Leveling the Foundation of the
Texas Residential Construction Commission

A Consumer’s Perspective

Prepared by

Homeowners Against Deficient Dwellings
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# Leveling the Foundation of the Texas Residential Construction Commission

## A Consumer’s Perspective

## Table of Contents:

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABOUT THIS REPORT</td>
<td>3</td>
</tr>
<tr>
<td>SUMMARY</td>
<td>3</td>
</tr>
<tr>
<td>REDEFINE WARRANTY LIMITS IN HB730</td>
<td>4</td>
</tr>
<tr>
<td>STOP THE ABUSE OF ARBITRATION</td>
<td>5</td>
</tr>
<tr>
<td>REQUIRE FULL DISCLOSURE OF THE ARBITRATION CLAUSE</td>
<td>5</td>
</tr>
<tr>
<td>LIMIT THE COST OF THE ARBITRATION</td>
<td>6</td>
</tr>
<tr>
<td>REQUIRE PUBLIC RECORDS OF ARBITRATION AWARDS</td>
<td>6</td>
</tr>
<tr>
<td>REDUCE THE COMPLEXITY OF THE TRCC AND RCLA</td>
<td>6</td>
</tr>
<tr>
<td>IMPLEMENT RECOMMENDATIONS IN THE COMPTROLLER’S REPORT</td>
<td>7</td>
</tr>
<tr>
<td>ENFORCE THE TRCC’S SIRP</td>
<td>7</td>
</tr>
<tr>
<td>MODIFY THE TRCC WEBSITE</td>
<td>8</td>
</tr>
<tr>
<td>ENCOURAGE PARTICIPATION BY CONSUMER ORGANIZATIONS</td>
<td>8</td>
</tr>
<tr>
<td>ABOUT HOMEOWNERS AGAINST DEFICIENT DWELLINGS</td>
<td>9</td>
</tr>
<tr>
<td>RESOURCES</td>
<td>9</td>
</tr>
</tbody>
</table>
About this Report

This report was created for reference for our elected officials in the Texas State House of Representatives and Senate when attempting to fix the Texas Residential Construction Commission.

This report is written from a consumer’s perspective based upon real life experiences and not from a legal standpoint.

Summary

As the Texas Comptrollers office, consumer organizations, and many media outlets have determined, the Texas Residential Construction Commission (TRCC pronounced trick) is a complete disaster and provides little if any consumer protection for the largest purchase of a lifetime, a new home.

Legislative action is needed in the 2007 session to resolve the issues with the TRCC. The problems with the Commission cannot be resolved by allowing more time to air out the failed policies, as the homebuilding industry has suggested. The building industry, their attorneys, and their lobbyist have had 4 years to create a Commission that would provide protection for homeowners, and they have failed. It is time for our elected officials to turn to the consumers of the state to understand the problems they are facing when dealing with a new home construction defect and provide solutions based upon that input.

To provide a consumer protection agency for new homebuyers, the Texas Legislature should:

- Redefine the limitations on warranty standards (1-2-10 year limits) by allowing the TRCC to determine the limitations. (Something the Comptroller failed to address)
- Rewrite the warranty standards adopted by the state to address common sense defects found in new home construction.
- Stop the abuse of mandatory binding arbitration in new home contracts
- Reduce the complexity of the TRCC services so consumers can benefit without the need for legal assistance
- Write legislation based upon the recommendations of the Texas Comptrollers Office in their report issued Jan 23, 2006
- Encourage participation by consumer organization to fully understand the problems facing consumer
- Redesign the TRCC website to provide useful information for the consumer.

A serious defect in a new home can put a family through tremendous financial and mental stress. The TRCC was to relieve this stress by providing an independent, third party, mediation service and it has failed. As the Comptrollers study has concluded, the TRCC has not curtailed the need for legal action, which was the main reason for its creation.
Unfortunately, if the Legislature does not address the recommendations in the Comptrollers report and in this report, the TRCC will continue to fail the families who are trying to prevent litigation and who simply want their new home fixed.

The members of Homeowners Against Deficient Dwellings would welcome an opportunity to participate in the process of filing legislation to correct the problems with the TRCC.

**Redefine warranty limits in HB730**

In 2003 HB730, which created the Commission, waived the implied warranty of good workmanship and adopted the near worthless 1-2-10 year warranties currently in use today. This was a consumer's nightmare, and a building industry’s dream. The industry fought hard for this by claiming the implied warranty, granted to consumers in the late 60’s, was “vague” and the consumers would be better served without it. They also claimed the expressed 1-2-10 warranties would provide the consumers with adequate protection. This was far from the truth.

The 1-2-10 year warranties provided by a number of third party warranty companies such as the Residential Warranty Corporation, 2-10 Warranty, and the Home of Texas Warranty, have been highly criticized for being chock full of exclusions and loopholes. Texas A&M, who was contracted to create the warranty standards, originally adopted a version of these extremely limited warranties. Instead of researching the common defects found in new home construction (see Common Defects in New Home Construction A report by HADD on common defects found in new home constructions. [http://www.hadd.com/documents/defects.pdf](http://www.hadd.com/documents/defects.pdf)) they simply adopted the lowest denomination of the near worthless warranties.

As written in HB730 the limitation of the warranty standards is 1 year for good workmanship, 2 years for Air Conditioning, heating, and plumbing, and 10 years for structural defects. Because the limitations are written into law, and the implied warranty of good workmanship was waived, the Warranty and Standards Working Group has no authority to address common defects with any common sense.

Because of the extreme limitations common defects seen in new home construction are no longer under any warranty, express or implied, and homeowners therefore cannot benefit from the services of the TRCC to resolve them. Examples of defects that are not covered by the TRCC warranties include:

- Hardwood floors coming off the floor after the first 12 months
- Cracks in bricks, walls, or exterior after the first 12 months
- Tile cracking and coming off the floor after the first 12 months
- Carpet deteriorating, coming apart, after the first 12 months
• Paint washing off the exterior after the first 12 months
• Paint flaking off after the first 12 months
• Shingles falling off the house after the first 12 months (seriously)
• Air conditioner requiring replacement after the first 24 months

Homeowners with these defects cannot apply for the mediation service called the State Sponsored Inspection and Resolution Process (SIRP), which is the cornerstone of the TRCC. Instead their application and fees are simply returned with a recommendation to "get an attorney", exactly what the Commission was designed to prevent.

To address this problem, the Commission, based upon inputs from the Warranty and Standards Working Group, should be able to determine warranty limitations with a minimum of 1-2-10 years. The working group could then determine reasonable coverage for every major component a new home.

Replacing an air conditioner after just 2 years is unreasonable. So is hardwood floors and tile coming up off the floor after just 1 year. The Commission should be able to determine the warranty limitations on every major item of a home, which will then allow all homeowners to use the services of the TRCC and prevent legal action.

After all, preventing the need for legal action was the original purpose of the TRCC.

**Stop the abuse of arbitration**

With 4 different studies by the Texas House, Senate, and the TRCC, it is clear: the use of mandatory arbitration in new home contracts is being abused by the homebuilding industry and should be curbed. Arbitration and all other dispute resolutions processes should always be available to the homebuyer, but never as a prerequisite to purchasing the home.

Over the last few years the Legislature has been reluctant to curb this abuse always referring to the Federal Arbitration Act as an excuse. Other states such as New Mexico and California have addressed this situation with the Fair Bargaining Act and other methods without violating the Federal Act.

In New Jersey, after a 1.5-year investigation, has called for the end to mandatory binding arbitration clauses in new home contracts. KB Home, a major builder in the United States has discontinued the use of mandatory binding arbitration in their contracts and warranties due to an order by the Federal Trade Commission.

**Require full disclosure of the arbitration clause**

Any mandatory binding arbitration clause used in new home contracts or warranty standards should be presented to the consumer in a noticeable format and it should be their option to decline the terms of the arbitration language without risking the purchase.
of the new home. This does not in anyway restrict the homeowner from using arbitration in the future to resolve a defect. The notice should be clear about the cost, the waiving of their Constitutional right to a jury trial, and the process.

**Limit the cost of the arbitration**

The filing fee of arbitration should never be more than the cost of a civil court fee usually about $125.00. Arbitration has been falsely advertised as being cheaper than our current court system, but instead application fees have been known to be extremely excessive, many times in the thousands of dollars. This does not include attorney fees, fees for the arbitrator, expert witnesses and reports or the stenographer if needed.

KB Homes recently, by a Federal Trade Commission order, has made arbitration in their contracts and warranties optional, free to the consumer, and non-binding. If one of the largest homebuilders in the nation can discontinue the use of mandatory binding arbitration, then the entire homebuilding industry can discontinue the practice, but always have it available for use.

**Require public records of arbitration awards**

Currently the results of an arbitration are kept in secret even with the rules set forth by the TRCC. All arbitration results should be filed with the TRCC and made available to the public for review unless both parties agreed to the arbitration process after full disclosure and if it is not a prerequisite to purchasing a new home. If a homeowner and builder enter into an arbitration agreement after all the facts are known and not as a prerequisite to purchasing a new home, then the process and the results should be confidential.

**Reduce the complexity of the TRCC and RCLA**

In 1989 Texas passed the first “right to repair” law in the Unite States, the Residential Construction Liability Act (RCLA also stands for Requires Competent Legal Assistance). What was promised as a simple procedure to prevent the need for legal action turned into a complicated, time consuming, limitation of rights for the homeowner with a construction defect. This law was so complicated and ineffective that in 2003 the TRCC was created.

The TRCC, especially the SIRP, much like RCLA, is complicated, time consuming, and can limit the rights of consumers if not followed correctly. Neither process is recommended to be followed without legal assistance.

Unfortunately, the TRCC did not replace the RCLA, in fact many have wondered just how the two interface with each other. Both are extremely complicated, time consuming, and filled with legal potholes that legal representation is highly recommended. Again both of these laws were to prevent the need of legal assistance.

The Texas Legislature should repeal RCLA, and streamline the TRCC process so legal assistance is not required for the consumer.
Implement recommendations in the Comptroller’s report

The Comptroller’s report was very detailed and the Legislature should look hard at the recommendations including the following:

- **Balance the composition of the Commission.** The Commission was to have 3 consumers oriented Commissioner, yet every one of the original Commissioners has some tie to the homebuilding industry. The selection process was an insult to the consumers of the state and reflected poorly on the TRCC and the Governor. The Legislature should create requirements for the selection process for all appointed Commissioners.

- **Streamline the SIRP process.** The State Sponsored Inspection and Resolution Process was intended to provide an independent third party mediation process for the consumer and homebuilder. Instead it has been found by the Comptroller to be a bureaucratic and costly nightmare for the consumer. This was addressed during the hearings in 2003 before the bill was passed.

- **Cut the fees for consumers.** Consumers should not have to pay for the inspection process or any service by the TRCC. The TRCC has been flush with money from fees on home registration. There is no reason to charge consumers.

- **Disciplinary action for all builders.** The law should be modified to allow the Commission to take action against builders who fail to complete the construction of a new home, or those who file for bankruptcy, or those who do not pay their subcontractors. The Commission should have disciplinary action against all builders doing business in Texas for all actions.

Enforce the TRCC’s SIRP

The Comptroller has recommended that the TRCC should enforce repairs according to the State Sponsored Inspection and Resolution Process (SIRP). Although this seems to be the common sense approach to this, HADD strongly recommends the Legislature to study this carefully.

In the past with RCLA and now with the TRCC there is ample opportunities for the builder to provide a “reasonable” settlement and to be protected if the homeowner refused to accept the offer. Unfortunately the definition of “reasonable” has been abused by the industry.

As an example, a “reasonable” solution for a foundation problem may be nothing more than installing a French drain around the foundation to drain off excess water, when in fact the problem was much more severe and requires extensive repairs.

If the TRCC was to recommend and demand these types of solutions, the homeowner will be no better off then what they currently have today. Given the complete failure of the TRCC and its extreme bias towards the building industry, the Legislature should be careful when giving the TRCC the authority to determine and demand repairs to a home.
Modify the TRCC website

The TRCC’s website could be an easy source of information about homebuilders, but currently is very simplistic and provides little if any information that a potential homebuyer would find useful.

The following suggestions have been provided to the TRCC with very few of them being implemented in the newest website. The information about a builder should be made easily available including:

- Name and address of the builder
- Aliases used in building
- Complaints against the builder
  - Number of complaints filed against the builder
  - Copy of the complaints filed
  - Number of complaints resolved
  - Comments by the homeowner
  - Comments by the homebuilder
  - Type of defects or complaint
- SIRPS filed against the builder
  - Number of SIRPS filed
  - Copy of the SIRPs filed
  - Number resolved
  - How the SIRP was resolved
  - Comments by the homeowner
  - Comments by the homebuilder
  - Type of defects contained in the SIRP
- Disciplinary history on the builder

Encourage participation by consumer organizations

The TRCC has been very reluctant to include participation by consumer organizations in the various working groups. According to records from the TRCC, members of volunteer organizations have applied for volunteer positions with the TRCC, but have not been selected.

A case in point is the composition of the Arbitration Task Force, initially composed of homebuilders, members of the American Arbitration Association, and their supporters. HADD had made recommendations for members with first hand experience with arbitration as homeowners and attorneys, yet not one was selected. Only after a Senate hearing where the Executive Director was questioned about the obvious bias was 4 of 5 of the recommendations accepted on the task force.

These volunteer organizations can provide valuable information with no financial bias. The TRCC should take advantage of these resources.
About Homeowners Against Deficient Dwellings

Homeowners Against Deficient Dwellings, (HADD) a non-profit organization, came into existence in response to an overwhelming need of support and resolution from families who felt isolated while coping with their devastating home damages and loss. Because the lone attempts to get their homes fixed proved unsuccessful, these families started to find each other and united into a cohesive group with a common cause. It was while testifying before legislative committees in the Kansas State Capital that HADD emerged as a grass roots organization.

HADD is not an arbitration group, nor does it provide legal counsel. HADD offers support and suggestions to assist consumers in making educated, informed decisions when buying a home or resolving the complicated issues involving deficient homes.

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Resources


The Consumer Pitfalls of Binding Arbitration. A Report by the Texas Watch Foundation. The report raises questions about the quality of justice delivered through binding arbitration between parties of different bargaining levels and documents the uneven playing field binding arbitration offers consumers and citizens seeking justice. (PDF)

New Home Warranties. Deception or Protection? By Homeowners Against Deficient Dwellings. Homeowners Against Deficient Dwellings (HADD), a national non-profit consumer advocacy organization released a new report identifying extreme limitations and loopholes in new home warranties. The report, "New Home Warranties. Deception or Protection?" analyzes the warranties used by the majority of builders in Texas and highlights the limitations, exclusions, and unreasonable maintenance requirements common to each warranty. www.hadd.com/warranty.pdf


