

Substantial changes to the rest of the RCLA were also made:

- (i) The RCLA now prevails over any other law, including the Deceptive Trade Practices-Consumer Protection Act, or a common law cause of action, to the extent of conflict between this chapter and any other law.²³
- (ii) The conditions under which a contractor is held liable for a construction defect have been clarified and narrowed. A contractor is now only liable to the extent a defective condition directly causes actual physical damage to the residence, an actual failure of a building component to perform its intended function, or poses a verifiable danger to the occupants of the residence.²⁴
- (iii) The conditions under which a contractor is not liable for damages have been expanded. A contractor is not liable for damages caused by the negligence of a person other than the contractor or an agent, employee, or subcontractor of the contractor, failure of a person to mitigate the damages, maintain the residence, or timely notify a contractor of a construction defect. They are also not liable for damages caused by normal wear and tear, normal cracking due to drying or settlement, or reliance on inaccurate written information obtained from official government records.²⁵
- (iv) The statute clarifies that if an assignee or a person subrogated to the rights of a claimant fails to provide the contractor with the written notice and opportunity to inspect and offer to repair required by Section 27.004 before performing repairs, the contractor is not liable for the cost of any repairs or any percentage of damages caused by repairs.²⁶
- (v) A new subsection has been added which states that to maintain a claim of breach of a warranty of habitability, a claimant must establish that a construction defect was latent at the time the residence was completed or title was conveyed to the original purchaser and has rendered the residence unsuitable for its intended use as a home.²⁷
- (vi) The 60-day notice period prior to initiating an action has been specified for all construction defect claims, regardless of whether they are subject to Subtitle D, Title 16 or not. The claimant must provide written notice to the contractor specifying the defects and also provide any evidence that depicts the nature and cause of the defect.²⁸

²³ Tex. Prop. Code § 27.002(b).

²⁴ Tex. Prop. Code § 27.003.

²⁵ Tex. Prop. Code § 27.003.

²⁶ Tex. Prop. Code § 27.003.

²⁷ Tex. Prop. Code § 27.003(c).

²⁸ Tex. Prop. Code § 27.004.

- (vii) The contractor now has the opportunity to conduct up to three inspections within a 35-day period after receiving the notice. They may take reasonable steps to document the defect.²⁹
- (viii) The contractor may make a written offer of settlement to the claimant within 60 days after receiving the notice. If the claimant finds the offer unreasonable, they should advise the contractor in writing within 25 days after receiving the offer. The contractor then has 10 days to make a supplemental offer of settlement.³⁰
- (ix) The statute of limitations has been addressed; if an action is initiated to prevent expiration of the statute of limitations, the complaint must specify in reasonable detail each construction defect. Also, if the provisions of Subsection 27.004(a) were not properly followed, the action shall be abated to allow compliance.³¹
- (x) Abatement rules have been refined: the court or tribunal shall abate an action if the claimant failed to provide the notice or failed to give the contractor a reasonable opportunity to inspect the property.³²
- (xi) The law clarifies that claimants can recover only specific types of economic damages caused by a construction defect. This list now includes the reasonable and necessary arbitration filing fees and the claimant's share of arbitrator compensation.
- (xii) A new subsection allows the court or tribunal to consider a late offer from the contractor to be timely if the claimant failed to provide all available evidence at the time of the original notice or if they amended a claim to add a new defect, or due to events beyond the contractor's control.³³
- (xiii) The RCLA now requires that the claimant prove that the construction defect existed at the time of the completion of the construction, alteration, or repair.³⁴
- (xiv) Lastly, the any attempted waiver of the RCLA by contract is now void.³⁵

²⁹ Tex. Prop. Code § 27.004(a).

³⁰ Tex. Prop. Code § 27.004(b).

³¹ Tex. Prop. Code § 27.004(c).

³² Tex. Prop. Code § 27.004(d).

³³ Tex. Prop. Code § 27.004(g-1).

³⁴ Tex. Prop. Code § 27.006.

³⁵ Tex. Prop. Code § 27.009.

As a result of these amendments, my advice to Texas property owners' associations with concerns related to possible construction defects would include:

- a) If you are planning any construction or alteration work, you need to understand the new definitions of "Contractor" and "Appurtenance." Make sure your contracts clearly define the roles and responsibilities of all parties involved.
- b) With the new definition of "Construction defect," ensure your contracts have clear and comprehensive warranties and procedures for addressing any potential construction defects. It's more crucial than ever to have a thorough pre-construction and post-construction inspection process to detect and rectify any defects early.
- c) If a construction defect leads to a claim, be aware that "Economic damages" do not include certain types of personal injury damages. Consult with your insurance company to ensure you have adequate coverage for all types of potential claims.
- d) Lastly, keep in mind that this Act now has dominance over any other conflicting laws, including common law causes of action.
- e) When contracting for construction or repairs, ensure your contracts include clear language about the contractor's liability as per the new changes. Also, outline clear procedures for the timely notification of defects and the opportunity for the contractor to inspect and offer to repair.
- f) Continue to regularly maintain your properties and document these maintenance efforts, as a contractor can now avoid liability if a person fails to maintain the residence.
- g) Review your procedures for handling construction defects, and ensure all stakeholders are aware that they need to notify contractors of defects before making any repairs. Failure to do so can now negate the contractor's liability for the cost of repairs.
- h) In the event of a claim of breach of a warranty of habitability, prepare to establish that the defect was latent at the time of completion and that it has rendered the residence unsuitable for its intended use.
- i) When identifying construction defects, make sure to specify them in detail and gather all available evidence such as expert reports, photographs, and video or audio recordings. Develop a system for documenting every correspondence with contractors, especially the sending and receiving of notices, and offers of settlement.

These changes could have significant impacts on homeowners, builders, and developers. Manning & Meyers stands ready to help you navigate these changes and ensure your interests are protected. Please reach out to us at Casey@HOALegal.com if you have any questions regarding this section or if you wish to make a construction defect claim.

6) Insurance- Expansion of Insurance Coverage for Underserved Areas-

Section 2211.001 of the Texas Insurance Code sets forth requirements for insurance commonly known as the Fair Access to Insurance Requirements (“FAIR”) Plan. The 88th Texas Legislature makes changes to the FAIR Plan to expand the ability of Texas property owners’ associations to obtain insurance coverage. Those changes include:

The FAIR Plan now expressly includes “Property owners’ association insurance” which is defined as insurance coverage covering common areas and facilities of a homeowners’ association or condominium owners’ association.³⁶

Allows for the Texas Insurance Commissioner to provide insurance to underserved areas, as defined below, if the commissioner determines, after notice and a hearing, that the property owners’ association insurance is not reasonably available in the voluntary market.³⁷ A property owners’ association must first make a diligent effort to obtain insurance through the voluntary market, but be declined twice.³⁸

The FAIR Plan is only applicable to property owners’ associations within 10 miles of the Texas Windstorm Insurance Association catastrophe area.³⁹ That solely includes counties along the Gulf of Mexico. For a map of those areas, please see: <https://www.tdi.texas.gov/wind/maps/index.html>.

If you are a Texas property owners’ association along the Gulf Coast and unable to obtain insurance on the voluntary market, please contact your management company or Texas Insurance Commissioner so that you may go about obtaining insurance through the Fair Access to Insurance Requirements Plan.

³⁶ Tex. Ins. Code § 2211.001(6-a).

³⁷ Tex. Ins. Code § 2211.051(b).

³⁸ Tex. Ins. Code § 2211.1515(b).

³⁹ Tex. Ins. Code § 2211.1515(a).