CONSTRUCTION LAW – TEXAS – 2015

WHAT YOU NEED TO KNOW ABOUT CONSTRUCTION LAW – AND PROBABLY DON'T

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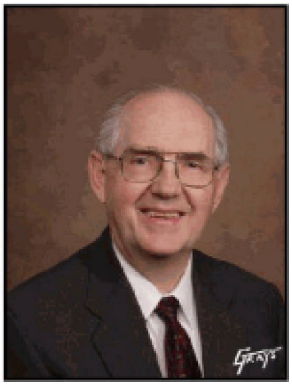

BIOGRAPHICAL INFORMATION

EDUCATION:

B.A. in Government & Economics, University of North Texas (1953)
L.L.B., University of Texas (1956)

PROFESSIONAL ACTIVITIES:

Board Certified in Civil Trial Law
Member of Texas Bar Association, Amarillo Bar Association, Fifth Circuit Federal Bar Association, Consumer Law Section of State Bar Association
Advocate [Rank], American Board of Trial Advocates, Past President of Panhandle Region of Tex ABOTA
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City Attorney, City of Amarillo, Texas, 1956-1958

LAW RELATED PUBLICATIONS, ETC.:

Author/Speaker for the State Bar of Texas
- 1986-1994 Advanced Civil Trial Course on Deceptive Trade Practice Act
- 1991-1993 Litigation Update — Multiple Submissions of DTPA
- 1992-1993 Advanced DTPA - Consumer Law Course
- 1992-1994 Advanced Personal Injury
- 1993 Advanced DTPA/Insurance/Consumer Law Course
- 2000 23rd Annual Civil Trial Course

Author/Speaker for the University of Texas
- 1989-1992 DTPA Conference
- 1994 DTPA Conference

Author/Speaker for the 1990 Texas Regional Judicial Conferences, DTPA Overview
Author/Speaker for the South Texas College of Law
- 1992 Advanced Personal Injury
- 1993 Advanced Civil Trial Law

Author/Speaker for the Cameron County Bar Association
- 1992 Civil Trial Mini-Course — "DTPA Update"

Author of book entitled **A Strategic Grasp of the DTPA** presented at the 1993 Advanced DTPA/Insurance/Consumer Law Course for the State Bar of Texas. Awarded Outstanding Seminar Article of 1993 by t he Professional Development Program of the State Bar of Texas.

Author of book entitled **The Deceptive Trade Practice Act and Premises Liability** dated May 18, 1993, published by Tungsten Publishing Company.

Author/Speaker for Texas Trial Lawyers Association
1993 South Padre Island Seminar - **Hot Tips for Hot Times**
1994 Advanced Premises Liability Seminar - January 20-21, 1994
1994 Multiple Causes of Action Seminar - May 20-21, 1994

Author of article entitled **The DTPA and Premises Liability** published in the Trial Lawyer's *Forum*, Volume 27, No. 2, 1993 on pages 21-28.

Author/Speaker for Amarillo Bar Association - 1994 Annual Spring Institute

Author/Speaker of "**Court's Charge Rule 277 Broad Form Submission**" presented at the 23rd Annual Civil Trial Course for the State Bar of Texas, September-November, 2000.

Author/Speaker of "**The DTPA is Alive and Well**" Webcast presented for the State Bar of Texas, September 12, 2006

Author/Speaker of "Ethical Considerations in Landlord-Tenant Law" and "Lease Provisions and Issues: Planning Ahead to Avoid Problems" presented at the Landlord-Tenant Law Update in Texas for Sterling Education Services, October 27, 2010

PROFESSIONAL AWARDS

1993 Recipient of Outstanding Achievement in Continuing Education Award from College of State Bar of Texas

2013 Recipient of the Temple Houston Award from the Texas Panhandle Trial Lawyers Association.

COMMUNITY ACTIVITIES

President, Santa Fe Historical Railway Museum, Amarillo, Texas

Chairman, Advisory Committee to the Office of Continuing Education of West Texas A&M University

Curator, Fred Poppe Scout Museum 1615 Bellaire Street, Amarillo, Texas 79106

Curator, Winfred and Elizabeth Moore Memorial Bible Collection, First Baptist Church of Amarillo, 13th at Tyler Street, Amarillo, Texas 79102

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MOST INTERESTING–BUT– DANGEROUS LAW WORK: Texas Regional attorney for the N.A.A.C.P. from 1972-1980; integrating public schools in Texas, New Mexico and Arizona. Obtained a practical education on how to stay alive. In all of life's studies regarding tolerance, never learned to be tolerant of the KKK.

CONSTRUCTION LAW

PURPOSE: The purpose of this paper is to introduce the practicing trial attorney to the most basic Texas law related to the construction industry. This presentation will review the laws applicable to the construction of residences and commercial buildings. These rules apply also to construction of industrial structures and publicly funded construction contracts but do not include rules related to environmental concerns, toxic concerns, radiation concerns, bidding requirements, bonding, etc., which are outside the scope of this paper. This paper is to assist the litigator on either side of the dispute to get a quick grasp of the rules applicable to construction law litigation.

CHAPTER 1 – APPLICABLE LAWS

I. **WHAT YOU CANNOT SEE CAN HURT YOU**: In every construction contract, whether oral or written, there are stringent and binding terms and conditions that may not be set forth in the contract's language but are never-the-less applicable and binding on the parties to the construction process and the financing of the project. Failure to insert them into the agreement language or to acknowledge their existence does not obviate their impact on the transaction. Many contractors and most owners are not aware of the existence of these terms and conditions. In this chapter, we hope to set forth most of them. Most fall in the following categories:

A. STATUTES, REGULATIONS AND ORDINANCES – PART OF THE CONTRACT;
B. STATUTORY IMPLIED WARRANTIES
C. COMMON LAW IMPLIED WARRANTIES
D. DTPA OVERLAY
E. EXPRESS WARRANTIES B&CC: Sec. 2.313.
F. TRUST FUND STATUTE -- PROTECTION OF THE OWNER'S CONSTRUCTION FUNDS
G. RETAINAGE – PROPERTY CODE CHAPTER 53

We shall deal with each of these categories separately.

A. **Statutes, Regulations and Ordinances – Part of the Contract:** Federal statutes and regulations, state statutes and regulations and municipal ordinances existing at the time a construction contract that relate to the subject matter of the construction contract whether written, oral or both, become part of the contract and govern the transaction as if they were expressly set out in the contract. Simply stated: (1)parties to a construction contract may not agree to violate the law; or (2) when the parties violate laws and ordinances through intention or ignorance, they have not repealed the statutes or ordinances – they still apply.

1. STATE STANDARD**:** ***McCreary v. Bay Area Bank & Trust,*** 68 S.W.3d 727 (Tex. App. Houston 14th Dist. 2001). ". . . it is well settled that the laws which are in existence at the time of the making of the contract enter into and become a part of such contract as if expressly referred to or incorporated therein. ***Griffin's Estate v. Sumner***, 604 S.W.2d 221, 230 (Tex.Civ.App.—San Antonio 1980, writ ref'd n.r.e.)." ***Wessely Energy Corp. v. Jennings,*** 736

S.W.2d 624 (Tex.,1987): ***Luling Oil & Gas Co. v. Humble Oil & Refining Co. ,144*** Tex. 475, 191 S.W.2d 716 (Tex. 1946) "When an agreement is silent or obscure as to a particular subject, the law and usage become a portion of it and constitute a supplement to it and interpret it.' ***Langever v. Miller,*** 124 Tex. 80, 76 S.W.2d 1025, 1026–27 (1934). . . . The laws existing at the time a contract is made becomes a part of the contract and governs the transaction."

2. FEDERAL STANDARD: ***United States of America v. Estate of Parsons***, 367 F.3d 409, 418 (5th Cir. 2004): "Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." ***Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond***, 262 U.S. 649, 660, 43 S.Ct. 651, 655, 67 L.Ed. 1157 (1923). ***Norfolk and Western Railway Co. V. American Train Dispatchers' Association***, 499 U.S. 117, 129–30 (1991). "[T]he law . . . existing at the time a contract is made becomes a part of the contract and governs the transaction." ***Tex. Nat'l Bank v. Sandia Mortgage Corp***., 872 F.2d 692, 698 (5th Cir.1989) (applying Texas law). When the government and Parsons entered into this agreement, abatement did not require the return of penalties paid before a defendant's death. Nothing in the agreement or the specific facts of this case suggests that the parties intended to avoid that pre-existing rule."

a. Caveat: Extraterritorial Jurisdiction of Cities: Municipal regulations that may be included in construction contracts, involve the zoning and water protection ordinances of cities that are extended to their "extraterritorial jurisdiction" [5,000 feet outside the city limits]. If these ordinances impact a construction contract, they will apply. However, the powers of a city related to usage of land in the municipal "extraterritorial jurisdiction" is limited. A quick review of the limitations of powers given to the cities of Texas to regulate in these areas, are embodied in Local Government Code § 212.003:

Extension of Rules to Extraterritorial Jurisdiction: (a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances relating to access to public roads or the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health. However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:

(1) the use of any building or property for business, industrial, residential, or other purposes;

(2) the bulk, height, or number of buildings constructed on a particular tract of land;

(3) the size of a building that can be constructed on a particular tract of land, including without limitation any restriction on the ratio of building floor space to the land square footage;

(4) the number of residential units that can be built per acre of land; or

(5) the size, type, or method of construction of a water or wastewater facility that can be constructed to serve a developed tract of land if:

(A) the facility meets the minimum standards established for water or wastewater facilities by state and federal regulatory entities; and

(B) the developed tract of land is:

(i) located in a county with a population of 2.8 million or more; and

(ii) served by:

(a) on-site septic systems constructed before September 1, 2001, that fail to provide adequate services; or

(b) on-site water wells constructed before September 1, 2001, that fail to provide an adequate supply of safe drinking water.

(b) A fine or criminal penalty prescribed by the ordinance does not apply to a violation in the extraterritorial jurisdiction.

(c) The municipality is entitled to appropriate injunctive relief in district court to enjoin a violation of municipal ordinances or codes applicable in the extraterritorial jurisdiction.

3. LOCAL GOVERNMENT CODE § 212.003 IS CONSTITUTIONAL: In ***Quick v. City of Austin,*** 7 S.W.3d 109 | 1999 Tex. LEXIS 110 | 42 Tex. Sup. J. 1217 (Tex 1997) , the Texas Supreme Court held that Local Government Code § 212.003 is constitutional. Please read the court's opinion as it is instructive on the issue of the home rule city derives its power to regulate within its boundaries and within the "extraterritorial jurisdiction" of its limits.

4. VIOLATION OF LAW REQUIREMENTS – PER SE DTPA VIOLATION: In ***Hurst v Sears Roebuck & Co.***, 647 S.W. 2nd 249 (Tex 1983) the Texas Supreme Court held that when you have a contract to build or install an object in accordance with certain government standards and fail to do so, it is a per se violation of the DTPA Section 17.46(b)(7).

a. Caveat to the Experts: Either side to a lawsuit involving whether the contractor has performed his/her obligations satisfactorily to the construction contract will likely use the services of an expert to opine whether the contractor's performance was legally sufficient. If the expert attempts to opine concerning construction inside a city limit, and states only that the contractor's work was done "according to generally accepted construction standards within the industry" and fails to measure the performance against the city's building code, the opinion fails for lack of a proper standard and can be suppressed and stricken. [Even Perryton, Texas, population 8,802, has a full set of building codes] If the construction is within the municipal limits, the expert must measure the performance against the standards of the codes but he/she may also opine that the "generally accepted construction standards acceptable within the industry" are greater than the code requirements and the contractor must meet them also. Therefore, the contractor may meet the local code requirements and still violate the Humber/Melody warranties or an express warranty.

5. COMMON KNOWLEDGE EXCEPTION TO REQUIREMENT FOR EXPERT: In ***Melody Home Mfg. Co. v. Barnes,*** 741 S.W.2d 349 (Tex 1987) we find a common sense approach to what circumstances need an expert.

> In this case, the breach of the implied warranty was plainly within the common knowledge of laymen and did not require expert testimony. The jurors had sufficient knowledge to find that the failure to connect a washing machine drain would not be considered good and workmanlike by those capable of judging repair work.

6. FAIR NOTICE DOCTRINE DOES NOT OBVIATE INCLUSION: The "fair notice" doctrine as stated in ***Storage & Processors, Inc. v. Reyes,*** 134 S.W.3d 190 (Tex 2004):

> A contract which fails to satisfy either of the fair notice requirements when they are imposed is unenforceable as a matter of law. See ***Dresser Indus., Inc. v. Page Petroleum, Inc***., 853 S.W.2d 505, 509-10, 36 Tex. Sup. Ct. J. 737 (Tex. 1993). . .One fair notice requirement, the express negligence doctrine, requires that "the intent of the parties must be specifically stated in the four corners of the contract." The other requirement, of conspicuousness, mandates "that something must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it.

does not apply to the inclusion of state and municipal laws in construction contracts.

7. LIMITATION OF "FAIR NOTICE" DOCTRINE: The "fair notice" doctrine referred to in ***Storage and Processors*** , citing ***Dresser***, applies only (1) to indemnity agreements and (2) to releases that relieve a party in advance of liability for its own negligence: ". . . the fair notice requirements of conspicuousness and the express negligence doctrine apply to both indemnity agreements and to releases in the circumstances before us. . . ." ***Dresser Indus. v. Page Petroleum***, 853 S.W.2d 505 (Tex 1993) 36 Tex. Sup. J. 737.

8. IMPLIED WARRANTIES – SILENCE SPEAKS LOUDLY: There are two categories of implied warranties: (1) statutory implied warranties and (2) common law implied warranties.

> ". . .While express warranties are imposed by agreement of the parties to the contract . . . implied warranties are created by operation of law and are grounded more in tort then in contract . . . . Implied warranties are derived primarily from statute, although some have their origin at common law." ***LaSara Grain v. First Nat'l Bank of Mercedes***, 673 S.W.2d 558 (Tex. 1984).

B. **Statutory Implied Warranties**: Statutory implied warranties are important to a construction contract because many times the contract calls for construction on the builder's land and is followed by a conveyance of the land to the owner.

1. REAL ESTATE: PROPERTY CODE SECTION 5.022: Creates a statutory warranty deed and provides that the warranty is not required. A general covenant of warranty in a deed applies to the title, and not to the quantity of land ***Mosteller v. Astin,*** 129 S.W. 1136 (Tex.Civ.App. 1910) unless sold by the acre and quantity is warranted. ***Brown v. Yoakum***, 170 S.W. 803 (Tex.Civ.App. 1914, error ref'd).

2. REAL ESTATE: PROPERTY CODE SECTION 5.023: Use of "grant" or "convey" impliedly warrants no prior conveyances by grantor and property is clear of debt.

3. TANGIBLE GOODS: CONSTRUCTION CONTRACT NOT SUBJECT TO STATUTORY IMPLIED WARRANTY UNDER BUS. & COM. CODE CHAPTER 2: Chapter 2 of the Bus.&Com. Code (which includes regulation of sales of tangible goods and also defines express warranties and establishes certain implied warranties relating to tangible goods) is not applicable to the construction and sale of a house. Although the transaction necessarily includes the sale of substantial tangible goods and materials for the construction of the house, the "essence" or "dominant" factor of the transaction is the furnishing of the labor and the performance of the work required for the construction of the house and therefore the transaction is for services. ***G-W-L, Inc. v. Robichaux***, 643 S.W.2d 392, 394 (Tex. 1982).

4. ROOF INSTALLATION - A SERVICE: In ***Montgomery Ward & Co., Inc. v. Dalton***, 665 S.W.2d 507 (Tex. App. –El Paso, 1983, no writ). The court held that the dominant factor of the complaint for a defective roof related to their installation and therefore the transaction was for services and was not subject to Chapter 2, Bus.&Com.Code regulation. In ***G-W-L, Inc. v. Robicheaux,*** 643 S.W.2d 392, 394 (Tex. 1982) a building contract for the construction of a home involving the sale of services and materials was declared to be a service contract and the materials/goods involved were not subject to Chapter 2, Bus.&Com. Code regulation.

a. CAVEAT: Sale and Erection of Prefabricated Steel Building– Purchase of Goods under Chapter 2, B&CC: Because the Business and Commerce Code of Texas is part and parcel of the "Uniform Code System" which Texas has adopted, we not only may but should look to other jurisdictions to see how they apply the Chapter 2 B&CC warranties. See: ***Sede: Cober v. Corley***, 610 A.2d 1036 (PA. Super.Crt. 1992): – the Superior Court of Pennsylvania held that a contract for the purchase of a pre-fabricated steel building which had no itemization of costs and inasmuch as the assembly of the building did not call for extensive construction services and the parties referred to the transaction as a purchase agreement and referred to themselves as "buyer" and "seller" was a sale of tangible goods under the U.C.C. The court found that the sale of goods predominated and was not a service construction contract, and therefore it was a contract for the purchase of tangible goods governed by Chapter 2 of the Uniform Commercial Code (Chapter 2 B&CC in Texas). The buyer had sued for the breach of an implied warranty of merchantability under Chapter 2 and the seller had countered that it was not the sale of tangible goods within the meaning of the B&CC.

5. HYBRID TRANSACTIONS – GOODS OR SERVICES? A number of types of transactions involve both the sale of services and the delivery of goods. In ***G-W-L, Inc. v. Robicheaux***, 643 S.W.2d 392, 394 (Tex. 1982) (a DTPA case) the Supreme Court held that in such hybrid transactions, the question becomes whether the dominant factor or "essence" of the transaction is the sale of the materials or the performance of the services. If the essence is for one over the other, then the transaction is one for the delivery of the dominant factor. This is important because it may determine whether Chapter 2, Bus.&Com. Code regulates the tangible goods, whether a product liability claim may be made, whether a Melody Homes implied

warranty exists that may not be waived and it may determine the applicable statutes of limitation. See ***Safeway Stores, Inc. v. Certainteed Corp.***, 710 S.W.2d 544 (Tex. 1986. In the ***G-W-L, Inc. v. Robicheaux,*** case, the building contract was for the construction of a home involving the sale of services and materials and was declared to be a service contract and the materials/goods involved were not subject to Chapter 2, Bus.& Com. Code regulation.

6. MANUFACTURED HOUSING WARRANTY: This section does not directly apply to our subject matter but since one third (1/3) of all single family dwellings in Texas are manufactured housing, it seemed appropriate to set forth the applicable statutory warranty: Texas Occupation Code: § 1201.351. Manufacturer's Warranty:

(a) The manufacturer of a new HUD-code manufactured home shall warrant, in a separate written document, that:

(1) the home is constructed or assembled in accordance with all building codes, standards, requirements, and regulations prescribed by the United States Department of Housing and Urban Development under the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. Section 5401 et seq.); and

(2) the home and all appliances and equipment included in the home are free from defects in materials or workmanship except for cosmetic defects..

C. **Common Law Implied Warranties**: There are several important common law implied warranties – important because they place a standard of performance on the contractor/builder in the final product of the construction project whether stated in the contract or not. Some may be waived by an adequate substitute thereof or through an express warranty. One may not be waived as to the owner of a residential construction.

1. KAMARATH COMMON LAW IMPLIED WARRANTY OF HABITABILITY – RESIDENTIAL: PRE-EMPTED: The common law implied warranty of habitability related to rented residential units created in ***Kamarath v. Bennett***, 568 S.W.2d 658 (Tex 1978) has been pre-empted by Chapter 91 of the Property Code and the tenant's rights are set forth therein. **I*ndart v. Bolin Dev. Corp.,*** 1991 Tex. LEXIS 99, Supreme Court of Texas, 1991. However, the statutory implied warranty of habitability in new construction for home owners remains intact. Definition of " IMPLIED WARRANTY OF HABITABILITY: ". . . In order to constitute a breach of implied warranty of habitability the defect must be of a nature which will render the premises unsafe, or unsanitary, or otherwise unfit for living therein.

a. Caveat: This warranty may be waived under rather restricted circumstances.

2. DAVIDOW COMMON LAW IMPLIED WARRANTY OF COMMERCIAL SUITABILITY: Although, facially applicable to landlord/tenant relationships, many times the relationship grows out of "build to suit tenant" contracts. Definition of **Common Law Implied Warranty of Commercial Suitability**: ". . ."there is an implied warranty of suitability by the land lord that the premises are suitable for their intended commercial ," which "means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that the essential facilities will remain in

suitable condition***." Davidow v. Inwood North Professional Group-Phase I,*** 747 S.W.2d 373 (Tex 1988). The focus is on "latent defects." ***Coleman v. Rotana, Inc***., 778 S.W.2d 867 (Tex.App.-Dallas 1989, writ den'd). ***Gober v. Wright,*** 838 S.W.2d 794 (Tex. App. —Houston [1st Dist] 1992, no writ).

a. Caveat: Whether there can be a waiver is not clear but the **Davidow Case** tends to support a waiver. Evidentiary Considerations – ". . .Among the factors to be considered when determining whether there has been a breach of this warranty are: the nature of the defect; its effect on the tenant's use of the premises; the length of time the defect persisted; the age of the structure; the amount of the rent; the area in which the premises are located; whether the tenant waived the defects; and whether the defect resulted from any unusual or abnormal use by the tenant." ***Davidow,*** page 250.

b. Comment on Waiver: Since waiver of defects is listed in the matters to be considered in determining a breach of the implied warranty of suitability, I suppose may we conclude that: (1) such a waiver is not prohibited; and (2) such a waiver is not conclusive. ***Davidow***, page 250.

3. MELODY/HUMBER COMMON LAW IMPLIED WARRANTIES –RESIDENTIAL: In the land mark case of ***Humber v. Morton***, 426 S.W.2d 554 (Tex. 1968) , the Texas Supreme Court abolished whatever was left of the doctrine of "caveat emptor" in relation to a builder/vendor of a new home and held that the builder/vendor of a new home warrants to the buyer that the home has been constructed in a good and workmanlike manner and that there is an implied warranty that the home is " suitable for human habitation." The ***Humber Case*** was followed by ***Melody Home Mfg. Co. v. Barnes,*** 741 S.W.2d 349 (Tex. 1987) which held "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA. . .[and]. . .we define good and workmanlike as that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."

a. **"**Property" Includes Home Construction: The term "property" contained in the implied warranty includes home construction. ***Gonzales v. Southwest Olshan Found. Repair Co.***, ***LLC***, 400 S.W.3d 52 [Tex 2013)

(1) CAVEAT: CONTRACT OR TORT – ISSUE IS ATTORNEY FEES**:** The ***Humber Case*** strengthened that "the notion of implied warranty arising from sales is considered to be a tort rather than a contract concept" set forth in ***LaSara Grain v. First Nat'l Bank of Mercedes,*** 673 S.W.2d 558 (Tex. 1984).The effect is that, standing alone, a suit for breach of this implied warranty being in the nature of a tort, does not support a claim for attorney fees.

D. **DTPA Overlay on Common Law Implied Warranties –Attorney Fees Awarded**: The ***Humber Case*** was followed by ***Melody Home Mfg. Co. v. Barnes,*** 741 S.W.2d 349 (Tex. 1987) which held that the Humber Implied Warranty was a warranty within the meaning of the Texas

Deceptive Trade Practices – Consumer Protection Act [DTPA] which allows enforcement of warranties as one of the DTPA causes of action and mandates recovery of attorney fees to a "prevailing consumer."

1. DIFFERENT REMEDIES: Remedies differ for Breach of Contract and Breach of Warranty: In ***Medical City Dallas, Ltd. v. Carlisle Corp***. 251 S.W.3d 55 (Tex.,2008), the court held:". . . breach of warranty and breach of contract are distinct causes of action with separate remedies. . .We held as much in ***Southwestern Bell Telephone Co. v. FDP Corp.***, 811 S.W.2d 572, 576 (Tex.1991), when we stated that "[t]he UCC recognizes that breach of contract and breach of warranty are not the same cause of action." But while an express warranty is a distinct claim, it is nonetheless a part of the basis of a bargain and is contractual in nature. . . An express warranty is the result of a negotiated exchange. . . and is a "creature of contract. . . When we ascertain the parties' intentions in a warranty, we look to well-established rules for interpretation and construction of contracts. . . And a breach of express warranty claim, like one for breach of contract, involves a party seeking damages based on an opponent's failure to uphold its end of the bargain. . . because a manufacturer securing the benefit of a sale to a third party and inducing purchase through representations as to its fitness and quality should not then be able to avoid the burdens of the transaction..Because ***Texas Civil Practice and Remedies Code section 38.001(8)*** permits an award of attorney's fees for a suit based on a written or oral contract, and because we conclude that breach of an express warranty is such a claim, the court of appeals erred in reversing Medical City's attorney's fees award in connection with its successful claim for breach of an express warranty."

a. Commentary: The homeowner's attorney should consider casting his/her suit for breach of implied warranty under the DTPA as a "breach of warranty" because the DTPA mandates recovery of attorney fees to a prevailing consumer. Whether the claim is for the breach of an implied warranty or express warranty does not prevent a recovery of attorney fees under the DTPA.

2. GOOD AND WORKMANLIKE DEFINED: ***Melody Home Mfg. Co. v. Barnes***, 741 S.W.2d 349 (Tex. 1987) defined "good and workmanlike" to mean "that quality of work performed by one who has the knowledge, training or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."

3. SEPARATE WARRANTIES – SEPARATE CAUSES OF ACTION: The implied warranties of (1) fit for human habitation, and (2) constructed in a good and workmanlike manner are separate and distinct warranties, breach of which will give rise to separate causes of action. ***Evans v. Stiles, Inc.,*** 689 S.W.2d 399 (Tex. 1985).

4. IF NOT FINISHED – PARTIAL PERFORMANCE IS WARRANTED: If the construction project is not finished, the part that is finished is warranted to have been done in a good and workmanlike manner. ***March v. Thiery,*** 729 S.W.2d 889 (Tex.App. - Corpus Christi 1987, no writ).

5. WARRANTY THAT MATERIALS ARE NOT DEFECTIVE: The warranty that materials are not defective may be regulated under B&CC, Chapter 2 and may be waived under circumstances provided in Chapter 2 of B&CC. ***Moore v. Werner***, 418 S.W.2d 918 (Tex.Civ.App. - Houston [14th Dist.] 1967, no writ).

6. IMPLIED WARRANTY EXTENDED TO SECOND HOMEOWNER: In ***Gupta v. Better Homes, Inc.***, 646 S.W.2d 169 (Tex. 1983) the Supreme Court overruled ***Thorton Homes, Inc. v. Greiner***, 619 S.W.2d 8 (Tex.Civ.App. - Eastland 1981, n.r.e.) and held that an implied warranty exists in the sale of a used home. The Supreme Court made the followings holdings:

> The question before us is whether that implied warranty extends to subsequent purchasers. We hold that it does cover -latent defects not discoverable by a reasonably prudent inspection of the building prior to sale- . . . As between the builder and owner, it matters not whether there has been intervening owner. The effect of the latent defect on the subsequent owner is just as great as on the original buyer and the builder is no more able to justify his improper work as to a subsequent owner than to the original owner. (page 169)

7. IMPLIED WARRANTIES ARE BINDING: ***Lilac Variety, Inc. v. Dallas Texas Co.***, 383 S.W.2d 193, 196 (Tex.Civ.App.—Dallas 1964, writ ref'd n.r.e.) (holding that implied covenants are as binding as express covenants).

8. NO IMPLIED WARRANTY -EXISTS BETWEEN OWNER AND SUBS: ***Codner v. Arellano***, 40 S.W.3d 666 (Tex.App.–Austin,2001 no writ) held that no implied warranty of good and workmanlike construction [Humber/Melody Warranty] exists between owner and sub-contractor. Did not discuss the DTPA issue that the homeowner is a "Consumer" as to sub-contractor due to the relation to the contract between the homeowner and the sub-contractor. In so far as the case went, it is probably correct. It is noteworthy that the Court in ***Codner*** went out of its way to appear "intellectual" as it dismantled the consumer's position. See also: ***J.M. Krnpak Construction CO., Inc., v Rosenberg*** 95 S.W. 3rd 322, 332 (Tex–Houston [1st] 2002, no pet); and ***Pugh v General Terrazo Supplies, Inc***. 243 S.W. 3rd 84, 89 (Tex App -Houston [1st] 2007, no writ yet.

a. Comment: Plaintiff's attorney missed the opportunity that his client was a "consumer" as to the sub-contractor because of the sub-contractor's relationship to the contract and lost the issue of the DTPA. However from the evidence in the case, the plaintiff could not have won.

9. NO LIABILITY BETWEEN GENERAL CONTRACTOR AND DESIGNERS: In the recent case of ***LAN/STV v. Martin K. Eby Constr. Co.***, 435 S.W.3d 234 (Tex 2014) , the Texas Supreme Court held that if the design team of professionals had no direct contractual relationship to the General Contractor but created errors in the design and plans that were a proximate cause of damages to the General Contractor, the General Contractor had no claim against the design team and its only remedy was whatever his contract provided against the owner. The Court specifically rejected a tort theory of negligent representation by th design team.

a. Comment**:** In ***LAN/STV v. Martin K. Eby Constr. Co.***, supra , the Plaintiff's attorney missed the opportunity that his client was a "consumer" as to the sub-contractor because of the sub-contractor's relationship to the contract and lost the issue of the DTPA. However from the evidence in the case, the plaintiff could not have won.

10. DTPA CONNECTS OWNER WITH SUBS: ***Cameron v. Terrell & Garrett, Inc.***, 618 S.W.2d 535 (Tex. 1981) holds that a suit may be brought by a "consumer" against any person if he has been adversely effected by the use or employment by that person of an act or practice declared to be unlawful under the DTPA, and therefore, the consumer need not necessarily seek or acquire goods or services from the defendant, per se. A party who seeks goods or services by purchase or lease is categorically different from a party who acquires goods or services by purchase or lease. Although both are "consumers." ***Kennedy v. Sale***, 689 S.W.2d 890 (Tex. 1985). However, do not forget that for a DTPA "Consumer" to prevail, he/she must show reliance under the "laundry list" of Section 17.46(b), B&CC., an unconscionable act or a breach of a warranty, express or implied.

11. RELATIONSHIP TO THE TRANSACTION CREATES CONSUMER STATUS: It is well established that a plaintiff's relationship to a transaction establishes his standing as a consumer. ***Flenniken v. Longview Bank & Trust, Co.***, 661 S.W.2d 705, 707 (Tex.1983); ***Cameron v. Terrell & Garrett, Inc***., 618 S.W.2d 535, 538 (Tex.1981). All that is required is that the goods or services sought or acquired by the plaintiff (consumer) form the basis of his complaint. ***Flenniken***, 661 S.W.2d at 707. . .."

12. MELODY/HUMBER WARRANTIES NON -WAIVEABLE –ALMOST: ***Melody Homes*** held that both common law implied warranties were non-waiveable. This seemed to end the matter until ***Centex Homes v. Buecher***, 95 S.W.3d 266 (Tex 2001) which held:

> ". . .the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance or quality of the desired construction. We further hold that the warranty of habitability may not be disclaimed generally. This latter implied warranty, however, only extends to defects that render the property so defective that it is unsuitable for its intended use as a home. Further, the implied warranty of habitability extends only to latent defects. It does not include defects, even substantial ones, that are known by or expressly disclosed to the buyer."

13. IMPLIED WARRANTY MAY NOT BE CIRCUMVENTED: ***Melody Homes*** implied warranty may not be circumvented by asserting (1) assumption of risk; or (2) forcing consumer to indemnify provider. ***Archibald v. Act III Arabians***, 768 S.W.2d 827 (Tex.App. - Houston [14th Dist.] 1989) on remand from 755 S.W.2d 84 (Tex. 1988).

14. BUILDERS' RESPONSIBILITY TO COMPLY: The question naturally surfaces as to where the responsibility lies to comply with the unspoken statutes and implied warranties that have become a part of the construction contract where it is likely that neither party realizes their

existence or impact in their agreement at the time of the execution of the contract. Is it the owner's duty or the contractor's duty to see to compliance with the newly discovered contract terms and conditions? The answer: In ***Gupta v. Ritter Homes, Inc.***, 646 S.W.2d 168 (Tex.1983), the supreme court stated that builders carry the burden of delivering structures in a good and workmanlike manner because (1) they should be in the business of constructing buildings free of latent defects; (2) buyers are not in a position to discern defects; (3) buyers cannot normally rely on their own judgment in such matters; (4) buyers rely on builders to construct in a good and workmanlike manner; and (5) the builder is the only one who knows the manner in which the building was built. ***Gupt***a, at 169. See also: ***Tips v. Hartland Developers, Inc.***, 961 S.W.2d 618 (Tex.App.–San Antonio,1998 no writ): ". . . The existing codes require newly constructed buildings to meet certain standards; however, the codes do not dictate whether the responsibility for ensuring compliance rests on the building owner or the building contractor. We believe that there is ample case law to suggest that, in the absence of a contrary agreement, the burden should fall on the builder..We hold that a cause of action is available to plaintiffs for breach of contract where a contractor has failed to comply with building codes relevant to the intended use of the structure. ." [Emphasis supplied]

E. **Express Warranties**: **B&CC: Sec. 2.313**: Express Warranties by Affirmation, Promise, Description, Sample.

(a) Express warranties by the seller are created as follows:
(1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
(2) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
(3) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

1. STATUTORY DEFINITION ADOPTED: The statutory definition of Bus.& Comm. Code Section 2.313 has been adopted in ***Southwestern Bell Tel. Co v. FDP Corp***., 811 S.W.2d 572 (Tex. 1991) to be applied to the delivery of services –including construction services. Previously, it was confined solely to sales of tangible goods. A "warranty contemplates that a sale has been made and the seller, to induce the sale, undertakes to vouch for the condition, quality, quantity or title of the thing sold." ***Church v. Ortho Diagnostic Systems, Inc.,*** 694 S.W.2d 552, 555 (Tex.App. - Corpus Christi 1985, n.r.e.)

a. Note: The importance of the ***Southwestern Bell Case*** is where there is a mere statement of a warranty or where one is implied the definition from B&CC Chapter 2 applies. Although a construction contract transaction necessarily includes the sale of substantial tangible goods and materials for the construction of the house, the "essence" or "dominant" factor of the transaction is the furnishing of the labor and the performance of the work required for the construction of the house and therefore the transaction is for services and not for the sale of goods. ***G-W-L, Inc. v. Robichaux***, 643 S.W.2d 392, 394 (Tex. 1982).

F. **Trust Fund Statute -- Protection of the Owner's Construction Funds**: An additional term and condition to a construction contract that need not be set forth in the written construction contract documents is designed to protect the owner from the contractor's diverting the owner's construction funds from the project at hand and grants the owner standing to protect his/her funds. [Chapter 162, Tex Property Code]

(1) Owner's payments and loan receipts on the construction contract are construction trust funds. [Sect 162.001]
(2) Contractor is the trustee of the trust funds [Sect 162.002]
(3) Funds are to be placed in a "construction account" [Sect 162.006]
(4) Contractor to maintain an account record system [Sect 162.007]
(5) Quantum meruit funds are not Chapter 162 funds: ***Perry & Perry Builders, Inc. v. Galvan,*** 2003 Tex. App. LEXIS 6341 Court of Appeals of Texas, Austin 2003.

1. CAVEAT: TRUST FUND VIOLATION DOES NOT FACIALLY VOID BANKRUPTCY DISCHARGE: Bankruptcy Code Section ". . .11 U.S.C. § 523(a)(4) did not render the debt nondischargeable because Pledger's use of the funds was covered by an affirmative defense in the Trust Fund. 11 U.S.C. § 523(a)(4) did not render the debt nondischargeable because Pledger's use of the funds was covered by an affirmative defense in the Trust fund." ***Ratliff Ready-M ix, L.P. v. Baarry Jmoe Pledger,*** No. 14-50023, Fifth Circuit, US CT of Appeals. (th Cir – 2015).

G. **Retainage – Property Code Chapter 53**: Retainage is required by Section 53.101:

1. SEC. 53.101. REQUIRED RETAINAGE: (a) During the progress of work under an original contract for which a mechanic's lien may be claimed and for 30 days after the work is completed, the owner shall retain: (1) 10 percent of the contract price of the work to the owner; or (2) 10 percent of the value of the work, measured by the proportion that the work done bears to the work to be done, using the contract price or, if there is no contract price, using the reasonable value of the completed work. The purpose of this statute is to secure subs – both labor and materiel. If retainage is not honored, the owner may have to pay to artisans and materialmen at last another 10% of the contract price or value.

2. SEC. 53.025. LIMITATION ON ORDINARY RETAINAGE LIEN: A lien for retainage is valid only for the amount specified to be retained in the contract, including any amendments to the contract, between the claimant and the original contractor or between the claimant and a subcontractor.

3. SEC. 53.105. OWNER'S LIABILITY FOR FAILURE TO RETAIN: (a) If the owner fails or refuses to comply with this subchapter, the claimants complying with Subchapter C or this subchapter have a lien, at least to the extent of the amount that should have been retained from the original contract under which they are claiming, against the house, building, structure, fixture, or improvement and all of its properties and against the lot or lots of land necessarily

connected. (b) The claimants share the lien proportionately in accordance with the preference provided by Section 53.104.

This statutory scheme is quite complex and should be reviewed closely as to the remedies and defenses available to the parties.

CHAPTER 2 – STATUTORY CAUSES OF ACTION AND LIMITATIONS

Once the contractor has either finished or pulled off the job and either the owner or the builder [or both] becomes dissatisfied, we look to the elements of the various causes of action to enforce owner's claims, the builder's claims, and the variety of defenses provided in the large realm of "construction laws." They fall in two major categories: (1) statutory schemes and (2) common law schemes. The statutory schemes are treated in Chapter 2 and the Common Law Schemes are treated in Chapter 3.

There are three fully developed statutory schemes developed primarily for the homeowner that should be looked at by both the homeowner and the contractor before instituting litigation. They are:

(1) The Texas Deceptive Trade Practice -Consumer Protection Act **[DTPA**], Chapter 17, B&CC;
(2) Fraud in Transactions Involving Real Estate and Stocks; Chapter 27, B&CC.; and
(3) The Residential Construction Liability Act [**RCLA**] Chapter 27, Civil Practice and Remedy Code;

Each will be addressed separately.

I. **DTPA AND HOME OWNERS' CLAIMS**: The starting point of understanding the potential impact of the DTPA as it relates to homeowner's claims against contractors is found in its definition of a residence:

> ***B&CC: Section 17.45 (12)***: ". . ."Residence" means a building: (A) that is a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system; and (B) that is occupied or to be occupied as the consumer's residence. . ."

and the fact that the exemptions and waivers of the DTPA to certain transactions does not apply in a transaction involving the consumer's residence. [Section 17.49]

A. **Consumer Definition Does Not Hamper Claims Related to the Home**: The limitations on the definition of a "consumer" in Section 17.45 (4):

> ". . . (4) "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods

or services, except that the term does not include a ***business consumer*** that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more."

does not pre-empt a DTPA case involving the home regardless of the assets of the owner because the limitation is restricted to a "business consumer" and the home is not a "business transaction" within the meaning of the DTPA.

B. **Purpose of DTPA**: The purpose of the DTPA is to ". . . protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." [B&CC Section 17.44]

C. **Five Causes of Action under the DTPA**: Section 17.50 of the DTPA provides a series of reliefs for consumers:

(1) engaging in a false, misleading or deceptive act or practice as defined in Section 17.46(b)– affectionately called the "laundry list;"
(2) breach of express or implied warranty;
(3) Any unconscionable action or course of conduct by any person;
(4) violations of certain insurance codes [not applicable to our circumstances] ; and
(5) violations of ceratin "plug-in" statutes that add to the "laundry list. "

D. **DTPA Remedies**: Section 17.50(b) In a suit filed under this section, each consumer who prevails may obtain:
(1) economic damages;
(2) attorney fees [mandated to a prevailing consumer];
(3) for a knowing or intentional violation of the DTPA [mental anguish damages and punitive damages];
(4) injunctive relief;
(5) rescission;
(6) "any other relief which the court deems proper;" and
(7) appointment of a receiver

1. SEC. 17.505. NOTICE; INSPECTION: (a) As a prerequisite to filing a suit seeking damages under the DTPA, the homeowner must a 60 day written notice to the contractor advising the contractor in "reasonable detail of the consumer's specific complaints" and the amount of economic damages, damages for mental anguish, and expenses, including attorneys' fees. Inspection of the home is allowed to the contractor during this 60 day period.

2. RESCISSION – UNUSED REMEDY: Section 17.50 (3) provides the remedy of securing " orders necessary to restore to any party to the suit any money or property, real or personal. . ." This writer has found this remedy to be underused. Surprisingly, builders are receptive to unhooking the deal and taking the home back. It is cheaper to unhook than it is to litigate, lose and pay both sides' attorney fees; also it protects the builder's reputation as being a fair and reasonable guy.

E. **When a DTPA Case Is Not a DTPA Case**: The DTPA remedies make it a rather logical starting point if there is fraud, misrepresentation, or a violation of an express or implied warranty [see the warranty section above]. However, in a bizarre line of reasoning, the Texas Supreme Court held ***in Southwestern Bell Tel. Co. v. Delanney***, 809 S.W.2d 493 (Tex 1991), that if the "consumer" is seeking only contract damages, his/her claim may not be a DTPA claim.

> ". . .The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of a contract itself the action sounds in contract alone."

II. CHAPTER 27 B&CC – HOME OWNERS' CLAIMS. (FRAUD IN TRANSACTIONS INVOLVING REAL ESTATE). Chapter 27, B&CC is a very short and compact statute of relief for "persons" who have been damaged by "fraud in a transaction involving real estate. . .[etc]. . ." The statute fraud in traditional terms [including withholding pertinent facts] and provides a rack of remedies – actual damages, exemplary damages for fraud done with "actual awareness of the falsity of the statements, recovery of expert fees, copies of costs of depositions and attorney fees. The remedies do not include rescission – otherwise it seems to be as broad in its impact as the DTPA.

The importance of this statute is its lowered standard for actionable fraud and its application where the facts demonstrate a

> "(1) false representation of a past or existing material fact, when the false representation is (A) made to a person for the purpose of inducing that person to enter into a contract; and (B) relied on by that person in entering into that contract; or
>
> (2) false promise to do an act, when the false promise is (A) material;(B) made with the intention of not fulfilling it; © made to a person for the purpose of inducing that person to enter into a contract; and (D) relied on by that person in entering into that contract." [Section 27.01(1)-(2)].

The phrase, "transaction involving real estate" includes a dispute between the contractor and sale of a new home to the new homeowner. ***Woodlands Land Dev. Co., L.P. v. Jenkins***, 48 S.W.3d 415, (Tex Appeals – Beaumont, 2001, no writ).

The remedies in the DTPA and Chapter 27, B&CC are similar in many respects – each has a lowered fraud standard and defines fraud and misrepresentation without a scienter element.

A. **Practice Commentary**: "Actual awareness" as a predicate for punitive/exemplary or additional damages contains the same elements and the same evidentiary standard whether the case is brought under the DTPA or under Fraud in transactions involving real estate. See***: Scott v. Sebree***, 986 S.W.2d 364, (Tex App – Austin, 1999 writ denied) , citing ***St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.***, 974 S.W.2d 51, 53-54 (Tex. 1998):

> ". . .Actual Awareness" does not mean merely that a person knows what he is doing; rather, it means that a person knows what he is doing is false, deceptive, or unfair. In other words, a person must think to himself at some point, "Yes, I know this is false, deceptive, or unfair to him, but I'm going to do it anyway."
>
> Although the St. Paul Surplus court addressed "actual awareness" in the context of DTPA violations rather than statutory fraud under section 27.01, we believe the court's treatment of "actual awareness" would be similar, if not identical, under the two statutes.

III. **RCLA** – **HOMEOWNERS' CLAIMS (Residential Construction Liability Act)**: We will deal first with the claims apparatus provided in Texas construction law related to claims by a residential owner against the contractor. These claims are highly regulated in a procedural morass designed to give the owner and the contractor an opportunity to address the claims of the owner against the contractor and give the contractor the opportunity to repair his/her mistakes, pay money for the claimed damages or offer to settle before suit may be filed by the owner. Whether this is a good statutory procedure may be dictated by whether you are primarily the attorney for owners or the contractor – in either case, the procedures must be complied with or any lawsuit prematurely filed will be abated until the procedures are complied with.

A. **1993 - RCLA Passed**: In 1993, the Texas Legislature passed the **Residential Construction Liability Act [RCLA**] – a comprehensive regulation of the procedures for processing claims by a home owner against his/her builder. If you have a claim on behalf of a home owner against the builder, you must follow the RCLA procedures and you may not by artful pleading, avoid the impact of the legislative scheme of regulation.

B. **RCLA Does Not Create a Cause of Action § 27.005**: The Residential Construction Liability Act (RCLA) modifies causes of action for damages resulting from construction defects in residences; but it does not provide the basis for a liability determination. The statute does not create a cause of action, but instead simply limits and controls causes of action that otherwise exist. The RCLA does contain a section providing that, to the extent RCLA conflicts with any other law, RCLA prevails over that "other law" [including the DTPA] Tex. Prop. Code Ann. § 27.002. ***Sanders v. Constr. Equity, Inc***., 42 S.W.3d 364 (Tex Appeals – Beaumont 2001).

C. **RCLA § 27.001(4) Construction Defect**: The scope of the statute is found in the definition of a "construction defect:"

1. **RCLA, § 27.001(4) "Definitions**: Construction defect … means a matter concerning the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor. The term may include any physical damage to the residence, any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.

The RCLA applies to any action to recover damages or other relief arising from a "construction defect;"

D. **RCLA Sec. 27.002. Application of Chapter**: (a) This chapter applies to: (1) any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods; and (2) any subsequent purchaser of a residence who files a claim against a contractor.

E. **Homeowner's Required Demand and Notice**: The RCLA hallmark is its requirement that a home owner shall give written notice to the contractor of his/her complaints and give the contractor an opportunity to investigate the claim and offer to make amends if the circumstances require or to make an offer – if no more than to buy his peace. Settlement of disputes is encouraged by society and our courts.

> Texas Civil Practice & Remedies Code § 154.002: "It is the policy of this state to encourage the peaceable resolution of disputes …"; *see also* ***Vinson Minerals, Ltd. v. XTO Energy, Inc.,***335S.W.3d 344,353 (Tex.App.—Fort Worth 2010, pet. den.): "The purpose of rule 408 [Tex Rules of Evid] is to encourage settlement. … settlement offers are excluded to allow a party to 'buy his peace …'"

> Specifically, the homeowner [styled "claimant" in the statute] "… shall give written notice by certified mail, return receipt requested, to the contractor, at the contractor's last known address, ***specifying in reasonable detail the construction defects that are the subject of the complaint.***" RCLA, § 27.004(a) (emphasis added)

F. **Contractor's Response**: The contractor/builder has the right to respond in several ways:

1. <u>REQUEST OF EVIDENCE</u>. On the request of the contractor, the claimant [homeowner] shall provide to the contractor any evidence that depicts the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect, including expert reports, photographs, and videotapes, if that evidence would be discoverable under Rule 192, Texas Rules of Civil Procedure. RCLA, § 27.004(a).

2. <u>OPPORTUNITY TO INSPECT</u>. During the 35-day period after the date the contractor receives the notice, and on the contractor's written request, the contractor shall be given a reasonable opportunity to inspect and have inspected the property that is the subject of the complaint to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect. RCLA, § 27.004(a).

3. <u>DOCUMENT THE DEFECT</u>. The contractor may take reasonable steps to document the defect. RCLA, § 27.004(a), (k).

4. <u>MAKE OFFER OF SETTLEMENT</u>. "… not later than the 45th day after the date the contractor receives the notice under this section. . . the contractor may make a written offer of settlement to the claimant." RCLA, § 27.004(b)

G. **No Notice Given**. If the contractor/builder has not been given the required notice and denied the opportunity for a response, it is entitled to abate this matter until the notice is accomplished.

1. ABATEMENT MANDATORY. The statutory abatement is mandatory and is binding on both a judicial proceeding and an arbitration proceeding. The statute provides as follows:

> "Section 27.004 (d) ***The court or arbitration tribunal shall abate an action governed by this chapter*** if Subsection (c) does not apply and the court or tribunal, after a hearing, finds that the contractor is entitled to abatement because the claimant failed to comply with the requirements of Subtitle D, Title 16, if applicable, failed to provide the notice or failed to give the contractor a reasonable opportunity to inspect the property as required by Subsection (a), or failed to follow the procedures specified by Subsection (b). An action is automatically abated without the order of the court or tribunal beginning on the 11th day after the date a motion to abate is filed if the motion:
>
> (1) is verified and alleges that the person against whom the action is pending did not receive the written notice required by Subsection (a), the person against whom the action is pending was not given a reasonable opportunity to inspect the property as required by Subsection (a), or the claimant failed to follow the procedures specified by Subsection (b) or Subtitle D, Title 16; and
> (2) is not controverted by an affidavit filed by the claimant before the 11th day after the date on which the motion to abate is filed.

H. **Practice Commentary**: I attach to this presentation a redacted copy of an RCLA Demand Letter used in an actual cased from our offices seeking rescission [a proper remedy] and another seeking damages and repairs. The names are redacted to protect the name of the scoundrel. Perhaps these will give the reader a perspective of what might be done for the home owner to comply with the RCLA.

CHAPTER 3 – COMMON LAW SCHEMES – HOMEOWNER AND BUILDER

I. **FIVE THEORIES OF LIABILITY**: There are at least five (5) fully developed common law schemes accessible to both the owner and the contractor to facilitate the resolution of disputes in litigation involving the construction of a building, whether residential, commercial or industrial. They should be looked at by both the owner and the contractor before instituting litigation. They involve cases alleging:

A. Material Breach of contract
B. Mere breach of contract – costs of finishing
C. Substantially completion – costs of finishing
D. Quantum meruitt
E. Rescission plus Damages

F. Caveat: Section 18.01 Civ Prac & Rem Code Affidavit of Reasonableness and Necessity Does Not Prove Causation

Each will be addressed separately.

A. **Material Breach of Contract**: In order for one party to prevail against the other alleging such a breach of contract that the injured party does not have to comply with his/her stated obligations under the contract or is such a breach that the injured party may seek rescission, the breach must be "material."

> ". . .It is a fundamental principle of contract law that when one party to a contract commits a ***material breach*** of that contract, the other party is discharged or excused from further performance." ***Mustang Pipeline Co. v. Driver Pipeline Co.***, 134 S.W.3d 195 (Tex 2004) [Emphasis supplied]

There are several terms and conditions of a contract that may be deemed "material" sufficiently to allow a release of the injured party from the contract or to allow the injured party to rescind the transaction, such as: (a) "time is of the essence;" (b) failure of consideration; (c) anticipatory repudiation; (d) breach of express or implied warranties. We shall deal with each separately.

1. TIME IS OF THE ESSENCE: ". . .if it is clear the parties intend that time is of the essence to a contract, timely performance is essential to a party's right to require performance by the other party." ***Mustang Pipeline Co, supra***

2. FAILURE OF CONSIDERATION: Failure of consideration is ground for rescission**.** ***Progressive Union of Texas v. Independent Union of Colored Laborers,*** 264 S.W.2d 765 (Tex.Civ.App. - Galveston 1954, writ ref'd n.r.e.) Sometimes a failure of consideration is referred to as a material breach. ***PJC 101.22, Comment/Contract, page 59 (2014***) See: ***National Bank of Commerce v. Williams,*** 125 Tex. 619, 623, 84 S.W.2d 691, 692, (Tex 1935), which holds that there is a ". . . distinction between a defense that contends that the plaintiff's cause of action never came into existence, and a defense that contends that it did come into existence, but later ceased to exist."

3. ANTICIPATORY BREACH: In ***Murray v. Crest Constr.***, 900 S.W.2d 342 (Tex 1995) th Texas Supreme Court held: ". . . We have long recognized the rule of anticipatory breach: the repudiation of a contract before the time of performance has arrived amounts to a tender of breach of the entire contract and allows the injured party to immediately pursue an action for damages. . . When a claim is released for a promised consideration that is not given, the claimant may treat the release as rescinded and recover on the claim."

4. BREACH OF EXPRESS OF IMPLIED WARRANTIES: In ***Smith v. Kinslow***, 598 S.W.2d 910, 912 (Tex.App. - Dallas 1980, no writ) the court held that damages for the breach of an express warranty were measured as for the breach of any contract; that is, the complaining party is entitled to be put in as good a position as if the contract had been performed. However,

if the implied warranty is derived from Sec. 2.313, 2.314 and 2.315, Bus.&Com.Code, incidental and consequential damages are recoverable under Sec. 2.714 and 2.715.

B. **Mere Breach of Contract**

1. DAMAGES MEASURED BY PECUNIARY LOSS

a. Actual Damages*:* "More than half a century ago, we observed that "[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained." ***Zachary Constr. Corp. v. Port of Houston Auth.,*** 449 S.W.3d 98. (Texas 2013). See also: "Actual damages may be recovered in an action for breach of contract when the loss is the natural, probable and foreseeable consequence of the defendant's conduct." ***Mead v. Johnson Group, Inc.***, 615 S.W.2d 685, 687 (Tex. 1981). See also: PJC 115.3-5 in"Business, Consumer, Insurance, Employment

b. Consequential Damages: "Consequential damages are those damages that result naturally, but not necessarily, from the defendant's wrongful acts." ***Basic Capital Mgmt. v. Dynex Commercial, Inc.***, 348 S.W.3d 894, 901 (Tex. 2011)***; El Paso Mktg., L.P. v. Wolf Hollow I, L.P.***, 383 S.W.3d 138, 144 (Tex. 2012). Delay damages are consequential damages.

2. UNCERTAINTY: FACT OF DAMAGES v. AMOUNT OF DAMAGES: "There is a distinction between uncertainty as to the fact of damages and uncertainty merely as to the amount of damages. Uncertainty as to the fact of legal damages is fatal to recovery, but uncertainty as to the amount will not defeat recovery." **McKnight v. Hill & Hill Exterminators, Inc.,** 689 S.W.2d 206 (Texas 1985)

3. CAUSATION FROM THE DEFENDANT: "We hold that the plaintiff must produce evidence from which the jury may reasonably infer that the damage sued for has resulted from the conduct of the defendant." **McKnight v. Hill & Hill Exterminators, Inc.,** 689 S.W.2d 206 (Texas 1985).

4. CONTRACTOR'S DAMAGES INCLUDES LOST PROFITS: ". . .in a breach-of-contract case, the normal measure of damages is just compensation for the loss or damage actually sustained, commonly referred to as the benefit of the bargain. . ..[and]. . . may include reasonably certain lost profits. . .Lost profits are damages for the loss of net income to a business. . .that would have been attributable to that activity***. . . Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d 41, 50, 41 Tex. Sup. Ct. J. 289 (Tex. 1998).**" "Generally, lost profits are properly calculated by deducting the costs of . . . performance supported by data from the actual contract price." ***Bowen v. Robinson*****,** 227 S.W.3d 86 (Tex App- Houston [1st] 2006 n writ).

5. OWNER'S DAMAGES - INCLUDES COST OF COMPLETION: ". . .The measure of damages for an owner when the contractor is alleged to be in breach of a construction contract is the cost of completing the job or of remedying those defects that are remediable. If only part

of the contract price has been paid to the contractor, then the amount of the owner's damages is credited against the balance of his payments still unpaid." ***Vance v. My Apartment Steak House, Inc***., 677 S.W.2d 480. (Tex 1984).

C. **Substantial Performance – Burden of Proof for Repairs**

1. CONTRACTOR'S CLAIM FOR SUBSTANTIAL PERFORMANCE INCLUDES REQUIREMENT OF PROOF OF COST OF FINISHING: In ***Mancorp, Inc. v. Culpepper***, 802 S.W.2d 226, 230-231 (Tex 1990), the Supreme Court held that a ".. building contractor who substantially performs is entitled to recover the full contract price less the cost of remedying those defects that are remediable, and less the reduction in value caused by defects that are not remedial . . ." The burden of proof is on the contractor to establish the costs of repairs or diminished value as those issues are elements of his/her cause of action and are not aspects of a defensive theory. Again in ***Another Attic, Ltd. v. Plains Builders, Inc***, 2010 Tex. App. LEXIS 9620 (Tex App -- Amarillo, 2010 we find: ". . . Where the theory of recovery has been substantial performance, courts have limited the amount recoverable by the contractor to "the contract price, less the reasonable cost of remedying the defects or omissions in such a way as to make the building conform to the contract."

2. MATERIAL BREACH PRECLUDES SUBSTANTIAL PERFORMANCE CLAIM: In Hooker v. Nguyen, 2005 Tex. App. LEXIS 6580 – Houston (14th) 2005, the court held: ". . .if there is a material breach of a contract, that contract has not been substantially performed. . . We see no reason why the converse should not apply; that is, that if a party fails to substantially perform, his breach of the contract is material.

3. MITIGATION OF DAMAGES: Burden of Proof: All claimants have a common law duty to mitigate their losses. ***Hycel, Inc. v. Wittstruck***, 690 S.W.2d 914, 924 (Tex.App. - Waco 1985, writ dism'd). **Question**: Whose burden of proof**? Answer**: The person who created the liability problem and initiated the damage must properly plead that the claimant failed to mitigate; ***Securities Credit Corp. v. White***, 346 S.W.2d 413 (Tex.Civ.App. - Amarillo 1961, no writ), and must prove both lack of diligence to mitigate and the amount by which the damages were increased by the failure to mitigate. ***Cocke v. White***, 697 S.W.2d 739, 744 (Tex.App. - Corpus Christi 1985, n.r.e.). See also, ***Pinson v. Red Arrow Freight Lines, Inc.***, 801 S.W.2d 14, 16 (Tex.App-Austin 1990, no writ).

4. ONLY ONE RECOVERY: "BRADSHAW RULE" REVIVED: In ***Stewart Title Guaranty Co. v. Sterling***, 822 S.W.2d 1 (Tex. 1991), the Supreme Court of Texas reaffirmed the "one satisfaction rule" first articulated in Texas in ***Bradshaw v. Baylor University***, 84 S.W.2d 703, 705 (Tex. 1935) as it applies to damages. It held that the "Bradshaw Rule" applied to DTPA cases and all other cases except those governed by the doctrine of strict liability and common law contribution by comparative causation set forth in ***Duncan v. Cessna Aircraft Co.***, 665 S.W.2d 414, 429 (Tex. 1984). Quoting the ***Bradshaw*** case, the Supreme Court held:

> "It is a rule of general acceptation that an injured party is entitled to but one satisfaction for the injuries sustained by him. That rule is in no sense modified by the

> circumstance that more than one wrongdoer contributed to bring about his injuries. There being but one injury, there can, in justice, be but one satisfaction for that injury.

The Supreme Court further relied upon ***Mail v. John Hancock Mutual Life Insurance Co.***, 711 S.W.2d 5, 7 (Tex. 1986) which prohibited a double recovery even when different acts were involved, so long as there was a single injury or set of damages even though caused by multiple misrepresentations or violations of the DTPA.

5. BURDEN OF PROOF TO ESTABLISH BRADSHAW RULE: ***First Title Co. of Waco v. Garrett***, 36 Tex.S.Ct.J. 980, 983 (Tex. 1993) holds that "any party seeking the benefit of a settlement credit [under the Bradshaw Rule] has the burden of establishing that it is entitled to such a reduction in the amount of a judgment."

D. **Quantum Meruit**

1. QUANTUM MERUIT AND EXPRESS AGREEMENT- INCONSISTENT REMEDIES: *Black Lake Pipe Line Co. v. Union Const. Co., Inc*. 538 S.W.2d 80 (TEX 1976.) "We begin with the premise that the right to recover in Quantum meruit is based upon a promise implied by law to pay for beneficial services rendered and knowingly accepted. ***Davidson v. Clearman***, 391 S.W.2d 48 (Tex.1965). If a valid express contract covering the subject matter exists there can be no recovery upon a contract implied by law. ***Woodard v. Southwest States, Inc***., 384 S.W.2d 674 (Tex.1964)."

2. VALUE, INTEREST AND ATTORNEY FEES RECOVERABLE: [Value]"However, the existence of an express contract does not preclude recovery in quantum meruit for the reasonable value of services rendered and accepted which are not covered by the contract. . .[Interest] It has long been a settled rule in Texas that where damages are established as of a definite time and the amount thereof definitely determinable, interest is recoverable as a matter of right from the date of the injury or loss. . . . Prejudgment interest may be awarded on a recovery in quantum meruit. [Attorney Fees] ***Angroson, Inc. v. Independent Communications, Inc.,*** 711 S.W.2d 268 (Tex App – Dallas, 1986) Article 2226, which is now found in the Texas Civil Practices and Remedies Code, §§ 38.001-.006 (Vernon 1986), allows the recovery of attorneys' fees for a valid quantum meruit or contract claim. Article 2226. . . expressly allows attorneys' fees for "a valid claim . . . for services rendered, labor done, material furnished . . . or suits founded on oral or written contracts." Additionally, the courts have upheld the recovery of attorney fees for quantum meruit. ***Ferrous Products Co. v. Gulf Trading Co.***, 160 Tex. 399, 332 S.W.2d 310, 312 (1960)".

E. **Rescission – Plus Damages**

1. UNDERUSED REMEDY: The owner who purchases the improved property from the contractor as part of the transaction, should readily consider offering to rescind the transaction, get his/her money back [less the reasonable use value of the property during occupancy] and convey the property back to the contractor. During the early stages of the conflict and before

great effort and expenditures have been made by both sides, the contractor will usually explain in great detail to everyone who will listen that his construction project was just fine and that there are no defects in workmanship or materials. This is the time to offer rescission and explain how it will save both sides cost. It may surprise you how many times the contractor will take your deal. He saves money and reputation.

Smith v. National Resort Communities, Inc., 585 S.W.2d 655 (Tex 1979) held: "Rescission is an equitable remedy and, as a general rule, the measure of damage is the return of the consideration paid, ***together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract.***" [Emphasis supplied]

2. GROUNDS FOR RESCISSION:

a. Fraud and misrepresentation: Fraud and misrepresentation are grounds for rescission. ***Maddox v. Clark***, 175 S.W. 1053 (Tex. 1915).

b. Duress: Duress is ground for rescission. ***S. H. Kress & Co. v. Rust***, 97 S.W.2d 997 affm'd 120 S.W.2d 425 (Tex. 1938).

c. Failure of consideration: Failure of consideration is ground for rescission. ***Progressive Union of Texas v. Independent Union of Colored Laborers***, 264 S.W.2d 765 (Tex.Civ.App. - Galveston 1954, writ ref'd n.r.e.).

d. Purchaser must be damaged as a prerequisite to the right of equitable rescission: ***Russell v. Industrial Transportation Co.***, 113 Tex. 441, 258 S.W. 462 (Tex. 1924); ***Adickes v. Andreoli***, 600 S.W.2d 939, 946 (Tex.Civ.App. - Houston [1st Dist.] 1980, writ dism'd).

e. Damage must be substantial to justify rescission: ***Texas Industrial Trust, Inc. v. Lusk***, 312 S.W.2d 324, 327 (Tex.Civ.App. - San Antonio 1958, writ ref'd); ***Russell v. Industrial Transp. Co.***, 258 S.W. 460, 51 ALR 1 (Tex. 1924); ***Adickes v. Andreoli***, 600 S.W.2d 939, 946 (Tex.Civ.App. - Houston [1st Dist.] 1980, writ dism'd).

f. Damage may be other than money: It is sufficient that the injured party has incurred liability different from that represented; or has suffered some other non-monetary damage for rescission to lie. ***Russell v. Industrial Transp. Co.***, 113 Tex. 441, 258 S.W. 462 (Tex. 1924); ***Adickes v. Andreoli***, 600 S.W.2d 939, 946 (Tex.Civ.App. - Houston [1st Dist.] 1980, writ dism'd); ***Bonanza Restaurants v. Uncle Pete's Inc.***, 757 S.W.2d 445, 448 (Tex.App. - Dallas 1988, writ den'd).

g. Intent Not an Element: Except in cases of common law fraud, intent on the part of the seller is not an element of the common law, equitable remedy of rescission, ***Russell v. Industrial Transp. Co.***, 258 S.W.2d 462, 51 ALR 1 (Tex. 1924); indeed, the seller may be all together innocent. ***Citizen's Standard Life Ins. Co. v. Muncy***, 518 S.W.2d 391 (Tex.Civ.App. - Amarillo 1974, no writ).

h. Restored Amounts Secured by Lien: When rescission is granted, the purchaser is entitled to an equitable lien on the property originally acquired but turned back, in order to secure repayment of the funds advanced. ***Masten v. Masten***, 165 S.W.2d 225, 228 (Tex.Civ.App. - Fort Worth 1948, writ ref'd).

3. COUNTER POINTS THAT MUST BE SATISFIED:

a. Timely Notice of Intent to Rescind Required: To invoke the common law, equitable remedy of rescission, timely notice must by given by the buyer to the seller that grounds for rescission exist and that the buyer intends to rescind or the remedy is denied. ***David McDavid Pontiac, Inc. v. Nix***, 681 S.W.2d 831, 836 (Tex.App. - Dallas 1984, writ ref'd n.r.e.); ***Mathis Equip. Co. v. Rosson***, 386 S.W.2d 854, 869-70 (Tex.Civ.App. - Corpus Christi 1964, writ ref'd n.r.e.); ***Carrow v. Bayliner Marine Corp.***, 781 S.W.2d 691, 696 (Tex.App. - Austin 1989, no writ).

b. Tender of Restoration Required: A return or tender of return of the consideration or goods received by the buyer is a prerequisite in most cases to the remedy of rescission. ***Price v. Kittredge***, 361 S.W.2d 721, 723-4 (Tex.Civ.App. - Fort Worth 1962, no writ); ***Mathis Equip. Co. v. Rosson***, 386 S.W.2d 854, 869-70 (Tex.Civ.App. - Corpus Christi 1964, writ ref'd n.r.e.); ***David McDavid Pontiac, Inc. v. Nix***, 681 S.W.2d 831, 836 (Tex.App. - Dallas 1984, writ ref'd n.r.e.).

c. Tender Back Includes Value of Benefits: In making a tender of restoration as a prerequisite to rescission, the buyer must tender back the benefits, if any, of the goods acquired while in the possession of the buyer. ***David McDavid Pontiac, Inc. v. Nix***, 681 S.W.2d 831 (Tex.App. - Dallas 1984, writ ref'd n.r.e.); ***Mathis Equip. Co. v. Rosson***, 386 S.W.2d 854, 869-70 (Tex.Civ.App. - Corpus Christi 1964, writ ref'd n.r.e.); ***Green Tree Acceptance, Inc. v. Pierce***, 768 S.W.2d 416 (Tex.App. - Tyler 1989, no writ).

d. Burden of Proof on Claimant: The burden to prove all elements of the remedy of common law equitable rescission, including tender of restoration of consideration and tender of value of benefits of the consideration while in the hands of the claimant is strictly on the claimant and failure to plead and prove these elements is fatal to recovery. ***David McDavid Pontiac, Inc. v. Nix***, 681 S.W.2d 831, 836 (Tex.App. - Dallas 1984, writ ref'd n.r.e.).

e. Continued Use After Knowledge Loses Rescission Remedy: If the buyer continues to use the goods purchased after he has obtained knowledge of grounds for rescission, he loses his common law right of rescission. ***Villareal v. Boggus Motor Co.***, 471 S.W.2d 615, 619 (Tex.Civ.App. - writ ref'd n.r.e.), 1971, writ ref'd n.r.e.); ***Carrow v. Bayliner Marine Corp.***, 781 S.W.2d 691, 696 (Tex.App. - Austin 1989, no writ).

f. Caveat: § 18.01 Civ Prac & Rem Code Affidavit of Reasonableness and Necessity Does Not Prove Causation: **Civ. Prac. & Rem Code § 18.001** provides that ". . .an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a

finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary."

The affidavit may be challenged by a counteraffidavit. Interestingly, **Section 18.01(f)** provides that the ". . .counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit."

> "Reasonableness and necessity are usually determined by experts, but may be determined without experts if the party files medical affidavits thirty days before presentation of evidence and the opposing party does not file countervailing affidavits under **Tex. Civ. Prac. & Rem. Code Ann. § 18.001(b), (d).**" ***Watkins v. Watkins***, 2000 Tex. App. LEXIS 8479 (Tex. App. Austin Dec. 21 2000).

The form of the affidavit is set forth in the old Texas Rules of Evidence [TRE] Rule 902 (1O). However, the records and affidavit are not otherwise self-proving – in addition to the affidavit, the movant must have ***causation evidentiary support***.

> "Plaintiff has failed to establish that her medical expenses were proximately caused by the conduct of either defendant. The affidavits of reasonableness and necessity are insufficient to establish causation." ***Hilland v. Arnold***, 856 S.W.2d 240 (Tex.App. – Houston [1st Dist.] 1984, no writ); ***Beauchamp v. Hambrick***, 901 S.W.2d 747 (Tex.App. – Eastland 1995, no writ)."

Whether the transaction is a sale of personalty and subject to the warranties, terms and conditions of Chapter 2, B&CC or is a contract for services and subject to Civ Prac & Rem Code § 18.001 along with the bevy of implied warranties, is more fully discussed in the section HYBRID TRANSACTIONS – GOODS OR SERVICES, supra.

CHAPTER 4 – LIENS

There is a variety of liens that impose themselves onto construction contracts. The subject of liens is so broad that it deserves its own paper and seminar. References will be skeletal only and as a pointer for others to flesh out:

A. Constitutional Lien . . . . . Involuntary Lien
B. Rescission Lien. . . . . Involuntary Lien
C. Affidavit/mechanics' and materialmen's lien. . . . . Involuntary Lien
D. Contractual mechanics' and materialmen's lien. . . . . Voluntary Lien
E. Deed of Trust Lien. . . . . Voluntary Lien
F. Homestead Lien. . . . . Voluntary Lien

I. CONSTITUTIONAL LIEN –SELF OPERATING:

A. **Article 16, Section 37, Texas Constitution**: **Liens of Mechanics, Artisans, and Material Men**: "Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

1. LONG HISTORY: In ***Strang v. Pray,*** 89 Tex. 525 (Tex 1896) we find the language that has remained the same over the years. ". . . The lien is not statutorily dependent, and the legislature has no power to affix to the lien conditions of forfeiture. It may, under the Constitution, provide means for enforcing the lien, and in doing so may prescribe such things to be done as may be deemed necessary for the protection of an owner or purchasers of such property, a limitation upon the time for the enforcement of such lien, and such other things as pertain to the remedy."

In ***Irving Lumber Co. v. Alltex Mort. Co.***, 446 S.W.2d 64 (Tex App -Dallas 1969, affirmed at 468 S.W.2d 341, Tex Sup Ct): ". . . In its third point in its Reply Brief Lumber Company points out that its lien is a constitutional lien. Art. 16, Sec. 17 [sic: Secteion 37] , Constitution of Texas. ***It is true that a mechanic's and materialman's constitutional lien is self-executing as between the contractor and the owner and is enforceable against the owner without being filed for record.*** But even a constitutional lien will not be enforced against an innocent purchaser or mortgagee who has neither actual nor constructive notice of the constitutional lien. . ." [Emphasis supplied]

Trinity Drywall Sys. v. TOKA Gen. Contrs., Ltd., 416 S.W.3d 201 (Tex App –El Paso, 2013, denied): ". . .Texas law recognizes two types of mechanic's liens: (1) a constitutional lien; and (2) a statutory lien. Tex. Const. art. XVI, § 37; Tex. Prop. Code Ann. § 53.001 (West 2007). . . The constitutional lien is only available to those who contract directly with the property owner or its agent. ***Da-Col Paint Mfg. Co. v. American Indem. Co.***, 517 S.W.2d 270, 273 (Tex. 1974).

B. **Rescission Lien**: When rescission s allowed as a remedy and where the purchaser has advanced consideration the purchaser is entitled to a restoration or refund of the consideration and that amount is secured by an involuntary, equitable lien on the property involved in the transaction in order to secure repayment of the funds advanced. ***Masten v. Masten***, 165 S.W.2d 225, 228 (Tex.Civ.App. - Fort Worth 1948, writ ref'd). This lien is acquired without the consent of the opposing party.

C. **Affidavit/Mechanic's Materialmen's Lien**

1. PRIORITY OF LIENS: I refer the reader to ***Diversified Mortg. Investors v. Lloyd D. Blaylock General Contractor***, 576 S.W.2d 794 (Tex 1978) for a scholarly discussion on the doctrine of inception of title and attachment of a mechanic's lien – whether the mechanic's lien gains priority over the lender who provides the purchase money. Essentially, the mechanic's lien attaches only to whatever ownership or possessory rights of the purchaser at the time of the events necessary for the mechanic's lien to attach.

2. STATUTORY SCHEME: Chapter 53 of the Texas Property Code outlines in great detail how liens to secure payment for labor and materials are attached. The overall scheme is much too complicated for the scope of this paper. However, I refer the reader to that Chapter as being necessary for builders– labor and materialmen – to understand the process of securing payment for their effort and materials.

3. SUBCONTRACTOR HAS NO CONSTITUTIONAL LIEN: Because a subcontractor is a derivative claimant and, unlike a general contractor, has no constitutional, common law, or contractual lien on the property of the owner, a subcontractor's lien rights are totally dependent on compliance with the statutes authorizing the lien. ***Da-Col Paint Manufacturing Co. v. American Indemnity Co.***, 517 S.W.2d 270 (Tex. 1974).

4. CAVEAT - STATUTORY PROCEDURES ARE TO BE STRICTLY FOLLOWED: "**Sec. 53.051. Necessary Procedures.** To perfect the lien, a person ***must comply*** with this subchapter." [Emphasis supplied] Sections 53.054-55 provide for the contents of the affidavit to be prepared, verified, and filed to secure the line - must be followed.

5. DOES NOT SECURE ATTORNEY FEES: The limitations on what payments are secured by this scheme are set out in Section 53.023 of the Property Code and attorney fees are not listed.

D. **Contractual Liens - Contractual Mechanic's and Materialmen's Liens**

E. **Deed of Trust Liens**

1. A MATTER OF AGREEMENT– GET A GOOD ATTORNEY! These two categories are treated in the same paragraph. Contractors and owners should obtain the services of a qualified commercial real estate attorney to assist them in the preparation of the construction contract which should contain provisions for a mechanic's and materialmen's lien to secure payment and most usually contain deed of trust provisions for private foreclosure in the event of a default in payments. To be sure, one can get on the Internet and obtain suggested forms and thereby avoid the costs of an attorney; however, surely the State Bar of Texas has an "Ode to the Party Who Makes His Own Construction Contract" as there is the "Ode to the Party Who Makes His Own Will."

F. **Homestead Lien**: The issues related to lien on a homestead are allowed a separate treatment because that lien is restricted by the Texas Constitution.

1. ARTICLE XVI, Sec. 50. HOMESTEAD; PROTECTION FROM FORCED SALE; MORTGAGES, TRUST DEEDS, AND LIENS

> ". . . (a) The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for: . . ."(5) work and material used in constructing new improvements thereon, if contracted for in writing, or work and material used to repair or renovate existing improvements thereon if:

(A) the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead;
(B) the contract for the work and material is not executed by the owner or the owner's spouse before the fifth day after the owner makes written application for any extension of credit for the work and material, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing;
(C) the contract for the work and material expressly provides that the owner may rescind the contract without penalty or charge within three days after the execution of the contract by all parties, unless the work and material are necessary to complete immediate repairs to conditions on the homestead property that materially affect the health or safety of the owner or person residing in the homestead and the owner of the homestead acknowledges such in writing; and
(D) the contract for the work and material is executed by the owner and the owner's spouse only at the office of a third-party lender making an extension of credit for the work and material, an attorney at law, or a title company. . .”

In ***Inwood North Homeowners' Association v. Harris***, 736 S.W.2d 632 (Tex 1987) we find this clarion statement albeit in the dissent: “. . .A review of the history of the homestead exemption in Texas makes the matter as clear and bright as the Texas sky at night; the public policy of this State has been and is to protect homestead property from creditors' claims.” [This includes contractor’s claims]

2. D/B/A – SOLE PROPRIETOR– AND OWNER ARE THE SAME: A sole proprietorship business and its owner are the same legal entity. “A sole proprietorship does not have a separate legal existence distinct from the operator of the business. ***Ideal Lease Serv., Inc. v. Amoco Prod. Co., Inc.***, 662 S.W.2d 951, 952 (Tex.1983) . The assets and liabilities of the sole proprietorship belong to the operator directly. ***CU Lloyd's of Tex. v. Hatfield***, 126 S.W.3d 679, 684 (Tex.App.-Houston [14th Dist.] 2004, pet. denied) (citing **Black's Law Dictionary** 1398 (7th ed.1999)).” ***Bush v. Bush***, 336 S.W.3d 722, 740 (Tex.App.—Houston [1st Dist.] 2010, no pet.).

3. CONTROL OF VENDOR BY OWNER PREVENTS SHAM CONTRACT SHIELD: ***Texas Property Code: § 53.026*** states " (a) A person who labors, specially fabricates materials, or furnishes labor or materials under a direct contractual relationship with another person is considered to be in direct contractual relationship with the owner and has a lien as an original contractor, if:

(1) the owner contracted with the other person. . . and the owner can effectively control that person through ownership of voting stock, interlocking directorships, or otherwise; [OR]
(2) the owner contracted with the other person.. and that other person can effectively control the owner through ownership of voting stock, interlocking directorships, or otherwise; or

(3) the owner contracted with the other person for the construction or repair of a house, building, or improvements and the contract was made without good faith intention of the parties that the other person was to perform the contract.

4. LIEN VS LIABILITY ISSUES: In ***Southwest Props., L.P. v. Lite-Dec, Inc***., 989 S.W.2d 69 (Tex App- San Antonio, 1998, writ denied) the court held: ". . .considering Chapter 53 in its entirety, it is clear that the only reasonable and just interpretation of section 53.026 is to construe "in a direct contractual relationship" as an effort to effectuate the timetables for filing liens and not an effort to control liability of an owner."

CHAPTER 5 – DAMAGES

I. **DEFINED**. "'Damages' are defined as 'compensation in money imposed by law for loss or injury.' Webster's Ninth New Collegiate Dictionary 323 (1989)." ***Geters v. Eagle Ins. Co.***, 834 S.W.2d 49 (Tex 1992).

Damages for our purposes are divided into two categories: (1) "Direct Damages" and (2) Consequential Damages."

A. **Categories: Direct and Consequential Damages**: ***El Paso Marketing, L.P. v. Enterprise Texas Pipeline LLC***, 383 S.W.3d 138, 55 Tex. Sup. Ct. J. 877 (Tex 2012) held "direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong. . . . Consequential damages, on the other hand, result naturally, but not necessarily . . . ." (Citing ***Arthur Andersen***, below).

B. **Categories Defined**: ***Arthur Andersen & Co. v. Perry Equip. Corp.***, 945 S.W.2d 812 (Tex 1997) Actual damages are those damages recoverable under common law. . . At common law, actual damages are either "direct" or "consequential.". . . ***Direct damages*** are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong. . . Direct damages compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the defendant from his wrongful act. . . ***Consequential damages***, on the other hand, result naturally, but not necessarily, from the defendant's wrongful acts. . . Under the common law, consequential damages need not be the usual result of the wrong, but must be foreseeable. . . . Still, if damages are too remote, too uncertain, or purely conjectural, they cannot be recovered. [Emphasis supplied]

Both categories are "economic damages" but the latter category can be contracted away by the parties in advance. ***Materials Marketing Corp. v. Spencer***, 40 S.W.3d 172 (Tex.App.–Texarkana,2001, no writ.)

C. **Contractual Limitations of Damages**: The issues of damages related to construction contracts is too long and complicated for the limited scope of this paper. However, it does seem appropriate to set forth the right of the contractor to limit the threat of damages by contract. It is quite disarming to understand the ability of the contractor to limit the contractor's damages by contract

and perhaps even unfair but so long as the law allows it, we should inform our contractor clients and permit them to limit their scope of possible loss. The recent case of ***LAN/STV v. Martin K. Eby Constr. Co.***, 435 S.W.3d 234 (Tex 2014) is instructive of the present view of the Texas Supreme Court and its reliance on the power of contract to limit damages.

> ". . .We think it more probable that a contractor will assume it must look to its agreement with the owner for damages if the project is not as represented or for any other breach. Though there remains the possibility that a contractor may not do so, we think the availability of contractual remedies must preclude tort recovery in the situation generally because, as stated above, "clarity allows parties to do business on a surer footing. . ." Where contracts might readily have been used to allocate the risk of a loss," the Restatement observes, "a duty to avoid the loss is unlikely to be recognized in tort — not because the economic loss rule applies, but simply because courts prefer, in general, that economic losses be allocated by contract where feasible. . .construction disputes . . . are good candidates for precluding recovery under the "economic loss" rule, because the parties are in a position ***to protect themselves through bargaining***." [Emphasis supplied]

We will set forth in shortened form the areas where damages may be limited by contract:

D. **Limitations Basic Principles**: ***Materials Marketing Corp. v. Spencer***, 40 S.W.3d 172 (Tex.App.–Texarkana,2001, no writ.) The parties may contract to limit damages and the term is enforceable . See: ***Southwestern Bell Telephone Co. v. FDP Corp.*** 811 S.W.2d 572 (Tex.,1991). A limitation on damages for breach of warranty is enforceable.

1. LOST PROFITS: ***Specifics COC Services, Ltd. v. CompUSA, Inc.***, 150 S.W.3d 654 (Tex.App.–Dallas,2004.dismissed/denied). Contract waived claims for lost profits – valid.

2. INCIDENTAL AND CONSEQUENTIAL DAMAGES UNDER EXPRESS WARRANTY: ***W. R. Weaver Co. v. Burroughs Corp***., 580 S.W.2d 76 (Tex.Civ.App., 1979 n.r.e.) .The contract precluded Weaver from recovering any incidental or consequential damages since the lease and sales agreement provide that Weaver expressly waives all damages, whether direct, incidental or consequential, as they provide that Burroughs shall not be held liable under the agreements for any more than exchange of equipment under the express warranty. . . that such agreements are common in commercial transactions between businessmen acting at presumed arm's length; and that there is nothing unconscionable about them. Comment: Terms arrived at arms length are enforceable. ***Coastal Plains Development Corp. v. Micrea, Inc.***, 572 S.W.2d 285 (Tex. 1978).

E. **Scope of Limitations in Express Warranty Cases**: In ***Southwestern Bell Tel.Co. v FDP Corp.*** 811 S.W. 2d 572 (Tex 1991), the Texas Supreme Court held that a claim for damages for the breach of an express warranty is burdened with all the limitations agreed upon and contained in the express warranty.

F. **Damage Claims in Misrepresentation Cases**: This analysis will include owners' claims under the DTPA and Chapter 27 of the Civ Prac & Rem Code for Fraud in transactions involving real estate.

G. **Out of Pocket vs Benefit of the Bargain**: In ***W. O. Bankston Nissan, Inc. v. Walters***, 754 S.W.2d 127 (Tex. 1988) the court held: "In a DTPA case [misrepresentation case] , the plaintiff is entitled to actual damages . . . this court has defined actual damages as those recoverable at common law . Under common law, there are two measures of damages for misrepresentation: (1) the `out of pocket' measure, which is the difference between the value of that which was parted with and the value of that which was received'; and (2) the 'benefit of the bargain' measure, which is the difference between the value as represented and the value actually received.

1. CAVEAT: Claimant's attorneys need to take great care in their submission of issues. In the ***Bankston*** case, supra, and in ***Leyendecker & Associates v. Wechter***, 683 S.W.2d 369 (Tex. 1984) the cases were lost for failure to submit issues to obtain the "differences."

H. **Owner's Opini0n on Value Admissible – with Caveat**: In ***Porras v. Craig,*** 675 S.W.2d 503 (Tex 1984) the Texas Supreme Court stated:

> "Opinion testimony concerning these damages [to the owner's real property] is subject to the same requirements as any other opinion evidence, with one exception: the owner of the property can testify to its market value, even if he could not qualify to testify about the value of like property belonging to someone else. State v. Berger, 430 S.W.2d 557 (Tex.Civ.App. -- Waco 1968, writ ref'd n.r.e.). Even an owner's testimony, however, is subject to some restrictions. HN2 In [505] order for a property owner to qualify as a witness to the damages to his property, his testimony must show that it refers to market, rather than intrinsic or some other value of the property. This requirement is usually met by asking the witness if he is familiar with the market value of his property."

CHAPTER 6 – DANGER – DANGER – BLUFF LIENS

Contractors need not get so angry that they set out to cloud the title of the owner by filing a lien that they know is not genuine or that the time has past whereby the lien may be attached by affidavit.

I. CIV. PRAC. & REM. CODE SEC. 12.002:

(a) A person may not make, present, or use a document or other record with:
(1) knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property. . . [with the] . . . intent to cause another person to suffer: (A) physical injury; (B) financial injury; or (C) mental anguish or emotional distress.

(b) A person who violates Subsection (a) or (a-1) is liable to each injured person for:

(1) the greater of: (A) $10,000; or (B) the actual damages caused by the violation; (2) court costs; (3) reasonable attorney's fees; and (4) exemplary damages in an amount determined by the court.

There seems to be no requirement to acquire a finding of fact that the owner has been injured as predicate to the award of the statutory damages. In ***Vanderbilt Mortgage & Finance vs Flores*** 692 F3rd 358 U.S. Court of Appeals 5tth Cir 2012, the Court held ". . .that the plain reading of Civ Prac & Rem Code Section 12.002 is an alternative to an award of actual damages and eviscerates any argument that actual damages are necessary to recover under this statute."

CHAPTER 7 – MISC STATUTES

I. CIVIL PRACTICE AND REMEDIES CODE CHAPTER 130. INDEMNIFICATION PROHIBITED IN CERTAIN CONSTRUCTION CONTRACTS

A. **Sec. 130.001. Definition**. In this chapter "construction contract" means a contract or agreement made and entered into by an owner, contractor, subcontractor, registered architect, licensed engineer, or supplier concerning the design, construction, alteration, repair, or maintenance of a building, structure, appurtenance, road, highway, bridge, dam, levee, or other improvement to or on real property, including moving, demolition, and excavation connected with the real property.

B. **Sec. 130.002. Covenant or Promise Void and Unenforceable.**

(a) A covenant or promise in, in connection with, or collateral to a construction contract is void and unenforceable if the covenant or promise provides for a contractor who is to perform the work that is the subject of the construction contract to indemnify or hold harmless a registered architect, licensed engineer or an agent, servant, or employee of a registered architect or licensed engineer from liability for damage that:

(1) is caused by or results from:

(A) defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or

(B) negligence of the architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the Construction contract; and

(2) arises from:

(A) personal injury or death;

(B) property injury; or

(C) any other expense that arises from personal injury, death, or property injury.

(b) A covenant or promise in, in connection with, or collateral to a construction contract other than a contract for a single family or multifamily residence is void and unenforceable if the covenant or promise provides for a registered architect or licensed engineer whose engineering or architectural design services are the subject of the construction contract to indemnify or hold harmless an owner or owner's agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner's agent or employee.

C. **Sec. 130.003. Insurance Contract; Workers' Compensation**. This chapter does not apply to:

(1) an insurance contract; or
(2) a workers' compensation agreement.

D. **Sec. 130.004. Owner of Interest in Real Property**:
(a) Except as provided by Section 130.002(b), this chapter does not apply to an owner of an interest in real property or persons employed solely by that owner.
(b) Except as provided by Section 130.002(b), this chapter does not prohibit or make void or unenforceable a covenant or promise to:
(1) indemnify or hold harmless an owner of an interest in real property and persons employed solely by that owner; or
(2) allocate, release, liquidate, limit, or exclude liability in connection with a construction contract between an owner or other person for whom a construction contract is being performed and a registered architect or licensed engineer.

E. **Sec. 130.005. Application of Chapter**. This chapter does not apply to a contract or agreement in which an architect or engineer or an agent, servant, or employee of an architect or engineer is indemnified from liability for:

(1) negligent acts other than those described by this chapter; or
(2) negligent acts of the contractor, any subcontractor, any person directly or indirectly employed by the contractor or a subcontractor, or any person for whose acts the contractor or a subcontractor may be liable.

F. **Curiosity – this Statute Ignored – but Same Result**: In ***LAN/STV v. Martin K. Eby Constr. Co.***, 435 S.W.3d 234 (Tex 2014) , THE General Contractor [within the definition above] contracted with the Dallas Area Rapid Transportation Authority (DART) to build DART a light rail transit system based on plans developed by professional designers as defined above. The plans were faulty and caused great economic loss to the General Contractor. The General Contractor sued the designers with whom they had no contract. Without any reference to Chapter 130, Civ Prac & Rem Code, the Court held that absent a contractual relationship, the General Contractor had no claim against the design team. The Court referenced Chapter 150 of the Civ Prac & Rem Code but its existence was not involved in the Court's holding. The Court applied only the common law approach and ignored the legislative effort. The Court's citation and analysis was not necessarily new - it was that the Court ignored what the legislature had done that was curious.

II. **STATUTES OF LIMITATION APPLIED TO TRANSACTIONS INVOLVING REAL ESTATE**: [Chapter 16, Civ Prac & Rem Code]

A. **Sec. 16.003.** 2 years for trespass to the property of another, conversion of personal property and death actions unless covered by one or more of the following statutes of limitation.

B. **Sec. 16.004**. 4 years for claims for (1) specific performance of a contract for the conveyance of real property. . .(3) debt [contract]; (4) fraud; or (5) breach of fiduciary duty.

C. **Sec. 16.008.** 10 years for claims against ARCHITECTS, ENGINEERS, INTERIOR DESIGNERS, AND LANDSCAPE ARCHITECTS FURNISHING DESIGN, PLANNING, OR INSPECTION OF CONSTRUCTION OF IMPROVEMENTS; extended two years from date of written claim for damages.

D. **Sec. 16.009**. 10 years for claims against PERSONS FURNISHING CONSTRUCTION OR REPAIR OF IMPROVEMENTS. Extends for 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvements; extended two years from date of written claim for damages.

E. **Sec. 16.011.** 10 years for claims against SURVEYORS; extended two years from date of written claim for damages. "(c) This section is a statute of repose and is independent of any other limitations period."

F. **Sec. 16.051**. 4 years for claims not covered by other specific sections.

III. **STATUTES OF LIMITATION APPLIED TO DTPA CLAIMS: Sec. 17.565.** 2 years after the date on which the false, misleading, or deceptive act or practice occurred or within two years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice

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August 20, 2015

Our File No:

CERTIFIED MAIL RETURN RECEIPT REQUESTED
[corporation]
[party]

RE: Notice of Rescission of Building and Purchase Contract– Demand of Return of Consideration and Damages: Claimant _____

Greetings:

This firm has been engaged to represent [Client] in her claims against the "contractors", [corporation] Inc., and [party], [1] jointly and severally arising out of a transaction in which [Client] sought or acquired goods and services by lease or purchase from [corporation] Inc., and [party] jointly and severally and her claims arise out of that transaction. My client asserts her common law remedy of rescission.

This notice and demand letter are addressed to [corporation] Inc., and [party] jointly and severally.

> It is addressed to [corporation] Inc., because there exists a written contract between my client and the corporation for the sale and purchase of the property , a copy of which is attached and marked **Exhibit 1**. [No mention that the home was to be constructed]

[1] Property Code , Section 27.001. . ."Definitions". . . (5) "Contractor": (A) means: (i) a builder, as defined by Section 401.003, contracting with an owner for the construction or repair of a new residence, for the repair or alteration of or an addition to an existing residence, or for the construction, sale, alteration, addition, or repair of an appurtenance to a new or existing reside nce; (ii) any person contracting with a purchaser for the sale of a new residence constructed by or on behalf of that person. . ."

It is addressed to [party] because he represented to the City of [CITY] that he was the builder and made no mention of any interest in the project the corporation might have in the property. See a certified copy of the Application and permit for Building bearing the signature of [party] as Applicant or Builder. [Certified Copy of City Ordinance adopting 2003 IRCC as the applicable building code for residential buildings and certified copy of the application for building permit]. Marked **Exhibit 2**.

The contract between my client and [corporation] Inc., [Exhibit 1] is not dated other than by month and year [October of 2012] on page 8 of the sale and purchase contract. It is noteworthy that the contract calls for a closing date of November 6, 2012, while the building permit application was approved on October 5, 2012, thus allowing by inference or implication a construction period of 32 days.

The contract for purchase and sale has apparently been treated by the parties as a contract for the construction of the residential building now on the lot described in the contract document. This will assume, of course, that there are other terms and conditions of the agreement not included in the written document – such as plans and specifications for the construction of the home and including all applicable aspects of the 2003 IRCC Building Code adopted by the City of [CITY] which were in effect at and during the construction of the home.

As you know, any contract that involves a regulated subject matter, all applicable laws are adopted by implication into the contract and form terms and conditions of the contract. [2] That being the case, it was the burden of the builder [party] to follow the applicable building code and any violations on his part in failing to comply with the 2003 IRCC of the City of [CITY], Texas, constitute a breach of the agreement. [3]

In addition to the incorporation of the 2003 IRCC building code of the City of [CITY], Texas, the law provides my client with the common law implied warranty set forth in ***Humber v. Morton***,

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[2] ***Applicable construction laws – a matter of law.*** Laws existing at the time a contract is made become part of the contract and govern the transaction as if they were expressly referred to or incorporated in its terms. ***McCreary v. Bay Area Bank & Trust***, 68 S.W.3d 727 (Tex. App. Houston 14th Dist. 2001)". . .it is well settled that the laws which are in existence at the time of the making of the contract enter into and become a part of such contract as if expressly referred to or incorporated therein. ***Griffin's Estate v. Sumner***, 604 S.W.2d 221, 230 (Tex.Civ.App.—San Antonio 1980, writ ref'd n.r.e.)." ***Wessely Energy Corp. v. Jennings***, 736 S.W.2d 624 (Tex.,1987): ". . . The laws existing at the time a contract is made becomes a part of the contract and governs the transaction. ***Langever v. Miller,*** 124 Tex. 80, 76 S.W.2d 1025, 1026–27 (1934)."

[3] ***Municipal Building Codes***: "***Tips v. Hartland Developers, Inc.,*** 961 S.W.2d 618 (Tex.App.–San Antonio,1998 no writ): ". . . The existing codes require newly constructed buildings to meet certain standards; however, the codes do not dictate whether the responsibility for ensuring compliance rests on the building owner or the building contractor. We believe that there is ample case law to suggest that, in the absence of a contrary agreement, the burden should fall on the builder..We hold that a cause of action is available to plaintiffs for breach of contract where a contractor has failed to comply with building codes relevant to the intended use of the structure. ." [Emphasis supplied]

426 S.W.2d 554 (Tex 1968) in which the Texas Supreme Court extended to the purchaser of a new home from the builder, the common law implied warranty that the home would be built in a good and workmanlike manner. The court rejected the "merger" doctrine of contracts; [4] specifically the warranty provides:

> ". . .Through the implied warranty of good workmanship, the common law recognizes that a new home builder should perform with at least a minimal standard of care. . . This implied warranty requires the builder to construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances."

This would require, at the least, compliance with the city building code. This the builder did not do.

The issue may surface in your mind whether the RCLA pre-empts claims related to warranties. That issue has been dealt with in my client's favor in ***Sanders v. Co. Construction Equity, Inc.,*** 42 S.W.3d 364 (Tex.App.–Beaumont,2001, writ denied at 43 SW3rd). There have been adjustments in the RCLA since that time but none seem to advert to the reasoning and holding in the case. In short, the RCLA does not pre-empt common law claims that do not conflict with it. Remember that the RCLA does not create a cause of action – only a limitation on damages if complied with by the contractor.

I have had my client engage the services of [expert] P.E. [professional engineer] out of [CITY] Texas, for an assessment of the problems in the construction of the home. I enclose a copy of his email to me dated _____. [**Exhibit 3**] It is self-explanatory. The patent construction defects include all of the specific items listed in the demand letter of November 12, 2013, over the signature of _____, attorney for my client and the problems set forth in the email from [EXPERT], P.E., aforesaid. These defects are restated herein by reference.

My client's first approach, prior to my entry into the matter, was an attempt to obtain acceptable repairs of her home. However, that did not work. Your client was not willing to address the underlying problems – the home was poorly constructed, was not constructed in a good and workmanlike manner and was constructed in violation of the 2003 IRCC - the Building Code of the City of [CITY], Texas. In this connection, I have reviewed your client's offer in your letter dated December 27, 2013, [**Exhibit 4**] to repair which is cosmetic at best, below standard of care and unreasonable. As many builders respond to claims that the foundation is moving, your client blames my client for watering her yard. I suppose he believes - or will testify- that she should not water her yard and just let it die because he was not hired to build her a home where she could water her yard and have a pretty place to live in. Why would she ever dare claim that she should have a green lawn –like any other person who spends that kind of money on their home?

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[4] In ***Centex Homes v. Buecher***, 95 S.W.3d 266 (Tex.,2002.) The Texas Supreme Court held that the Humber Warranty could be circumscribed by providing a specific standard of construction. However, the contract document between our parties does not address the issue and therefore the Humber Warranty prevails.

Your client's offer requires my client to release all future claims that might surface whether under your offer to repair or under a cash settlement offer. Whether either offer might have otherwise been acceptable is not reached because of the requirement that my client release all claims related to the construction pf the home whether known or unknown. This is unreasonable as it asks her to assume that the existing problems are the only ones that will surface. With the quality of construction present my client would not dare accept an offer that requires her to absorb the risk of future damages and breaches of warranty that are sure to come; therefore. Your offer is unreasonable and is rejected.

In the process of analyzing your offer, I had my client ascertain some of the costs of repair and in so doing found some direction in determining the underlying causes of her problems. Here is a list of estimates [collectively **Exhibit 5**]:

1. Overhead Builders [door repair facility to rehang doors]. $2,608.12
2. _____ Contractor [Repairs caused by sagging floor; walls puLling off the floor] $21,400.00
3. Childers Bros [foundation repairs].. . . . . $6,400.00

Cost of repairs known at this time [this does not include the undetermined costs suggested in the email from the engineer]. **$30,408.12**

These costs of repairs are virtually 20% of the cost of the contract with your client!

I attach a series of photographs that demonstrate conclusively that the builder did not meet the requirements of the 2003 IRCC of [CITY], Texas. [Collectively **Exhibit 6**]

This level of breach of the warranty of good and workmanlike performance including the failure to comply with the building code constitutes a breach of the construction contract and the builder – your clients -- are not entitled to retain the contract price of $154,000.00 which they have received. My client has suffered substantial damage and is entitled to the remedy of rescission. [5]

Neither does this level of performance rise to "substantial performance " under ***Atkinson v. Jackson Bros.***, 270 S.W. 848 (Tex.Com.App. 1925) [6] reaffirmed in ***Vance v. My Apartment Steak House of San Antonio, Inc***., 677 S.W.2d 480 (Tex.,1984). With this definition [fn 4] there is no substantial performance and your clients [whether E&M or Elliott –, or both] are subject to a rescission claim which is hereby made . My client is entitled to get out of the contract, recover her damages and reclaim her consideration paid and recover her special damages and attorney fees.

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[5] ***Russell v. Industrial Transp. Co.***, 113 Tex. 441, 258 S.W. 462 (TEX. 1924): "In an action for rescission, the amount of the damage is immaterial, provided it is substantial."

[6] In ***Atkinson v. Jackson Bros.***, 270 S.W. 848 (Tex.Com.App. 1925) the court defined "substantial performance" as " "Substantial performance" of building contract permits only such omissions or deviations from contract as are inadvertent and unintentional, are not due to bad faith, do not impair structure as whole, and are remediable without doing material damage to other parts of building in tearing down and reconstructing."

This level of breach also suggests that your clients knowingly failed to comply with the 2003 IRCC building code of the City of [CITY] and therefore is liable to my client for mental anguish damages and "additional damages' under the DTPA not to exceed twice actual damages [not including mental anguish damages].

The RCLA allows the contractor to rescind the transaction; however, it does not pre-empt the right of the buyer under the common law also to rescind. If the contract provides for rescission under Section 27.0042 (a) -(c) he may limit the recovery of special damages to those set out in sub-sections (c) (1)-(2); [7] if the buyer rescinds there seems no effort to limit the special damages under the common law.

My client is entitled under the doctrine of rescission to recover her special damages as well as the consideration paid. In ***Smith v. National Resort Communities Inc.***, 585 SW2d 655, 690 (Tex 1979) the Texas Supreme Court held that return of the consideration paid and special damages are recoverable by the wronged party.

> "Rescission is an equitable remedy and, as a general rule, the measure of damage is the return of the consideration paid, together with such further special damage or expense as may have been reasonably incurred by the party wronged on account of the contract."

As a "special damage" my client is entitled to recover interest on the money paid to your client. See ***Watkins v. Junker***, 90 Tex. 584, 40 S.W. 11 (1897) cited in *Smith,* supra

> ". . . the person entitled to recover has also the right to have compensation for the detention of the money to which he is entitled by reason of the wrong done to him; that if interest be properly an element of damages in any case, then it is so as a matter of law; and that ***the courts have by analogy adopted the legal rate of interest fixed by statute as the standard by which to be governed in assessing damages for the detention of money***. Accord, ***Texas Company v. State***, 154 Tex. 494, 281 S.W.2d 83 (1955)." [Emphasis supplied]

My client's special damages are as follows:

1. Custom installed window blinds $731.34
2. Installation of stove hood vent $1,000.00
3. Installation of back patio $900.00
4. Supplies for shutters and crown molding $593.55

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[7] ***Section 27.0042*** "(c) If a contractor elects to purchase the residence under Subsection (a): (1) the contractor shall pay the original purchase price of the residence and closing costs incurred by the homeowner and the cost of transferring title to the contractor under the election; (2) the homeowner may recover: (A) reasonable and necessary attorney's and expert fees as identified in Section 27.004(g); (B) reimbursement for permanent improvements the owner made to the residence after the date the owner purchased the residence from the builder; and (C) reasonable costs to move from the residence. . .."

5. Jose Astrada contractor related to item 4 above $500.00
6. Installed new yard and sod $10,500.00
7. Sprinkler system maintenance $1,000.00
8. Construction of outbuilding shed $3,000.00
9. Labor related to installation of shed $211.36
10. Move-in costs actually incurred $3,034.17
11. Move-out costs [estimated] $3,000.00
12. Interest on $124,000.00 at 5% [statutory rate] since Nov 15, 2012 [$516.67.month] for 16 months $8,266.72
13. Closing costs $3,000.00
14. Ad Valorem taxes paid for 2013 . . . . . $3,160.43
15. Attorney fees to date [recoverable under the DTPA] $2,000.00

Total Special Damages **$35,737.14**

Refund of the purchase price $154,000.00

Total of rescission consideration and special damages $189,737.14

Mental anguish damages for the knowing breach of the ***Humber Warranty*** $10,000.00

"Additional Damages" in the nature of punitive damages [not to exceed twice actual damages] $70,000.00

Total Claim: Rescission plus damages **$269,737.14**

Less the use value of the home based on a reasonable rental value of $800.00/month for 16 months . . . . . -$12,800.00

Total Due: **$157,737.14**

My client will vacate the property upon payment of the amount due in cash or equivalent funds and she will execute such instruments of reconveyance as are suggested in the RCLA to vest title in the property back into your client or to their order. She will execute mutual universal releases with your clients of all claims, known and unknown, disclosed and undisclosed upon payment of her damages and refund of her consideration.

Because of the adverse financial impact on my client, she is unable to move out on this tender back of the home. Continued use of the home under exigent circumstances does not bar the remedy of rescission. ***Vista Chevrolet, Inc. v. Lewis***, 704 S.W.2d 363 (Tex.App. 13 Dist.,1985,reversed on other grounds at 709 S.W.2d 176 (Tex 1986).

Yours Very Truly,