PROP. CODE ANN. § 426.008(a) (Vernon 1995 & Supp. 2004).

122. See John Torigian, *Texas Legislature Regulates Homebuilders*, 67 TEX. B.J. 26, 26 (2004) (portraying the TRCCA as “simplif[ying] the dispute resolution process while leaving open the door to the courthouse at the conclusion of this process”).

123. See Purva Patel, *Splintered Hopes; Crooked Contractors Leave Clients in Shambles*, HOUS. CHRON., Aug. 8, 2004, at D1, available at 2004 WL 83656245 (calculating that the process “can take up t 150 days”).

124. See TEX. PROP. CODE ANN. § 426.004 (Vernon 1995 & Supp. 2004) (providing the rules for the assessment of fees against the party who makes a request under the TRCCA); see also TEXAS RESIDENTIAL CONSTR. COMM’N, *How to File an SIRP Request*, at [http://www.trcc.state.tx.us/Complaints\\_SIRP/HowToFileSIRP.htm](http://www.trcc.state.tx.us/Complaints_SIRP/HowToFileSIRP.htm) (documenting that

tlement process for construction defect claims inherently favors the expertise of builders over the lay-person homeowner.<sup>125</sup> In order to remedy these disadvantages and to provide a desirable alternative forum to consumers, the TRCCA should alter the form of the process to resemble the system currently used by the Better Business Bureau.<sup>126</sup> This system, known as “pre-dispute conditionally binding arbitration,” would allow for the homeowner to pursue a court remedy if unsatisfied with the ruling, but would effectively bind the builder to the Commission’s final ruling, in the event the home owner chooses to forego costly and time-consuming court procedures.<sup>127</sup>

Why bind the builder and not the consumer? First, the builder is more likely to have the resources to challenge the Commission’s ruling and prolong recovery, where a financially strapped consumer may choose to accept.<sup>128</sup> Second, and following these same assumptions, an erroneous ruling leaves a more severe and lasting impact on the consumer than it would with the builder.<sup>129</sup> But, without making the ruling binding on the

the requesting party must pay \$350 for materials and workmanship inspections and \$450 for structural issues, which must be paid before a party receives the right to subsequently proceed with traditional litigation). Many homeowners are first-time buyers, who may have scrounged up every available cent in order to afford the down-payment for their home, making this added expenditure unattainable for some would-be claimants. See Amy L. McDaniel, *The New York Housing Merchant Warranty Statute: Analysis and Proposals*, 75 CORNELL L. REV. 754, 774 (1990) (attesting that “[m]ost homeowners cannot afford to hire expert examiners to inspect for them” because the average home buyer is “very likely mortgaged heavily in order to purchase even a modest unit in a typical housing development . . .”). The inspection fee is only refundable where the inspector finds in favor of the homeowner. TEX. PROP. CODE ANN. § 428.004(d) (Vernon 1995 & Supp. 2004).

125. See Thomas J. Stipanowich, *Reconstructing Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 505 (emphasizing that “homeowners’ lack of technical expertise may place them at a real or perceived disadvantage in negotiations with builders”).

126. BETTER BUS. BUREAU, BBB Auto Line, available at <http://www.dr.bbb.org/autoline/index.asp> (providing information about BBB’s program for consumer complaints against automobile manufacturers). Consumers may accept or reject the decision, except that the ruling is binding on manufacturers. *Id.*; see also Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements By Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1, 14 n.66 (2004) (presenting BBB’s arbitration program for automobile consumers).

127. See Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357, 360-61 (2002) (elaborating on the operation of pre-dispute conditionally binding arbitration). “This structure may or may not be coupled with an exhaustion requirement.” *Id.* at 361-62.

128. See Amy L. McDaniel, *The New York Housing Merchant Warranty Statute: Analysis and Proposals*, 75 CORNELL L. REV. 754, 777 (1990) (exposing the minimal resources of the average homebuyer).

129. See generally Jeffrey C. Nickerson, *When That Dream Home Becomes a Nightmare: Should Emotional Distress Be a Compensable Damage in Construction Defect*

builder, the lengthy process outlined by the TRCCA, increasingly runs the risk of serving merely as a speed bump on the road to court.

## VI. PROPOSALS TO MODIFY THE TRCCA AND SECTION 27 OF THE RCLA

### A. *Exemplary Damages: Are They Recoverable?*

The damage cap provisions in Section 27 of the Property Code discourage improved building practices; even if the dispute breaks free from settlement negotiations, so long as the builder asserted some pre-trial settlement offer, the potential damages facing homebuilders are so slight that they encourage maintenance of the status quo.<sup>130</sup> After all, aside from attorney's fees, recovery will not result in much more than what builders would have had to expend had they constructed the home properly in the first place.<sup>131</sup> Thus, the TRCCA provides no substantial incentive for builders to invest an adequate amount of time and labor in a project to insure that defects are remedied before closing.<sup>132</sup> Extreme damages limitations keep the stakes minimal, and to marginalize poor construction practices in the housing industry.

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*Cases?*, 3 SAN DIEGO JUST. J. 297, 300 (1995) (comparing home construction to the "way a large corporation would manufacture a consumer product," Nickerson promotes the idea that "buyers and sellers are generally not in equal bargaining positions").

130. TEX. PROP. CODE ANN. § 27.004(e) (Vernon 2000 & Supp. 2004). Damages caps are invoked when the homeowner rejects a reasonable settlement offer from the contractor. *Id.* In these situations, the homeowner may not recover more than the contractor's last settlement offer or a reasonable offer to purchase back the home, and attorney's fees are limited to those incurred before the reasonable offer was rejected. *Id.* Even when a contractor does not make a reasonable settlement offer, the homeowner may only recover costs of repair, engineering and consulting fees, costs of temporary housing, reasonable attorney's fees, and the home's reduction in market value, but only if the defect is structural. *Id.* § 27.004(g). In fact, the only way the restrictive damages provisions will not apply is in the highly unlikely situation where a contractor refuses to perform repairs under an accepted offer. *Id.* § 27.004(q).

131. *See* TEX. PROP. CODE ANN. § 27.001(6) (Vernon 2000 & Supp. 2004) (delineating that recovery does not include "exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society"). The damages provisions work to place the plaintiff in the position they contracted for, a defect free house; however, these provisions fail to account for mental anguish, punitive damages, or other harmful consequences.

132. *Contra* Melissa Ludwig, *Agency Would Referee Home Building Fights, Bill Awaiting Governor's OK Is Meant to Settle Disputes Before Binding Arbitration*, AUSTIN AM.-STATESMAN, June 14, 2003, at F1 (stating that home builders believe that the Act provides "more incentive to fix problems to avoid costly arbitration and litigation").

The impact of shoddy construction cannot be minimized.<sup>133</sup> Not only is the property value of the affected homeowner diminished, but neighbors and communities must absorb the impact of the defective work.<sup>134</sup> During boom periods, it is very easy for builders to throw homes together and then leave the state or go out of business.<sup>135</sup> These types of operations cause irreparable damage to homeowners, neighbors and communities, and a lack of firm oversight and punitive consequences only tends to foster these potential occurrences.

In light of these concerns and the statutory language, the question remains for exemplary damages: To recover or not to recover?<sup>136</sup> From one vantage point, exemplary damages are not generally recoverable from contract actions.<sup>137</sup> But, exemplary damages were once available to homeowners under the DTPA.<sup>138</sup> There is no reason that buying a defective automobile is any more significant than buying a defective home, and why exemplary damages should apply in one and not the other.<sup>139</sup> Under the former purchase, exemplary damages are available, while under the latter, a strong argument exists that they are not. At first blush, the definitional section of the TRCCA specifically omits exemplary damages

133. See Loretta Kalb, *For Owners, Pattern's All Too Familiar*, SACRAMENTO BEE, Oct. 13, 1996, at E1 (relating that homeowners who encounter construction defects “lose sleep” and “feel overwhelmed and traumatized”). From the homeowner’s perspective, the damages are not merely those visible to the structure of the home.

134. Cf. Robert C. Ellickson & Charles D. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 348 (1995) (stating that “[d]esign and construction defects in buildings pose risks to occupants as well as neighbors”).

135. See Wendy A. Gable, Comment, *Constructing a Solution to California’s Construction Defect Problem*, 30 MCGEORGE L. REV. 299, 318 (1999) (exposing the ease with which contractors can escape liability for defective construction).

136. TEX. PROP. CODE ANN. § 27.001(6) (Vernon 2000 & Supp. 2004) (limiting “[e]conomic damages” to “compensatory damages for pecuniary loss proximately caused by a construction defect. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.”).

137. See Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 33 n.73 (1985) (observing that, “[g]enerally, punitive damages are unavailable in breach of contract actions”).

138. See Lisa L. Havens-Cortes, Comment, *Melody Home, DTPA, and the Medical Profession*, 45 BAYLOR L. REV. 985, 1002 (1993) (explaining that “under a DTPA cause of action a successful plaintiff may recover attorney’s fees, court costs, and punitive damages in the form of treble damages”).

139. See Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 304 (1999) (asking whether “buying a house or having a home remodeled [is] any less of a strain on a consumer’s mental health than buying a car or another product or service covered by the DTPA”).

from the term “economic damages.”<sup>140</sup> According to the wording of Section 27.004(g), “economic damages” are the only damages recoverable in a law suit arising from a construction defect.<sup>141</sup> The critical inquiry is whether the amended Act preempts common law causes of action<sup>142</sup> and, more importantly, whether the altered damages section attempts to exclude exemplary damages from a plaintiff’s recovery.<sup>143</sup> The answer to this question likely lurks in the historical context of this amendment.

Two pre-TRCCA decisions interpreted the unaltered language of the RCLA in terms of common law causes of action and exemplary damages, despite the limited language of the statute.<sup>144</sup> *Bruce v. Jim Walter Homes, Inc.*,<sup>145</sup> a 1997 decision, upheld the common law cause of action as “not conflict[ing] with the RCLA,” and approved of exemplary damages.<sup>146</sup> In 2001, *Sanders v. Construction Equity*<sup>147</sup> modified this holding and declared that when the common law cause of action “pertains to ‘a matter concerning the design, construction, or repair of a new residence,’ the statute expressly governs the claim.”<sup>148</sup> The court similarly found that since the “RCLA does not mention exemplary damages,” and because

140. See TEX. PROP. CODE ANN. § 27.001(6) (Vernon 2000 & Supp. 2004) (limiting “[e]conomic damages” to “compensatory damages for pecuniary loss proximately caused by a construction defect. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.”).

141. See TEX. PROP. CODE ANN. § 27.004(g) (Vernon 2000 & Supp. 2004) (outlining that “the claimant may recover only . . . economic damages proximately caused by a construction defect”).

142. See *id.* (stating that “[t]his chapter applies to: . . . (b) To the extent of conflict between this chapter and any other law, including the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or a common law cause of action, this chapter prevails.”) (emphasis added).

143. See TEX. PROP. CODE ANN. § 27.001(6) (Vernon 2000 & Supp. 2004) (limiting “[e]conomic damages” to “compensatory damages for pecuniary loss proximately caused by a construction defect. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.”).

144. Compare *Bruce v. Jim Walters Homes, Inc.*, 943 S.W.2d 121, 122 (Tex. App.—San Antonio 1997, writ denied) (upholding a common law cause of action since it “does not conflict with the RCLA” and granting exemplary damages), *with Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 372 (Tex. App.—Beaumont 2001, pet. denied) (finding that the statute governs common law fraud claims, but nevertheless granting recovery for exemplary damages).

145. 943 S.W.2d 121 (Tex. App.—San Antonio 1997, writ denied).

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

147. 42 S.W.3d 364 (Tex. App.—Beaumont 2001, pet. denied).

148. *Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 371 (Tex. App.—Beaumont 2001, pet. denied).

exemplary damages “serve the purpose of punishing the liable party and protecting the public,” the RCLA does not bar recovery of exemplary damages.<sup>149</sup>

Seemingly affirming the first holding in *Sanders*, the legislature implemented a 2003 amendment that explicitly added “a common law cause of action” to “other law[s]” that the RCLA effectively preempted.<sup>150</sup> Was the legislature’s decision to specifically omit exemplary damages from “economic damages” similarly aimed at the second holding in *Sanders*, in order to shelve exemplary damages once and for all? The legislature’s apparent response to the *Sanders* court lends strength to this argument. On the other hand, the *Sanders* court based its decision to grant exemplary damages in part on the understanding that the “damages listed in RCLA are all compensatory damages.”<sup>151</sup> On its face, the 2003 amendment creating the “economic” category of damages moves little from the compensatory damages label given by the *Sanders* court. As such, this controversy remains unresolved, but both sides of the spectrum remain legally viable arguments.

In terms of public policy, exemplary damages offer a desirable result, as they serve the socially desirable end of penalizing willful and knowing offenders of the TRCCA limited warranties, and effectively deter their socially harmful behavior from occurring in the future.<sup>152</sup> In eliminating,

149. *Id.* at 372.

150. See TEX. PROP. CODE § 27.004(g) (Vernon 2000 & Supp. 2004) (stating that “[t]his chapter applies to . . . (b) To the extent of conflict between this chapter and any other law, including the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) or a common law cause of action, this chapter prevails.”) (emphasis added). But, also consider the statement of Bob Bush, attorney for the Texas Association of Builders, given at a March 11, 2003 hearing for the bill. He articulated that “[t]his bill does not, and I want to emphasize this, protect anyone from responsibility, criminally or financially, for acts like fraud, fraudulent inducement, [or] misappropriation of trust funds.” *Texas Residential Construction Commission Act: Hearing on H.B. 730 Before the Regulated Industries Comm.*, 2003 Leg., 78th Sess. (Tex. 2003) (statement of Bob Bush, Attorney for Texas Association of Builders).

151. *Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 372 (Tex. App.—Beaumont 2001, pet. denied) (explaining candidly that “[c]onsidering the different purposes of exemplary and compensatory damages and considering the statute’s purpose to compensate for such things as repair costs,” the language of the statute “refers to compensatory damages, not exemplary damages”).

152. See generally Jeffrey R. Cagle et al., Comment, *The Classification of General and Special Damages for Pleading Purposes in Texas*, 51 BAYLOR L. REV. 629, 695 (1999) (noting that “[e]xemplary damages should be distinguished from other types of damages because they are not ‘suffered’ by the plaintiff, but are imposed by a court as punishment”); Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won’t Be the Last Word*, 37 AKRON L. REV. 779, 780 (2004) (stressing that “[a]lthough the primary purposes they serve may have changed over time, the functions of punitive damages today are commonly agreed to be the punishment and deterrence of extraordinarily wrongful,



the ability to enforce exemplary damages,<sup>153</sup> the TRCCA applies an

willful conduct that is variously characterized as malicious, outrageous, wanton, fraudulent or in deliberate disregard of the interests of others”); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 877 (1998) (stressing that exemplary damages represent the “effect that the prospect of having to pay damages will have on the behavior of similarly situated parties in the future”). The court in *FDIC v. W.R. Grace & Co.* explained the rationale behind employing exemplary damages. *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 623 (7th Cir. 1989). It explained that “[t]he most straightforward rationale for punitive damages, as for fines and other criminal punishments that exceed the actual injury done by (or profit obtained by) the tortfeasor or criminal, is that they are necessary to deter torts or crimes that are concealable.” *Id.* However, the court also stated that:

[c]oncealment is not the only rationale for punitive damages, although no other one is necessary to establish the propriety of an award of punitive damages in this case. Another rationale is that punitive damages provide surer deterrence than actual damages of conduct that we very much want to deter because it is highly anti-social.

*Id.* The court in *Allen v. R & H Oil & Gas Co.* recognized, as an “almost unanimous rule” that “[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.” *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1332 (5th Cir. 1995) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981)).

153. Exemplary damages are made available under Section 41.003 of Texas Civil Practice and Remedies Code:

Standards for Recovery of Exemplary Damages:

- (a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:
  - (1) fraud;
  - (2) malice; or
  - (3) gross negligence.
- (b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.
- (c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.
- (d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.
- (e) In all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:
 

You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (Vernon 2000 & Supp. 2004). It is possible in construction defect cases, if the TRCCA allowed for exemplary damages recovery, for a claimant to prove by clear and convincing evidence to the court that a builder created the

across-the-board standard severely limiting damages and giving shoddy builders every incentive to continue rapidly and haphazardly constructing homes. Exemplary damages would give the TRCCA the “teeth” necessary to combat the root problems in new home construction disputes, and counteract the damages limitations.<sup>154</sup> This is not a recommendation for a liberal or cursory application of exemplary damages, as once feared by contractors of the past, but for a limited and discretionary application to situations where the court finds that the offender has knowingly or willfully violated the state’s limited warranty provisions.<sup>155</sup> To clarify the availability of exemplary damages, the legislature should unambiguously adopt language that explicitly offers exemplary damages in these limited circumstances.

### B. *Modify the Composition of the TRCCA*

A simple, yet important, change to the TRCCA entails a modification in the composition of the Commission itself. Since the Commission employs the inspectors,<sup>156</sup> licenses builders,<sup>157</sup> and is empowered to create

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defect through gross negligence, or in some situations, fraud or malice. However, the TRCCA may have removed this possibility of recovery by excluding exemplary damages. See TEX. PROP. CODE ANN. § 27.001(6) (Vernon 2000 & Supp. 2004) (providing that the term economic damages “does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical imprisonment, or loss of companionship and society”).

154. *But see* Purva Patel, *Consumer Groups Skeptical of New Law: Industry-Created Legislation Creates Dispute Resolution*, HOUS. CHRON., Aug. 8, 2004, at D1, available at 2004 WL 83656245 (quoting Bobby Bowling, president of the Texas Builders Association as saying that the Commission “has some real teeth to it”).

155. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 475 (1993) (O’Connor, J., dissenting) (emphasizing that “time and again, this Court and its Members have expressed concern about punitive damages awards ‘run wild,’ inexplicable on any basis but caprice or passion” (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 9-12 (1991))).

156. TEX. PROP. CODE ANN. § 427.002(a) (Vernon 1995 & Supp. 2004). An inspector’s recommendation establishes a rebuttable presumption for or against the party requesting the inspection. *Id.* § 426.008(a). This presumption may be overcome through proving, by a preponderance of the evidence, that “the recommendation or ruling is inconsistent with the applicable warranty and building and performance standards.” *Id.* § 426.008(a). While homeowners may wish to employ a reputable inspector in their area or one whom they personally trust, the TRCCA does not give this option. Instead, the homeowner must use an inspector provided by the Commission. *Id.* § 426.004. However, home inspections are not conducted exactly the same each time and depend upon the inclinations of the individual inspector. Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC’Y REV. 41, 49 (2004) (indicating that “[i]nspectors differ in their inspection practices and their willingness to impose sanctions”).

157. TEX. PROP. CODE ANN. § 416.001 (Vernon 1995 & Supp. 2004).

the limited warranty provisions,<sup>158</sup> the make-up of the Commission garners the utmost importance.<sup>159</sup> In essence, the standards controlling the construction of every new home in Texas are dictated by the pro-consumer or pro-builder bias of the Commission.<sup>160</sup> Currently, the Commission is comprised of four builders, three members of the general public, one licensed engineer, and one licensed architect or a residential building inspector.<sup>161</sup> Also, two out of the three members of the general public are purported to hold ties to the construction industry.<sup>162</sup> Even if such a relationship did not exist, it is arguable that six of the nine members have a direct financial stake in the Texas construction industry.<sup>163</sup> Thus, the Commission would appear more balanced if it were composed of four members of the general public and three builders. This action would promote public confidence in the Commission's recommendations and statutory warranty provisions by diminishing the industry connection and, therefore, it would remove the potential for bias and favoritism.

### C. *Allow Inspectors to Assign Monetary Value to Repair Work*

Another beneficial change involves amending the prohibition on the inspectors' recommendation of cash payments in lieu of repairs.<sup>164</sup> In-

158. *Id.* § 430.001(a).

159. See Melissa Ludwig, *Agency Would Referee Home Building Fights, Bill Awaiting Governor's OK Is Meant to Settle Disputes Before Binding Arbitration*, AUSTIN AM.-STATESMAN, June 14, 2003, at F1 (mentioning the opinion of Reggie James, of the Consumers Union, that the success of the TRCCA "will depend on the independence and impartiality of a Commission made up mostly of people in the building industry").

160. See Adolfo Pesquera, *Critics Claim Proposed Texas Building Standards Are Far Too Lax*, SAN ANTONIO EXPRESS-NEWS, Jan. 11, 2005 at 1, available at 2005 WL 389051 (arguing that "[c]ritics of the [TRCCA] are concerned that standards to be considered for adoption Wednesday will give shoddy builders too much wiggle room to build sloppy and structurally unsound houses.").

161. TEX. PROP. CODE ANN. § 406.001 (Vernon 1995 & Supp. 2004).

162. See Purva Patel, *Consumer Groups Skeptical of New Law: Industry-Created Legislation Creates Dispute Resolution*, HOUS. CHRON., Aug. 8, 2004, at D1, available at 2004 WL 83656245 (explaining that on the Commission "two of the three chosen from the public also have strong industry ties"). The author notes that "Commissioner J. Paulo Flores is an attorney who represents many contractors and a member of the Hispanic Contractors Association. Patrick Cordero is president of the Midland Community Development Center." *Id.*

163. See TEX. PROP. CODE ANN. § 406.001(a)(1)(3)(4) (Vernon 1995 & Supp. 2004) (requiring that the Commission consist of four builders, one engineer, and an architect or building inspector). The engineer and the architect, as required by TRCCA, base their livelihood on a healthy and expanding construction industry and work hand-in-hand with builders.

164. *Contra* TEX. PROP. CODE ANN. § 428.004(d) (Vernon 1995 & Supp. 2004) (documenting that, "[e]xcept as provided by this subsection, the third-party inspector's recommendation may not include payment of any monetary consideration").

spectors should provide buyers with the option of receiving either the recommended repair work from the builder or the fair market value of the work to be performed. This option is critical in the situation where the homeowner and builder's relations are so eroded that the homeowner no longer trusts that the builder will perform the necessary repairs in a workmanlike manner.<sup>165</sup> With this option, homeowners would have the discretion to select the builder to perform the repairs. After all, if the inspector finds that repair work is in fact necessary, the burden should rest on the builder to remedy the problem in a way that does not penalize the innocent consumer.

#### D. *Provide Guidance on What Constitutes a Reasonable Offer*

When a homeowner files a claim with the TRCCA and a builder makes a settlement offer, the homeowner faces a daunting dilemma: What is a reasonable offer?<sup>166</sup> The TRCCA should provide a provision indicating the confines of a "reasonable offer." Without a definition of a reasonable offer, both builders and homeowners face a quandary over what value is in fact reasonable.<sup>167</sup> Texas courts have considered cases where the reasonable offer language was of issue, however none have yet offered guidance as to what actually constitutes a reasonable offer.<sup>168</sup> Without

165. See Thomas J. Stipanowich, *Reconstructing Construction Law: Reality And Reform in a Transactional System*, 1998 WIS. L. REV. 463, 478 (presenting that "[a] study sponsored by the Construction Industry Institute (CII) found considerable evidence of antagonism and mistrust between owners and contractors").

166. See TEX. PROP. CODE ANN. § 27.004(e) (Vernon 2000 & Supp. 2004) (indicating that when a "claimant rejects a reasonable offer," the claimant cannot recover more than the "fair market value of the contractor's last offer of settlement" or a reasonable settlement offer to purchase the home and the attorney's fees are limited to those "incurred before the offer was rejected or considered rejected").

167. TEX. PROP. CODE § 27.004(e) (Vernon 2000 & Supp. 2004). If the homeowner accepts an offer he believes to be unreasonable, he foregoes the risk of facing the consequences of rejecting a reasonable offer; but he also surrenders the potential to obtain a more substantial reward in court, should the court find the offer unreasonable. On the other hand, if a homeowner rejects an offer later found reasonable in court, he faces the serious consequences of Section 27.004(e).

168. See *Perry Homes v. Alwattari*, 33 S.W.3d 376, 383 (Tex. App.—Fort Worth 2000, pet. denied) (citing as "some" evidence of an unreasonable offer, the court explained that the offer required the homeowner to initially pay 40% of the costs, "with a promise of future reimbursement," and for the homeowners to release all adverse claims against the builder"); *O'Donnell v. Roger Bullivant of Tex., Inc.*, 940 S.W.2d 411, 420 (Tex. App.—Fort Worth 1997, writ denied) (holding that, since "Bullivant did not file any summary judgment evidence to controvert Bitting's and O'Donnell's affidavits," the offer was unreasonable "as a matter of law"); *Fontenot v. Kimball Hill Homes Tex., Inc.*, No. 14-03-00347-CV, 2004 Tex. App. LEXIS 1208, at \*7 (Tex. App.—Houston [14th Dist.], Feb. 10, 2004, no pet.) (mem. op.) (finding that since the homeowners did not contest the evidence supplied by Kimball Hill, the court "consider[ed] Kimball Hill's offer to repair reasonable").

guidance, the construction industry and the consumer are left with a difficult decision: Take a gamble in court, or avoid the gamble and settle. Carefully drafted language developed by the legislature could address the problem. A proposed clause might define a reasonable offer as one that amounts to not less than the fair market value of all reasonably necessary repair work, all reasonable attorney fees, if any, and all temporary lodging costs, if any, incurred up until the date of the settlement offer. The fair market value of all reasonably necessary repair work could be fairly determined by the state-sponsored inspector, subject to the current appeal process to the Commission.

#### E. *Develop Testing Requirements for Builder Licensing in Texas*

A multitude of occupations in Texas require the applicant to pass a proficiency test.<sup>169</sup> Why is the construction industry any different and why should builders enjoy an exemption from proving a basic aptitude for construction? This requirement should not serve to unreasonably limit competition in the industry, but should serve the simple requirement of showing basic and elementary competence in the construction trade.<sup>170</sup> The TRCCA could generate a test of its own, or borrow the testing re-

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169. See TEX. GOV'T CODE ANN. § 419.032(a)(1) (Vernon 1998 & Supp. 2004) (explaining that fire department personnel must complete a "preparatory program of training"); TEX. HEALTH & SAFETY CODE ANN. § 773.050(b)(4) (Vernon 2003 & Supp. 2004) (requiring applicants for emergency medical services personnel to receive an examination); TEX. INS. CODE ANN. § 4051.203 (Vernon 2004) (requiring insurance agents to take an examination "that fairly tests knowledge of the information" in a course defined by statute); TEX. OCC. CODE ANN. § 164.052 (Vernon 2004) (requiring physicians to pass an examination, prior to licensing); TEX. OCC. CODE ANN. § 501.256(a) (Vernon 2004) (prescribing an examination for psychologists prior to licensing); TEX. OCC. CODE ANN. § 1001.310(b)(2) (Vernon 2004) (requiring applicants for an engineering license to pass a "national or other examination recognized by the board"); TEX. OCC. CODE ANN. § 1305.162(b) (Vernon 2004) (demanding that all electricians pass an examination to "test the knowledge of the applicant about materials and methods used in electrical installations related to the activities that may be performed"); TEX. OCC. CODE ANN. § 1701.304(a) (Vernon 2004) (directing law enforcement personnel to take and pass an examination "at least four times each year"); TEX. REV. CIV. STAT. ANN art. 179e §3.07(c) (Vernon 1969 & Supp. 2004) (requiring stewards or judges of horse races to "take and pass both a written examination and a medical examination annually"). While some of these listed professions involve emergency care personnel, others, like electricians and engineers, are more synonymous with builders. This begs the question: Why do builders receive an examination exemption from the state?

170. See A. Scott McDaniel, *The Good, the Bad, and the Unqualified: The Public Interest and the Unregulated Practice of General Contracting in Oklahoma*, 29 TULSA L.J. 799, 801 (1994) (advocating that a sufficiently stringent licensing scheme "allows consumers to evaluate general contractors and to verify at least minimum competency").

quirements of other states, such as North Carolina,<sup>171</sup> New Mexico<sup>172</sup> or Arkansas,<sup>173</sup> which require all builders to pass a basic exam before receiving the state's stamp of approval. Considering the heavy builder representation on the TRCCA,<sup>174</sup> this requirement should not represent a burdensome challenge. Requiring testing would promote consumer confidence in Texas, and would likely limit the quantity of builder-consumer disputes by increasing the overall competency level of builders.

## VII. CONCLUSION

The story of real estate law documents the perennial struggle between buyers and sellers.<sup>175</sup> Historically, once sellers have obtained a relative advantage, a commensurate adjustment ensues to alleviate the burden on buyers, and vice versa.<sup>176</sup> The enactment of the TRCCA represented another event in the teetering balance of residential construction law.<sup>177</sup>

171. See N.C. GEN. STAT. § 87-10(b) (2003) (requiring, as a prerequisite to licensing, that a contractor receive an oral or written examination to measure the “practical application of the applicant’s knowledge of the profession of contracting”); Purva Patel, *Splintered Hopes: Crooked Contractors Leave Clients in Shambles*, HOUS. CHRON., Aug. 8, 2004, at D1 (contrasting the TRCCA, which does not require “showing any proficiency in the trade,” with North Carolina, which requires builders to pass an exam in order to meet licensing requirements).

172. See N.M. STAT. ANN. § 60-13-16(A) (Michie 2004) (declaring that “no certificate of qualification shall be issued to an individual desiring to be a qualifying party until he has passed with a satisfactory score an examination approved and adopted by the division”).

173. See ARK. CODE ANN. § 17-25-306(b) (Michie 2001) (requiring contractors to pass an examination prior to licensing).

174. See TEX. PROP. CODE ANN. § 406.001(a) (Vernon 1995 & Supp. 2004) (requiring that the Texas Residential Construction Commission consist of four registered builders, three members of the general public, one licensed engineer who practices residential construction, and one architect who practices residential construction).

175. See generally Lynn Y. McKernan, Note, *Strict Liability Against Homebuilders for Material Latent Defects: It’s Time, Arizona*, 38 ARIZ. L. REV. 373, 373 (1996) (documenting the changing landscape of residential construction).

176. See generally Wendy A. Gable, Comment, *Constructing a Solution to California’s Construction Defect Problem*, 30 MCGEORGE L. REV. 299, 304-05 (1999) (recalling the historical changes in the law surrounding the purchase of a new home as the industry moved from *caveat emptor* to the doctrine of implied warranty). Specifically, as the housing industry evolved after World War II toward the mass production of homes on “large tracts of land owned by developers,” there resulted an “unequal bargaining power between the buyer and seller.” *Id.* at 305. In response, “courts extended the doctrine of implied warranty to home sales transactions.” *Id.*

177. See Melissa Ludwig, *Agency Would Referee Home Building Fights, Bill Awaiting Governor’s OK Is Meant to Settle Disputes Before Binding Arbitration*, AUSTIN AM.-STATESMAN, June 14, 2003, at F1 (recognizing that “[r]eaction to the passage of the Texas Residential Construction Commission Act” falls “on one side of the spectrum or another”).

*Caveat emptor* led to the creation of the implied warranty.<sup>178</sup> The implied warranty led to the DTPA,<sup>179</sup> and this, in turn, led to the RCLA.<sup>180</sup> Now, the TRCCA follows the RCLA by disproportionately advancing the interests of builders.<sup>181</sup> In the current market, however, consumers increasingly stand in a powerless position; purchasers of consumer goods often have little bargaining power, and this is largely the truth for new home buyers.<sup>182</sup>

In many ways, the purchase of a new home closely resembles the ordinary sale of a mass-produced consumer good.<sup>183</sup> New homes are often purchased on the representation of a "model home," and are constructed by a large corporate developer.<sup>184</sup> In terms of warranty provisions, the

178. See James R. Pomeranz, Note, *The State of Caveat Emptor in Alaska As It Applies to Real Property*, 13 ALASKA L. REV. 237, 239-40 (1996) (explaining that the implied warranty arose due to the mass production of housing following World War II, which "left buyers unable to closely inspect the real estate for defects prior to purchase").

179. See Richard F. Whiteley, Comment, *The Scope of the Residential Construction Liability Act in Texas*, 36 HOUS. L. REV. 277, 291 (1999) (stating that "[t]he DTPA was, ab initio, decidedly pro-consumer"). The DTPA represented another step in favor of consumers. *Id.* However, the implied warranty did not go far enough to protect the interests of consumers. "Before the DTPA, consumers had been strapped with causes of action which provided meager remedies that made most litigation economically impossible." *Id.* at 292.

180. See TEX. PROP. CODE ANN. § 27 (Vernon 2000 & Supp. 2004) (defining the Residential Construction Liability Act).

181. See *Builders' Protection Act?; Homeowners Need More Than Plan Provides*, DALLAS MORNING NEWS, Feb. 13, 2003, at 24A (noting that consumer groups worry that the Commission will become a hurdle for homeowners and that the review process will effectively wear down most homeowners); William M. Coats, *The Winds of Austin, TEX. CONSTR.*, Dec. 2003, available at <http://texas.construction.com/opinions/law/archive/2003/0312.asp> (last visited Jan. 25, 2005) (opining that the home registration fee "may seem like a slap in the face to homeowners who will now have to pay to have the right to a prompt suit and implied warranties taken away from them"); Purva Patel, *Consumer Groups Skeptical of New Law: Industry-Created Legislation Creates Dispute Resolution*, HOUS. CHRON., Aug. 8, 2004, at D1, available at 2004 WL 83656245 (quoting Cheryl Turner, a consumer attorney in Dallas, as declaring that the TRCCA has "just created another layer of bureaucracy and expense for homeowners").

182. Charles L. Armstrong, Note, *Who Pays the Price for Defective Home Construction? A Note on Buecher v. Centex Homes*, 53 BAYLOR L. REV. 687, 711 (2001) (asserting that "[t]he very existence of the Humber warranty supports the view that new home purchasers are in an inferior bargaining position compared to builder/vendors"); Wendy A. Gable, Comment, *Constructing a Solution to California's construction Defect Problem*, 30 MCGEORGE L. REV. 399, 305 (1999) (explaining the lack of bargaining power held by modern new home purchasers).

183. See Jeffrey C. Nickerson, *When That Dream Home Becomes a Nightmare: Should Emotional Distress Be a Compensable Damage in Construction Defect Cases?*, 3 SAN DIEGO JUST. J. 297, 300 (1995) (comparing home construction to the "way a large corporation would manufacture a consumer product").

184. See Michael D. Lieder, *Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase*, 66 WASH. L. REV. 937, 981 (1991) (stating

consumer good comes with a warranty, as does the new home.<sup>185</sup> Under the limited, express warranty proposed by the TRCCA, the home is now, seemingly, just as warranted as the consumer good. However, the warranty of the consumer good, enforced through the DTPA, has “teeth,” while the new home warranty, enforced through the TRCCA, does not.<sup>186</sup> Without exemplary damages, the TRCCA is simply a bump in the road for contractors who knowingly and willfully construct homes in a defective manner.<sup>187</sup> From the consumer perspective, even in the event that they win in court, the potential recovery is essentially limited to what they should have received in the first place: A home free from serious defects.<sup>188</sup> A provision for exemplary damages for willful or knowing violations of the statutory warranty provisions would encourage more attention to detail in new home construction, and eliminate the incentive to rapidly and haphazardly construct new homes.<sup>189</sup> A correlative result of giving “teeth” to the TRCCA limited warranty will, in essence, reward builders who have been properly constructing homes by penalizing those

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that “[m]any homes are constructed by developers without the buyer even viewing the structure until after it is complete”).

185. See TEX. PROP. CODE ANN. § 430.002(a) (Vernon 1995 & Supp. 2004) (stating that “each new home or home improvement shall include the warranty of habitability”); *id.* § 430.006 (establishing that the limited “warranties established under this chapter supersede all implied warranties”); see also Frank L. Branson, *Personal Torts*, 47 SMU L. REV. 1493, 1515-16 (1994) (explaining the consumer protection offered by the DTPA). The new home is protected by the implied warranty of habitability and the limited warranty provisions of the TRCCA.

186. See TEX. PROP. CODE ANN. § 27.003 (Vernon 2000 & Supp. 2004) (outlining the recovery limitations placed upon homeowners, in which exemplary damages are excluded); see also Frank L. Branson, *Personal Torts*, 47 SMU L. REV. 1493, 1516 (1994) (articulating that, “[i]n a claim involving product liability and DTPA allegations, the plaintiff may recover both statutory penalties and exemplary damages”).

187. *But see* Melissa Ludwig, *Agency Would Referee Home Building Fights, Bill Awaiting Governor’s OK Is Meant to Settle Disputes Before Binding Arbitration*, AUSTIN AM.-STATESMAN, June 14, 2003, at F1 (opining that “[h]ome builders praise [the Act] as an unbiased way of resolving homeowner complaints” and that the Act provides “builders more incentive to fix problems to avoid costly arbitration and litigation”).

188. See TEX. PROP. CODE ANN. § 27.001(6) (Vernon 2000 & Supp. 2004) (outlining the limited damages provisions available to homeowners). The worst case scenario for a builder would require payment within the damage caps, which hovers not far from the fair market price of the home. *Id.*

189. See Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won’t Be the Last Word*, 37 AKRON L. REV. 779, 780 (2004) (stressing that “[a]lthough the primary purposes they serve may have changed over time, the functions of punitive damages today are commonly agreed to be the punishment and deterrence of extraordinarily wrongful, willful conduct that is variously characterized as malicious, outrageous, wanton, fraudulent or in deliberate disregard of the interests of others”).



that do not.<sup>190</sup> The root problem underlying construction defect disputes does not originate within the actions of the consumer, but within the shoddy construction work performed by the contractor.<sup>191</sup>

Aside from the tangible burdens presented by the TRCCA process, the Act fails to define what constitutes a reasonable settlement offer.<sup>192</sup> The importance of such a definition cannot be overstated. If a consumer refuses a reasonable settlement offer, not only has he potentially forfeited subsequent attorney's fees, but he also will have wasted precious judicial resources.<sup>193</sup> With a clear, yet workable definition, fewer conflicts will necessitate the dispute resolution process because more cases will settle out of court, and therefore, fewer will use the traditional legal system.<sup>194</sup>

Along with addressing internal problems in the residential construction industry, these changes will also foster consumer and public confidence in new home purchasing and increase property values within communities.<sup>195</sup> Some of the internal recommendations—requiring testing of

190. See *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1332 (5th Cir. 1995) (recognizing, as an “almost unanimous rule” that “punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct”) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981)). The reward comes from forcing offenders to reduce their harmful activity, or by forcing offenders to exist the industry entirely.

191. See Wendy A. Gable, Comment, *Constructing a Solution to California's Construction Defect Problem*, 30 McGEORGE L. REV. 299, 305, 317-18 (1999) (noting that “homebuyers point to shoddy construction and careless builders as the root of the litigation problem in California”); see also Kenneth Kasdan, *New Solutions Required to Eliminate Shoddy Homes*, BUS. PRESS (Cal.), Apr. 8, 1996, at 27 (indicating that construction defect litigation would greatly diminish if contractors used an appropriate level of care when constructing homes); Melissa C. Tronquet, Comment, *There's No Place Like Home . . . Until You Discover Defects: Do Prelitigation Statutes Relating to Construction Defect Cases Really Protect the Needs of Homeowners and Developers?*, 44 SANTA CLARA L. REV. 1249, 1286 n.264 (2004) (finding that “[a]lthough the legislative focus on construction defects is the abundance of litigation, poor construction is the root of this litigation. Consequently, use of legislation to solve defect problems should include measures to resolve current problems as well as discourage future problems.”). The author presents the problems associated with legislative solutions. *Id.* at 1272-73.

192. See TEX. PROP. CODE ANN. § 27.004 (Vernon 2000 & Supp. 2004) (explaining the ramifications of both rejecting and failing to make a reasonable offer of settlement).

193. See TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 1997) (declaring that “[i]t is the policy of this state to encourage the peaceable resolution of disputes . . . through voluntary settlement procedures”).

194. See, e.g., *Liberty Mut. Ins. Co. v. Garrison Contrs.*, 966 S.W.2d 482, 484 (Tex. 1998) (ascertaining the definition of “person”); *Coalition of Texans with Disabilities v. Smith*, No. 03-99-00064-CV, 1999 Tex. App. LEXIS 7629, at \*16 (Tex. App.—Austin, Oct. 14, 1999, no pet.) (clarifying the definition of “ritual”).

195. See Amy L. McDaniel, Note, *The New York Housing Merchant Warranty Statute: Analysis and Proposals*, 75 CORNELL L. REV. 754, 778 (1990) (arguing that higher stan-

builders, altering the composition of the Commission, and making the inspectors finalized recommendation binding on builders—may not actually produce any immediate tangible or visible results. However, the strength of the new home industry relies upon consumer confidence, which is cultivated through intensely regulating the construction industry.<sup>196</sup> In an era where virtually every industry is regulated, why not make the construction industry subject to the same scrutiny?<sup>197</sup> This Comment does not necessarily endorse repealing the TRCCA in accordance with the sunset provision in 2009. But, in order to support a balanced framework for both consumers and builders, builders must be willing to make concessions.

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dards in the building industry “will increase consumer confidence” and that “enhanced consumer confidence in home building should benefit the building industry in the long run”).

196. *Id.*

197. See A. Scott McDaniel, *The Good, the Bad, and the Unqualified: The Public Interest and the Unregulated Practice of General Contracting In Oklahoma*, 29 TULSA L.J. 799, 806 (1994) (advocating the testing of contractors in order to “meet minimum requirements of competency and responsibility”). At a minimum, the TRCCA should regulate builders through stringent licensing requirements which require a showing of competency in building standards. *Id.*