

HERMES SARGENT BATES

A LIMITED LIABILITY PARTNERSHIP

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Points of interest:

- A recent Fort Worth Court of Appeals case limits the applicability of the RCLA's protections available to contractors, and underscores the need for contractors to closely follow the instructional provisions of the statute in order to benefit from the damage limitations and defenses to liability the RCLA provides.
- The recent flurry of mold-related claims may open the door for contractors to merge traditional construction defect and products liability defense strategies.

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RECENT CASE LAW DEVELOPMENT ON RESIDENTIAL CONSTRUCTION LIABILITY ACT [home](#)

Enacted in 1989, the Texas Residential Construction Liability Act ("RCLA") governs actions to recover damages for residential construction defects, except for claims for personal injury, survival, or wrongful death or for damages to goods, and applies not only to defects in the construction of a new residence, but also to defects in an alteration of or addition to an existing residence. *(For an in-depth discussion about the defenses and damage limitations provided by the RCLA, as well as prior case law interpreting the RCLA, see HSB's Construction Litigation Manual.)*

Since its enactment, the RCLA has afforded contractors various protections against construction defect claims. For example, the RCLA requires that a contractor who receives proper notice of a construction defect must, within 35 days of receiving such notice, make a written request to inspect the property and then actually inspect the property that is the subject of the complaint. Within 45 days after the date the contractor receives written notice of the claim, the contractor may make a written offer of money, an offer of repair, or an offer to cure the construction defect. If the claimant unreasonably rejects the contractor's settlement offer or refuses to permit the contractor to repair the construction defects, the claimant's damages are ultimately limited to: (1) the reasonable



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cost of repairs necessary to cure the construction defect; and (2) the reasonable attorney's fees and costs incurred before the contractor's offer was rejected. The claimant's damages in a suit governed by the RCLA are capped at the claimant's purchase price of the home.

Moreover, to the extent that the RCLA conflicts with other law, including the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA") the RCLA prevails. This preemption provision can be vitally important to contractors, as it eliminates the possibility that the amount of a homeowner's monetary damages will be trebled under the DTPA.

The holding of a recent case from the Fort Worth Court of Appeals limits a contractor's ability to rely on these protections provided by the RCLA, and underscores the importance that a contractor strictly follow the RCLA's statutory requirements. In *Perry Homes v. Alwattari* (33 S.W.3d 376 (Tex. App.—Fort Worth 2000, pet. filed)), the court discussed its prior opinion in *O'Donnell v. Roger Bullivant of Texas, Inc.*, (940

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S.W.2d 411 (Tex. App.—Fort Worth 1997, writ denied)), holding that the RCLA’s limitation on the amount of recoverable damages did not apply when the contractor failed to make a reasonable settlement offer. The *Alwattari* court readdressed the issue, and overruled its prior *O’Donnell* holding to the extent that the prior holding stated that the only limitation on damages that does not apply when a contractor fails to make a reasonable settlement offer is the limitation on *amount* of damages recoverable by a claimant. Expanding its earlier interpretation, the *Alwattari* court held that the effect of a contractor’s failure to make a reasonable settlement offer pursuant to the RLCA is as follows: the contractor loses the benefit of *all* of the statute’s limitations on damages and defenses to liability, including both the limitations on the *types* of damages recoverable and on the *amount* of damages recoverable. Perhaps more important in the court’s opinion is the implicit effect the holding has on the RCLA’s preemption clause. Because the jury in *Alwattari* found that the contractor had not made a reasonable settlement offer, the contractor thus lost the availability of the limitations on the types and amounts of damages and the defenses to liability that would have otherwise applied under the RCLA. When these damage limitations and defenses were eradicated, there no longer existed any conflict between the provisions of the RCLA and the provisions of the DTPA, and the RCLA thus no longer acted to preempt the homeowners’ DTPA claims.

Thus, in order to take advantage of the damages, defenses, and preemption benefits of the RCLA, contractors must make sure to provide claimants with an offer of repair or settlement that is timely, is in writing, and that a jury will likely consider to be reasonable.

MERGING OF CONSTRUCTION DEFECT AND PRODUCTS LIABILITY DEFENSE STRATEGIES

One of the hottest new areas in construction defect and toxic tort litigation, that involving “sick building syndromes” and/or mold claims, is altering the traditional defense strategies employed in construction defect litigation. Featured on *48 Hours*, *NPR*, and a multitude of local news programs across the country, mold claims are rapidly becoming a staple element of construction defect and toxic tort litigation, and have thereby opened the door for defense attorneys to utilize products liability statutes and doctrines in defending construction clients. (Look for future HSB newsletter articles to provide a general overview and current analysis of mold litigation claims.)

Although mold growth allegedly can be prompted by a multitude of causes (including chemical off-gassing from carpet fibers, carpet backing, paint, coverings on walls, ceilings and floors, etc.), construction defect claims of moisture intrusion are typically at the heart of the rapidly growing number of mold cases. Allegedly, excessive moisture in a building fosters the

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growth of living organism molds, which in turn produce various harmful mycotoxins. Thus, lawsuits whose claims begin essentially as construction defect/property damage in nature (complaining of water leakage or drainage problems) can quickly develop into personal injury suits (as mold infestation is alleged to cause or exacerbate headaches, respiratory problems, allergies, and brain and nervous system disorders). Moreover, the possibility exists that these suits can diverge into the products liability arena as well.

Chapter 82 of the Texas Civil Practice & Remedies Code, commonly referred to as the “Products Liability Statute,” states in relevant part: “A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action” Under the statute, a “manufacturer” is defined as “a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.” A “seller” means “a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.” And a “products liability action” is defined as follows:

“[A]ny action against a manufacturer or seller for recovery of damages arising out of personal injury, death or property damage allegedly caused by a defective

product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.”

Thus, for example, in a mold case in which alleged moisture intrusion is caused by a defectively manufactured product (*i.e.*, a vapor barrier, pipe, of HVAC unit), the general contractor or subcontractor who incorporated the allegedly defective product into the house or building he constructed (and who therefore arguably qualifies as a “seller” under the above definition) may want to consider seeking indemnity from the manufacturer under the products liability statute, essentially converting a construction defect claim into a products liability action.

Historically, courts have not considered residential houses or commercial buildings to be “products,” as that term is used in the products liability context. Recently, however, courts and legal treatises have expanded the definition of “products” to include sellers of improved real property as “product sellers” in a number of contexts. The Restatement (Third) of Torts § 19 defines “product” as “tangible personal property distributed commercially for use or consumption.” Section 19 goes on to note that “other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution.” and use of tangible personal property Comment e to § 19 notes three

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scenarios in which courts around the country have treated contractors as product sellers entitled to products liability indemnity: (1) when the structure built by the contractor contains a variety of appliances or other manufactured equipment (even though, for other legal purposes, that built-in equipment may be considered to be attachments to the underlying real property); (2) when the building is prefabricated; and (3) when dwellings are mass-produced and sold, such as is the case with tract housing projects.

Texas courts have yet to follow this trend in expanding the definition of “product sellers” to the point of including contractors who build and sell residential or commercial properties on a smaller or more isolated scale. Eleven years ago, the Dallas Court of Appeals in *Barham v. Turner Construction Company of Texas* (803 S.W.2d 731 (Tex. App.—Dallas 1990, writ denied)) held that a general contractor of a commercial construction project was not subject to strict liability in a products liability context when a subcontractor’s employee was injured on the jobsite by a falling steel erection plate. Regardless of the fact that the general contractor incidentally sold the columns and plates as part of its contract to construct a building, the court held that the contractor was, at most, an occasional seller of the products. The court stated that the general contractor was in the business of selling its services as a general contractor, and was not in the business of selling the steel columns and erection plates that caused the

plaintiff’s injury. Because the contractor was not a product seller, it could not be held strictly liable in a products liability action (and by implication, was not entitled to indemnity from the product manufacturer).

Despite this earlier holding, as the frequency with which mold litigation appears in Texas courts increases, it is not difficult to foresee the possibility of a legal expansion of the definition of “product sellers” that would include contractors of any type and on any scale, or to imagine that the concepts and defense strategies of traditional construction defect and products liability litigation will merge in Texas as they have begun to do in other states.

As a final note, contractors should be aware that even if this merger becomes commonplace in Texas litigation, certain limits to the indemnification available to the contractor under the Products Liability Statute would apply. For example, under Chapter 82 of the Civil Practices and Remedies Code, the contractor, as a seller, would not be entitled to indemnity from a manufacturer for any loss that was caused by the contractor’s/seller’s negligence or other conduct for which the contractor/seller is independently liable. Thus, if the manufacturer could establish any misuse, misapplication, or misinstallation of the product by the contractor, the contractor would lose its right of indemnify from the manufacturer. However, this hurdle is not a simple one for the manufacturer to clear. In *Meritor Automotive, Inc. v.*

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Ruan Leasing Company (2001 WL 299090, March 29, 2001), the Texas Supreme Court recently held that the exception to a manufacturer's duty to indemnify a seller pursuant to the Products Liability Statute is only established by an actual *finding* of the contractor's/seller's independent liability. Thus, the manufacturer's mere *allegation* of the contractor's/seller's independent culpability would not be enough to defeat the contractor's/seller's indemnity claim, and the contractor/seller would be entitled to indemnity from the manufacturer up to and until that point in time where the manufacturer established the contractor's/seller's negligence. (For further discussion of the *Ruan Leasing Company* case, see the HSB newsletter article on products liability.)