

BILL ANALYSIS

C.S.H.B. 730
By: Ritter
Regulated Industries
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In 1989, the Residential Construction Liability Act (RCLA) became effective and, along with its subsequent amendments, provided remedies applicable to residential construction defect lawsuits. The lack of state performance standards for residential construction in Texas and case law makes it difficult for homeowners and homebuilders to resolve construction issues without costly and time consuming litigation. Without state involvement, homeowners and homebuilders will have to continue to resort to litigation to resolve disputes. As proposed, CSHB 730, the Texas Residential Construction Commission Act will create a Residential Construction Commission, adopt performance standards for residential construction and establish a state sponsored inspection and dispute resolution process that assists consumers in resolving construction issues with their homebuilders. In addition, the Committee Substitute adds three chapters that address the registration and regulation of homebuilders.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Texas Residential Construction Commission in SECTION 1.01 (Sections 408.001, 416.008, 416.009, 417.003, 426.004, 427.001, 428.001, 428.003, 428.004, 429.001, 430.001, 430.003, Property Code) of this bill.

ANALYSIS

Article 1.

Creation of the Texas Residential Construction Commission; State Sponsored Inspection and Dispute Resolution; Warranties and Building Standards

Section 1.01

The Texas Property Code is amended by adding Title 16 which is the Texas Residential Construction Commission Act. This Act creates the Texas Residential Construction Commission.

Chapter 401 - General Provisions

Definitions are provided for: "applicable building and performance standards," "applicable warranty period," "approved architect," "approved structural engineer," "builder," "commission," "home," "homeowner," "limited statutory warranty and building and performance standards," "nonstructural matter," "request," "settlement agent," "state inspector," "state-sponsored inspection and dispute resolution process," "structural," "structural failure," "third-party inspector," and "construction defect."

This title does not apply to an owner-constructed home.

The Texas Residential Construction Commission is subject to the Texas Sunset Act and will thus be abolished on September 1, 2015, unless otherwise directed.

Chapter 406 - Texas Residential Construction Commission

Membership to the Texas Residential Construction Commission consists of nine members appointed by the Governor. Of the nine, six members are required to hold a certificate of registration issued pursuant to the Texas Residential Construction Commission Act, two members must be from the general public, and one member must be a licensed professional engineer. The Commissioners will serve staggered six-year terms with three members' terms expiring on February 1 of each odd-numbered year. No member of the commission may serve more than two complete terms.

According to Section 406.003, one member of the commission will serve as presiding officer at the pleasure of the Governor.

Section 406.004 provides an outline of the commission membership and employee restrictions. In this section, "Texas trade association" is defined. Any person employed by a Texas trade association in any capacity or any person who has a spouse employed by a Texas trade association (administrative, executive, consultant, lobbyist et al.) is prohibited from service on the commission. Any person who is a lobbyist for a profession related to the operation of the commission is also prohibited from service on the commission.

Section 406.005 details the grounds for removal from the commission. Any commissioner that does not have, at the time of taking office, the qualifications outlined in Sec. 406.001, does not during service on the commission maintain the qualifications outlined in Sec. 406.001, is ineligible for membership under Section 406.004, cannot because of illness or disability discharge the member's duties for a substantial part of the member's term, or is absent from more than half of the regularly scheduled commission meetings is cause for removal from membership of the commission.

Actions taken by the commission while one or more of the members are eligible for removal are not invalid just because one or more members are eligible for removal.

If the Executive Director has knowledge that a potential ground for removal exists, then he/she must notify the presiding officer of this offense. The presiding officer will then contact the Governor and the Attorney General that a potential ground for dismissal exists. If the ground for dismissal involves the presiding officer, then the Executive Director is required to notify the next highest ranking officer of the commission. This commissioner must then notify the Governor and the Attorney General of the potential ground.

Section 406.006 stipulates that any person who is appointed to and qualifies for office as a member of the commission is prohibited from voting, deliberating, or being counted as a member in attendance at a meeting of the commission until the person completes a training program.

The Commission is required to meet at least quarterly and at other times at the call of the presiding officer, as required by Section 406.007.

Chapter 407 - Executive Director and Other Agency Personnel

The commission is required to employ an executive director as the executive head of the agency, and is authorized to employ other personnel as necessary for the administration of this title.

The commission is required to also develop and implement policies that clearly separate the policymaking responsibilities of the commission and the management responsibilities of the executive director and staff.

The Executive Director is required to create and provide information regarding the requirements for office or employment, is required to develop an adhere to an intra-agency career ladder program, is required to develop a system of annual performance evaluations, is required to prepare and maintain a written policy statement that implements a program of equal opportunity, and is required to provide to

commission employees information and training on the benefits and methods of participation in the state employee incentive program.

Chapter 408 - Powers and Duties

Section 408.001 describes the commission's process in generating rules and empowers the commission to adopt and implement rules for governing the state-sponsored inspection and dispute resolution process, establishing limited statutory warranty and building standards for residential construction, approving third-party warranty programs, and approving third party inspectors. Substantive rules must be approved by the Attorney General.

Section 408.002 (Fees) The commission is required to adopt fees commensurate with providing sufficient revenue to cover the costs of administering this program.

Section 408.003 (Accessibility) The commission is required to comply with federal and state laws related to accessibility and the Executive Director is required to prepare and maintain a written statement detailing how the commission will assist people who do not speak English.

Section 408.004 (Annual Report)

The commission is required to file annually a detailed written report accounting for all funds received and disbursed during the preceding fiscal year.

Chapter 409 - Public Interest Information and Complaint Procedures

Section 409.001 Public Interest Information

The commission is required to prepare information of public interest describing the functions, purpose, and various activities of the commission.

Section 409.002 Public Participation

The commission is required to develop and implement policies that provide the public with opportunity to appear and participate in commission activities.

Section 409.003 Records of Complaints

The commission is required to maintain a file on each written complaint filed with the commission and is required to keep both parties informed on the progress of the complaint and its resolution.

Chapter 416 - Certificate of Registration

Section 416.001 stipulates that unless a person holds a certificate of registration issued under this chapter, such person is prohibited from acting as a builder.

Section 416.002 states that each applicant for a builder certificate of registration is required to submit an application on a form prescribed by the Commission. Applicants under this section are also required to disclose whether they have ever entered a plea of guilty or nolo contendere to a felony or have been convicted of a felony and can no longer appeal. The commission is also authorized to conduct background checks on applicants.

Section 416.003 authorizes the Commission to issue conditional registration certificates while criminal background checks are pending. This section expires January 1, 2006.

Section 416.004 authorizes the Commission to charge and collect filing fees for applications, charging up to \$500 for an original certificate of registration and \$300 for a renewal.

Section 416.005 deals with general eligibility requirements for certificates of registration.

Section 416.006 deals with additional eligibility requirements for business entities.

Section 416.007 deals with the issuances of certificates, requiring the Commission to issue a certificate of registration within 15 days of receipt of an application wherein the applicant meets the criteria in Sections 416.005 and 416.006.

Section 416.008 deals with denial of registrations and creates an appeal process for decisions to reject applications. This section also grants rulemaking authority to the Commission relating to appeals of appeals.

Section 416.009 addresses expiration of certificates.

Section 416.010 requires a builder to maintain a fixed office location in the state, and deals with cases in which a builder moves from the address designated on the certificate of registration.

Chapter 417 - Prohibited Practices; Disciplinary Procedures.

Section 417.001 states the grounds for under which a person is subject to disciplinary action under this chapter.

Section 417.002 deals with the disciplinary powers of the Commission.

Section 417.003. If the Commission proposes to take disciplinary action, a person is entitled to a hearing before the Commission. The Commission shall adopt procedural rules that will apply to any such hearing.

Section 417.004 A person aggrieved by a ruling in a disciplinary hearing is entitled to appeal to a district court in the county in which the hearing is held.

Chapter 418 - Administrative Penalty.

Section 418.001 states that the Commission is authorized to impose administrative penalties on a certificate holder who violates Title 16 of the Property Code or a rule adopted by the Commission.

Section 418.002 states that administrative penalties may not exceed \$500 for each violation, and states the criteria that a hearings officer is authorized to consider for determining the size of an administrative penalty.

Section 418.003 states that the Commission is authorized to set a deadline for the payment of administrative penalties.

Section 418.004 For a violation of an order to pay an administrative penalty, the Commission is authorized to refer the matter to the attorney general for collection, or enforce any part of the order that specifies disciplinary action to be taken against the certificate holder if the certificate holder fails to pay the penalty within the time prescribed.

Chapter 426 - State-Sponsored Inspection and Dispute Resolution Process; Statutory Warranty And Building Standards

Section 426.001 Applicability of Subtitle

This section details what constitutes as a complaint subject to the state-sponsored inspection and dispute resolution process. This process begins if a dispute arises out of an alleged construction defect other than a claim solely for personal injury, survival, wrongful death, or damage to goods. A request must also be submitted to the commission on or before the 10th anniversary of the date of the initial transfer of title from the builder to the initial owner of the home or improvement that is subject of the dispute or the date on

which the contract for construction of the improvement was entered into.

This resolution process does not apply to disputes arising out of violations of the Business & Commerce Code, a contractor's wrongful abandonment of an improvement project before completion, or violation of Chapter 162.

Section 426.002 Conflict With Certain Other Law

This subtitle (article) prevails in any conflict with other law including Chapter 27 of the Property Code and the Deceptive Trade Practices-Consumer Protection Act.

Section 426.003 Registration Fee

A registration fee of not more than \$125 will be assessed at the closing of each sale of a home or as provided by subsection C. The commission is authorized to set levels of fees based on the value of the improvements. The settlement agent is required to collect the fees and remit them to the commission no later than the 15th day of the month after the month in which the fee is collected. If the transaction does not involve a settlement agent, then the builder must remit the fee no later than the 30th day after the earlier of the date of the agreement between the two parties, or the commencement of the work on the home. The commission is authorized to assess a late payment penalty of not more than \$500 against a builder who violates this procedure. This process applies only to new residential construction and the builder is responsible for paying the registration fee at closing in addition to any other fees for which the builder may be obligated.

Section 426.004 Application And Inspection Fees

An application fee in an amount determined by the commission will be assessed to the party who submits a matter to the commission for the state-sponsored inspection and resolution process. The commission is authorized to charge an additional amount to cover the expense of the third party inspector. Homeowners demonstrating a financial inability to pay the fees and expenses are authorized to qualify for waiver of the fees. If the initial transfer of title of the home from the builder occurred before 1/1/04, the party who submits a matter to the commission is required to pay the registration fee.

Section 426.005 Prerequisite To Action

This subtitle must be followed prior to filing an action. An action for damages or other relief from alleged construction defects must be filed on or before the 90th day after the date the third-party inspector issues the inspector's determination and if the determination is appealed - no later than the 90th day after the date the commission issues its ruling on the appeal. Any claim for personal injuries, damages to personal goods, or consequential damages arising out of an alleged construction defect must be included.

Section 426.006 Time For Requesting Inspection and Dispute Resolution

The State Sponsored Inspection and Dispute Resolution process must be requested on or before the second anniversary of the discovery of the conditions claimed to be evidence of the construction defect and in any event no later than the 30th day after the date the applicable warranty period expires.

Section 426.007 Admissibility Of Certain Evidence

A person who submits a request for the State Sponsored Inspection and Dispute Resolution must disclose the name of any person who, on behalf the requestor, inspected the home in connection with the construction defect alleged in the request. If the name is not included in the request, the requestor is prohibited from retaining the person as an expert or use materials prepared by that person in the dispute process or any action arising out of the construction defect that is subject of the request. The failure of a homeowner to obtain an expert during this process does not preclude such homeowner from retaining an expert if a dispute results in arbitration or litigation.

Section 426.008 Effect Of Third-Party Inspector's Determination or Ruling By Panel of State Inspectors

In any action brought after a determination by a third-party inspector or ruling by a panel of state inspectors on the existence of the construction defect or its appropriate repair, the determination or ruling is presumed

to be reasonable and dispositive. Any attempt to dispute, vacate, or overcome the presumption must establish by clear and convincing evidence that the determination or ruling is inconsistent with the applicable warranty and building standards. A third-party inspector's report does not apply in a subsequent action that is not between the homeowner and the builder.

Chapter 427 - Inspectors

Section 427.001 Qualifications Of Third-Party Inspectors

A third party inspector approved by the commission must meet the minimum qualifications prescribed by the commission and must also submit to the commission an annual application and fee in the amount required by commission rule.

Inspectors of workmanship and materials issues must have at least five years experience in the residential construction industry. An inspector who inspects issues involving structural matters must be an approved structural engineer or approved architect and must have a minimum of 10 years experience in residential construction.

Each inspector must be certified to the International Residential Code by the International Code Council and must have received initial training regarding the state-sponsored inspection and dispute resolution process and annual continuous education.

An inspector is prohibited from receiving more than 10% of the inspector's gross income from providing expert witness services, including retention for the purpose of providing testimony, evidence, or consultation in connection with a pending legal action.

Section 427.002 State Inspectors

The commission is required to employ state inspectors to serve on an appeals panel for the purpose of reviewing the determinations of the third-party inspectors, provide consultation to third-party inspectors, and to administer the state-sponsored inspection and dispute resolution process. All state inspectors must be certified to the International Residential Code by the International Code Council.

Chapter 428 - State-Sponsored Inspection and Dispute Resolution Process

Section 428.001 Request for Resolution

If a dispute arises out of an alleged construction defect between a builder and homeowner, either party is authorized to submit a written request to the commission for the state-sponsored inspection and dispute resolution.

The request must detail each alleged construction defect that is subject of the request, state the amount of any known out-of-pocket expenses and engineering or consulting fees incurred by the homeowner in connection with each alleged construction defect, include any evidence that depicts the nature and cause of each alleged construction defect and the nature and extent of repairs necessary to remedy the construction defect, and be accompanied by any specified fees.

The homeowner must also notify the builder in writing of each construction defect the homeowner claims to exist no later than 30 days before a request is submitted to the commission, and must provide a reasonable opportunity for the builder or the builder's designated consultants to inspect the home.

A person who submits a request must send a copy of the request and the evidence submitted with the request, by certified mail, return receipt requested, to every other party involved in the dispute.

The commission is required to establish methods to inform homeowners of the request process, and is required to provide a person who files a request with a copy of the commission's policies and procedures relating to investigation and resolution of a request.

The commission is required by rule to establish a standard form for submitting a request under these

provision and provide a means to submit a request electronically. The filing of a request tolls the limitations period in an action between a builder and a homeowner that arises out of the subject of the request until the 45th day after the date a final, non-appealable recommendation is issued under these provisions.

Section 428.002 Builder's Right of Inspection

At any time before the conclusion of the state-sponsored inspection and dispute resolution process and on the builder's written request, the homeowner is required to give the builder reasonable opportunity to inspect the home that is the subject of the request or have the home inspected to determine the nature and cause of the construction defect and the nature and extent of the repairs necessary to remedy the defect(s).

Additionally, the builder is authorized to take reasonable steps to document the construction defect and the condition of the home. If for any reason the homeowner delays the inspection for more than five days after the date of receiving the builder's written request, any time period for subsequent action to be taken by the builder or the third-party inspector is required to be extended one day for each day the inspection is delayed after the fifth day.

Section 428.003 Inspection By Third-Party Inspector

After receiving a request, the commission is required to appoint a third-party inspector to inspect the home and meet with the homeowner and the builder. Each party (homeowner and builder) each have the right to strike the appointment of a third-party inspector one time for each request submitted. The commission is required to appoint a third-party inspector within 15 days of receiving a request for a resolution under the process set forth in this bill.

Section 428.004 Inspector's Recommendation

Third-party inspectors involved in workmanship and materials issues are required to inspect and make recommendations no later than the 15th day after the date the third-party inspector receives appointment from the commission.

In the case of a structural matter in the home, an approved engineer is required to inspect the home no later than the 30th day after the date the request is submitted and issue a recommendation no later than 60 days after the date the third-party inspector receives the assignment from the commission. The inspector or the parties to the dispute are authorized to request additional time.

Third party recommendations must address only the construction defect (based on the applicable warranty and building standards), and designate a manner or method of repair. Third-party inspection recommendations are prohibited from including payment of any monetary consideration. If the inspector finds for the party who submitted the request, the commission is authorized to order the other party to reimburse all or part of the fees and inspection expenses paid by the requestor.

Section 428.005 Threat To Health or Safety

A builder who receives written notice of a request relating to a construction defect that creates an imminent threat to the health or safety of the inhabitants of the residence is required to take reasonable steps to cure the defect as soon as practicable. If the builder fails to do so, the homeowner is authorized to have the defect cured and recover from the builder the reasonable cost of the cure plus reasonable attorney's fees and expenses associated with the remedy.

Chapter 429 - Appeal Of Third-Party Inspector's Recommendation

Three state inspectors are required to serve on a three member panel to review inspector recommendations. If the appeal involves a dispute regarding a structural failure, one of the state inspectors on the review panel must be a licensed professional engineer. An appeal of a third-party inspector's recommendation is required to be conducted within 15 days.

The review panel is required to (i) review the recommendations without a hearing unless a hearing is

otherwise required by rules adopted by the commission; (ii) approve, reject, or modify the recommendation of the third-party inspector or remand the dispute for further action by the third-party inspector; (iii) and issue written findings of fact and a ruling on the appeal no later than 30 days after the date the notice of appeal is filed with the commission.

Chapter 430 - Warranties and Building Standards

Section 430.001 Limited Statutory Warranties and Building Standards

The commission is required to adopt limited statutory warranties and building standards for residential construction.

The warranty periods are required to be one year for workmanship and materials, two years for plumbing, electrical, heating, and air-conditioning systems, and ten years for major structural components of a home.

The building standards must require substantial compliance with the standards contained in either the International Residential Code for One and Two Family Dwellings published by the International Code Council or the National Electric Code, each as applicable. They are also required to include recommended management practices for limiting moisture intrusion, as well as for other various components of a home, including foundations, floors, ceilings, walls, roofs, interior and exterior components, drainage, landscaping, irrigation, heating, cooling, electrical and plumbing.

This section also describes which version of the International Residential Code or National Electric Code would apply to a particular residence, depending on whether the residence is located in a municipality or the extraterritorial jurisdiction of a municipality, an unincorporated area that is not within the extraterritorial jurisdiction of a municipality and residential construction located in an unincorporated area in a county that does not contain an incorporated area.

Unless otherwise specified in a written agreement between a builder and the homeowner, a warranty period for a new home begins on the earlier of the date of occupancy or transfer of title to the initial homeowner. A warranty period for an improvement other than a new home begins on the date the improvement is substantially completed.

Section 430.002 Statutory Warranties Exclusive

The only warranties that exist for residential construction or residential improvements are warranties created by this chapter or by other statutes expressly referring to residential construction or residential improvements, or any express, written warranty acknowledged by the homeowner and the builder. A court is prohibited from discerning or declaring any other implied warranty.

Section 430.003 Approval of Third-Party Warranty Company

The commission is authorized to approve as a third-party warranty company an entity that has operated warranty programs in this state for at least five years, a company whose performance is insured by an insurance company authorized to engage in the business of insurance in this state, or an insurance company that insures the warranty obligations of a builder under the statutory warranty and building standards. Before being approved by the commission a warranty company must first submit an application and a fee.

Section 430.004 Third-Party Warranty Company

If a builder chooses to provide a commission approved third-party warranty company, the builder is authorized to limit liability to the homeowner under the terms of that warranty. However, the limitation of liability under this section is not effective unless the company providing the warranty agrees to perform the builder's warranty obligations and actually pays for or corrects any construction defect covered by the warranty. A commission approved warranty company has all of the obligations and rights of a builder regarding performance of repairs to remedy construction defects or payment of money instead of repair. A company that administers a warranty is not liable for any damages resulting from a construction defect or from repairs covered under the warranty nor are they authorized to

assume liability for personal injuries or damage to personal property. A builder, on the other hand, does not avoid liability for personal injuries or damage to personal property for which the builder would otherwise be liable under law by providing a written warranty from a third-party warranty company.

Section 430.005 Minimum Standards For Determination of Defect

A warranty company is required to use defect inspection procedures substantially similar to those established by the commission, and is further authorized to adopt warranty standards in addition to the standards adopted by the commission, but it is prohibited from reducing the limited statutory warranty and building standards.

Section 430.006 Effect of Subtitle on Other Rights and Obligations

This subtitle provides the sole rights and obligations between a homeowner and a builder, unless additional rights and obligations are provided in an express, written contract between the homeowner and builder. Except as specified in this subtitle, an express, written contract between a homeowner and builder is prohibited from limiting the obligations of a builder under this title.

After an appeal has been made to the Commission, a homeowner is authorized to bring an action against a builder or a third-party warranty company for breach of a limited statutory warranty adopted by the Commission. Except as provided by this subtitle, a claim for tort, breach of contract, breach of warranty, statutory violation, or any other cause of action may not be pursued against a builder. This subtitle creates the only cognizable cause of action available against a builder or third-party warranty company with regard to construction defects.

Section 1.02

Commission Appointments

The Governor is required to appoint the members of the Texas Residential Construction Commission by December 1, 2003. Three members will have terms expiring February 1, 2005 and three members for terms expiring February 1, 2007, and three members for terms expiring February 1, 2009. The Governor is also required to designate a person to perform the ministerial acts necessary for posting notice of and holding the first meeting of the commission.

Section 1.03

Commission Adoptions

As soon as possible after appointment of its members, the Texas Residential Construction Commission is required to adopt limited statutory warranties and building and performance standards. Those warranties and building and performance standards apply only to residential construction that begins on or after the effective date of the standards as determined by the commission. Residential construction that begins before the effective date of the warranties and building and performance standards is governed by warranties and building and performance standards applicable to the construction before that date.

Section 1.04

The Commission is required to begin registering builders in this state by March 1, 2004.

Article 2.

Residential Construction Liability Act ("RCLA")

Section 2.01

amending Section 27.001 of the Property Code

Section 27.001 of the Property Code is amended to add the definitions and to refer to Title 16 - The Texas Residential Construction Commission Act. The definition of "action" is added. The definition of "construction defect" is amended to refer to Section 401.003 of the Texas Residential Construction Commission Act. The definition of "contractor" is amended to refer to Section 401.002 of the Texas Residential Construction Commission Act. The definition of "economic damages" is added. The definition

of “residence” is amended to mean the real property and improvements. The definition of “structural failure” is amended to refer to Section 401.002 of the Texas Residential Construction Commission Act.

Section 2.02

amending Section 27.002 of the Property Code

Section 27.002 of the Property Code is amended to add that the chapter also applies to other forms of relief. Subsection (d) is added to exclude from RCLA any action that arises from a violation of Section 27.01 of the Business & Commerce Code, a violation of Chapter 162, or a contractor’s wrongful abandonment of an improvement project before completion.

Section 2.03

amending Section 27.003 of the Property Code

Section 27.003(a) of the Property Code is amended to add the “other relief” language added to Section 27.002. Subsection (a) (2) is amended to add that an assignee of a claimant must provide prior notice and opportunity to inspect and offer to repair. This subsection is also amended to refer to Chapter 428 of the Texas Residential Construction Commission Act. Subsection (b) is amended to add the “other relief” language.

Section 2.04

amending Section 27.004 of the Property Code

Section 27.004(a) is amended to address the situation when Subtitle D, Title 16 (the Texas Residential Construction Commission Act) does not apply and incorporates other changes made in the prior section referring to “an action”, “other relief”. With respect to claims subject to Subtitle D, Title 16, a contractor is entitled to make an offer of repair in accordance with subsection (b). Also, a homeowner who has brought a complaint subject to Subtitle D, Title 16 is not required to submit a written notice as required by Chapter 27 of the Property Code to the builder upon the conclusion of that process.

Subsection (b) is amended to address the situation when Subtitle D, Title 16 (the Texas Residential Construction Commission Act) does apply. Not later than the 15th day after the conclusion of the process described in Subtitle D, Title 16, if applicable, or not later than the 45th day after the date the contractor receives the written notice under this section, if Subtitle D, Title 16 does not apply, the contractor may make a written offer of settlement to the claimant. The amendments also require a claimant under RCLA to inform the contractor, within 25 days, of why the claimant thinks the offer to repair is unreasonable and allows the contractor to address those issues. The contractor will then have 10 days to make a supplemental written offer of settlement.

The definition of independent contractor is deleted.

Subsection (c) is amended such that compliance with the provisions set forth in Subtitle D, Title 16 or the giving of notice under subsections (a) and (b) is not required if doing so would be impracticable because of the necessity for initiating an action to prevent the expiration of the statute of limitations or if the complaint is asserted as a counterclaim. It also adds language to state that if Subtitle D, Title 16 applies to the complaint, then, simultaneously to the filing of an action by a claimant, the claimant must submit a request under Section 428.001 of the Property Code. It also states that if Subtitle D, Title 16 does not apply, the inspection provided for by subsection (a) may be made not later than the 75th day after the date of service of the suit, request for arbitration, or counterclaim against a contractor. And, the offer provided for by subsection (b) may be made not later than the 15th day after the date the State-Sponsored Inspection and Dispute Resolution Process is completed, if Subtitle D, Title 16 applies, or not later than the 60th day after the date of service, if Subtitle D, Title 16 does not apply. Finally, this subsection is amended to remove the restrictions on abating an action for up to 75 days.

Subsection (d) is amended to require dismissal of an action in which a claimant failed to comply with Subtitle D, Title 16 (the Texas Residential Construction Commission Act). The current version of this subsection provides for an abatement, not dismissal. Subsection (e) is deleted because it refers to the

abatement.

The bill creates a new Subsection (e) [formerly (f)]. This subsection is amended to focus on the nature of the offer being reasonable or unreasonable. The current provision causes the finder of fact to focus on whether the claimant is reasonable or unreasonable. In addition, one of the limitations on damages is amended to be the fair market value of the contractor's last offer. The current provision limits the damages to the reasonable cost of the offered repairs necessary to cure the construction defect. This subsection is further amended to describe that attorney's fees are those prescribed by Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct.

Section (f) [formerly (g)] is amended to change the standard from completing repairs to fully performing. The additional changes will make clear that the limitation on damages does not apply but the RCLA still applies even if an offer is not made or full performance is not achieved.

Section (g) [formerly (h)] is amended to refer to an action and economic damages. The claimant may recover only the following economic damages proximately caused by a construction defect: the sum of (i) the lesser of (A) the cost of repairs or (B) the difference in the value of the residence constructed and the value of the residence had it been constructed without the defect, (ii) reasonable and necessary cost for the replacement or repair of any damaged goods in the residence, (iii) reasonable and necessary engineering and consulting fees, (iv) the reasonable expenses of temporary housing reasonably necessary during the repair period and (v) the reduction in current market value to the extent such reduction is caused by structural failure and (vi) reasonable and necessary attorney's fees.

Section (h) [formerly (i)] is amended to add that a claimant and a contractor can extend the times described in the RCLA.

Section (i) [formerly (j)] is re-lettered

Section (j) [formerly (k)] is amended to refer to an arbitration tribunal and that it is the final offer of settlement on which the trier of fact will determine reasonableness.

Section (k) [formerly (l)] is re-lettered.

Section (l) [formerly (m)] is re-lettered.

Section (m) [formerly (n)] adds that an offer to repurchase a residence is not precluded.

Section (n) is new and requires the notice and offer to be sent by certified mail, return receipt request. Further if previously known that an attorney represents a party the notice or response must be sent to the attorney. This section also strikes provisions relating to inspection and settlement provided by common law or in other statutes.

Section (o) [formerly (p)] is re-lettered.

Section 2.05

adding Section 27.0042 to the Property Code

This new section allows for a contractor and a homeowner to agree in advance on the terms for a purchase of the residence in the event the cost of repairs exceeds a pre-agreed upon percentage of the value of the fair market value of the home. In the event of a purchase, the contractor must pay the original purchase price, closing costs, reasonable and necessary attorney's fees and expert fees. An offer to purchase a claimant's home is considered reasonable.

Section 2.06

amending Section 27.007(a) of the Property Code

This described the notice required to be in a contract. Section 2.06 is amended to make minor clerical

corrections and clarifications. It also adds reference to arbitration.

Section 2.07

sets forth the effective date of the changes.

Article 3.

Damages In Certain Actions Involving Residential Construction Defect

Section 3.01

adding Chapter 42 to the Civil Practice and Remedies Code

Chapter 42

Section 42.001 Definition

Defining “residential construction defect,” the same as “construction defect” in Section 27.001 of the Property Code.

Section 42.002 Damages For Mental Anguish Not Recoverable

No person seeking damages arising from a residential construction defect is authorized to recover damages for mental anguish.

Section 3.02

describing the effective date for the new Chapter 42 provisions.

EFFECTIVE DATE

September 1, 2003.

COMPARISON OF ORIGINAL TO SUBSTITUTE

Chapter 401. General Provisions.

Same, except that the Substitute replaces the definition of “applicable building standards” with the definition, “applicable building and performance standards.” Also, the Substitute replaces the definition of “limited statutory warranty and building standards” with the definition, “limited statutory warranty and building and performance standards.”

Title 16 of the Property Code, which would be created by this bill, would not apply to owner-constructed homes (Sec. 401.004)

Chapter 406. Texas Residential Construction Commission.

Same, except that, of the nine members appointed by the Governor to serve on the Texas Residential Construction Commission, six members must hold a certificate of registration issued pursuant to the Texas Residential Construction Commission Act. Two members must represent the general public and one member must be a licensed professional engineer.

Chapter 416, Certificate of Registration, was added with the following sections:

Sec. 416.001. Registration Required.

Sec. 416.002. Application for Certificate.

Sec. 416.003. Conditional Registration.

Sec. 416.004. Fees.

Sec. 416.005. General Eligibility Requirements.

Sec. 416.006. Additional Eligibility Requirements for Business Entities.

- Sec. 416.007. Issuance of Certificate.**
- Sec. 416.008. Denial of Registration.**
- Sec. 416.009. Expiration of Certificate.**
- Sec. 416.010. Office Location; Change of Address.**

Chapter 417. Prohibited Practices; Disciplinary Procedures, was added with the following sections:

- Sec. 417.001. Grounds for Disciplinary Action.**
- Sec. 417.002. Disciplinary Powers of Commission.**
- Sec. 417.003. Hearing.**
- Sec. 417.004. Appeal.**

Chapter 418. Administrative Penalty, was added with the following sections:

- Sec. 418.001. Imposition of Administrative Penalty.**
- Sec. 418.002. Amount of Penalty.**
- Sec. 418.003. Payment of Penalty.**
- Sec. 418.004. Enforcement of Penalty.**

Chapter 416. State-Sponsored Inspection and Dispute Resolution Process; Statutory Warranty and Building and Performance Standards, was renamed Chapter 426.

Sec. 426.003. Registration Fee.

Same, except that language has been inserted to clarify that this process applies only to new residential construction, and that the builder is responsible for paying the registration fee at closing, in addition, and not in lieu, of any other fees for which the builder may be obligated. Language has also been inserted to clarify when the registration fee must be remitted to the Commission with respect to fees collected in connection with remodeling jobs. Finally, language has been inserted to state that a late fee for failure to pay the required registration fee may not exceed \$500.

Sec. 426.007. Admissibility of Certain Evidence.

Same, except that language has been inserted to clarify that the failure of a homeowner to obtain an expert at the Commission-stage of this process does not preclude such homeowner from retaining an expert in the event that the dispute between the builder and the homeowner results in arbitration or litigation.

Sec. 426.008. Effect of Third-Party Inspector's Determination or Ruling By Panel of State Inspectors.

Same, except that language has been added to clarify that the presumption to which a third-party inspector's report is entitled under these provisions would not apply in a subsequent action that is not between the homeowner and the builder, and that such report is not admissible in any such action.

Chapter 417. Inspectors, was renamed Chapter 427.

Chapter 418. State-Sponsored Inspection and Dispute Resolution Process, was renamed Chapter 428.

Sec. 428.001. Request for Resolution.

Same, except that language has been added to provide that (i) the Commission, by rule, shall establish a standard form for submitting a request under these provisions and provide a means to submit a request electronically, and (ii) the filing of a request tolls the limitations period in an action between a builder and a homeowner that arises out of the subject of the request until the 45th day after the date a final, non-appealable recommendation is issued under these provisions.

Sec. 428.003. Inspection By Third-Party Inspector.

Same, except language has been inserted that would require the Commission to appoint a third-party inspector within 15 days of receiving a request for a resolution under the process set forth in this bill.

Chapter 419. Appeal of Third-Party Inspector's Recommendation, was renamed Chapter 429.

Same, except that language has been added providing that an appeal of third-part inspector's recommendation must be appealed within 15 days. Also, the use of the word "determination" has been changed in this section to the word "recommendation," to more accurately reflect the nature of the third-party inspector's role in this process.

Chapter 420. Warranties and Building Performance Standards, was renamed Chapter 430.

Sec. 430.001. Limited Statutory Warranties and Building and Performance Standards.

Same, except that provisions have been added to reflect that the National Electrical Code governs electrical standards in residential construction, while the International Residential Code governs non-electrical standards. Also, the Commission would be directed to establish standards for performance for various components of a home, including foundations, floors, ceilings, walls, roofs, interior and exterior components, drainage, landscaping, irrigation, heating, cooling, electrical and plumbing. Also, the Commission is directed to establish certain standards for the unincorporated areas of a county in which no incorporated areas exist. Finally, language has been added to provide that the warranty period will begin to run on the earlier of (i) occupancy or (ii) transfer of title from the builder to the initial homeowner.

Sec. 430.006. Effect of Subtitle on Other Rights and Obligations.

Same, except that language has been inserted to clarify that, after an appeal has been made to the Commission, a homeowner may bring an action against a builder or a third-party warranty company for breach of a limited statutory warranty adopted by the Commission.

SECTION 1.02

Same, except that the Governor must make the necessary appointments by December 1, 2003.

SECTION 1.04

The Commission must begin registering builders in this state by March 1, 2004.

SECTION 2.04 amending Section 27.004 of the Property Code.

Same, except that language has been added to clarify that a homeowner who has gone through the State-Sponsored Dispute Resolution Process need not file a RCLA notice upon the conclusion of this process. Also, damages that may be recovered in a RCLA action may not exceed the lesser of (i) the reasonable cost of repairs or (ii) the difference in the value of the residence as constructed, and the value of the residence without the construction defect.