

Residential Construction Defect Claims in Texas



“Out with the New, in with the Old”

Presented to the Foundation Performance Association on July 14, 2008

by

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Goals



- Provide the brief legal education necessary for a complete understanding of today's topics.
- Survey recent changes in Texas residential construction law and achieve an understanding of why they occurred.
- Highlight the current state of residential construction law and how it affects the evaluation and pursuit of construction defect claims.

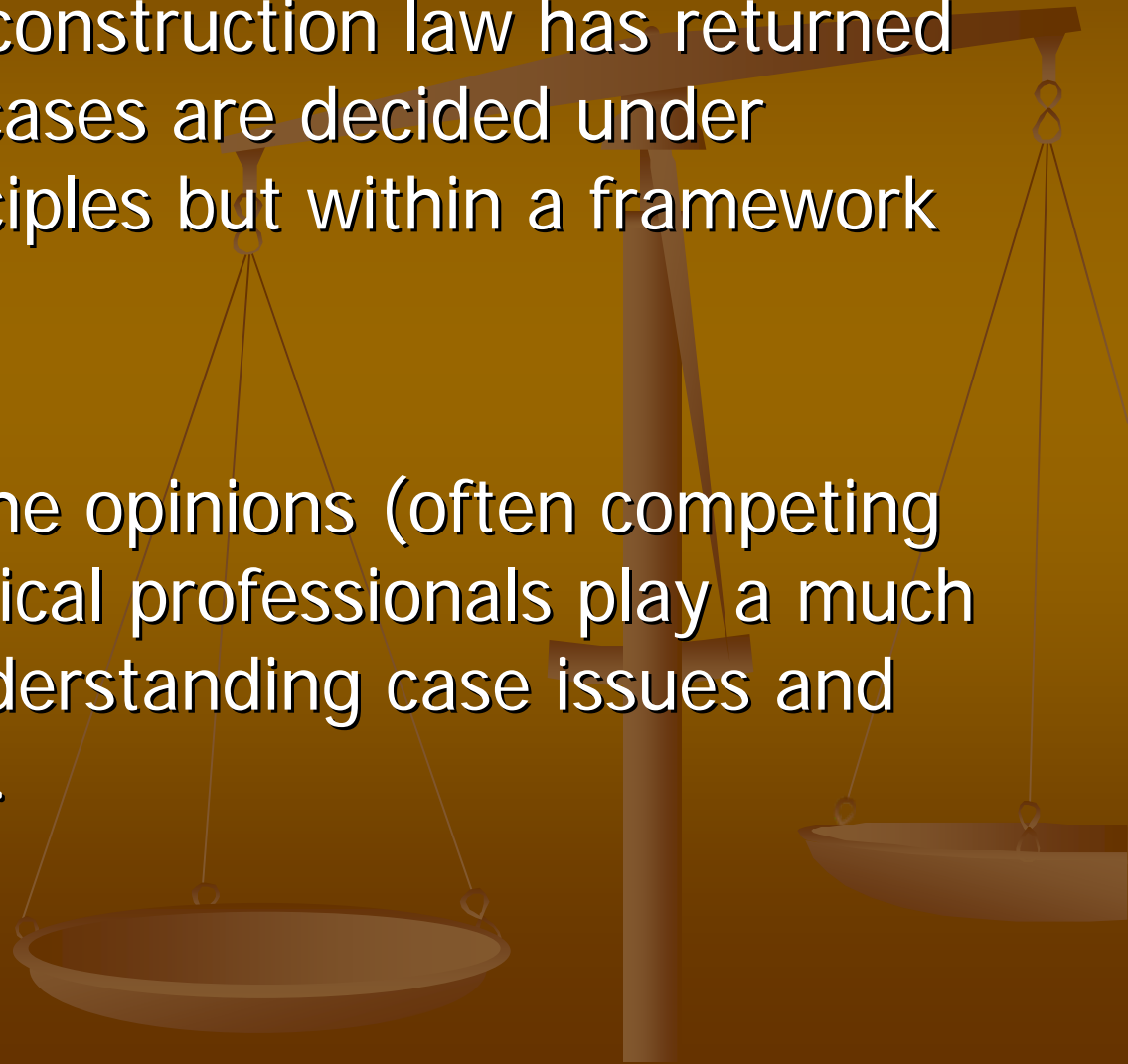
Types of Law



- “Common” Law – The law made by judges as they decide cases. Generally develops slowly over time. Occasionally radical shifts can happen as changes occur in societal values or novel legal issues arise. But tends to be stable over time.
- Statutory Law – The law made by legislatures (i.e., statutes). Sometimes based on common law principles. Can shift as often and as radically as the opinions of elected representatives do.

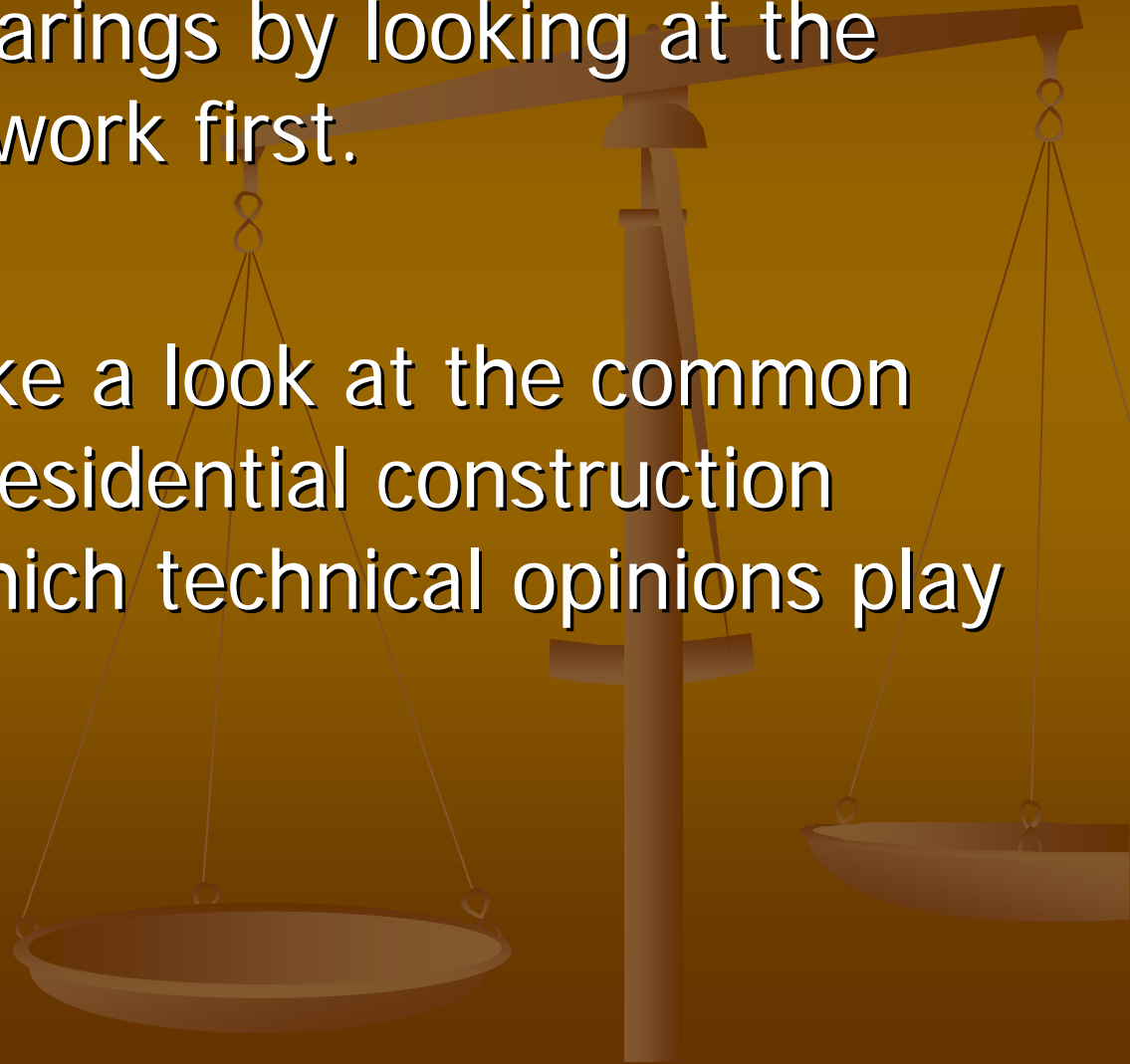
Why is that important Bill?

- Texas residential construction law has returned to a point where cases are decided under common law principles but within a framework of statutory law.
- This means that the opinions (often competing opinions) of technical professionals play a much greater role in understanding case issues and resolving conflicts.

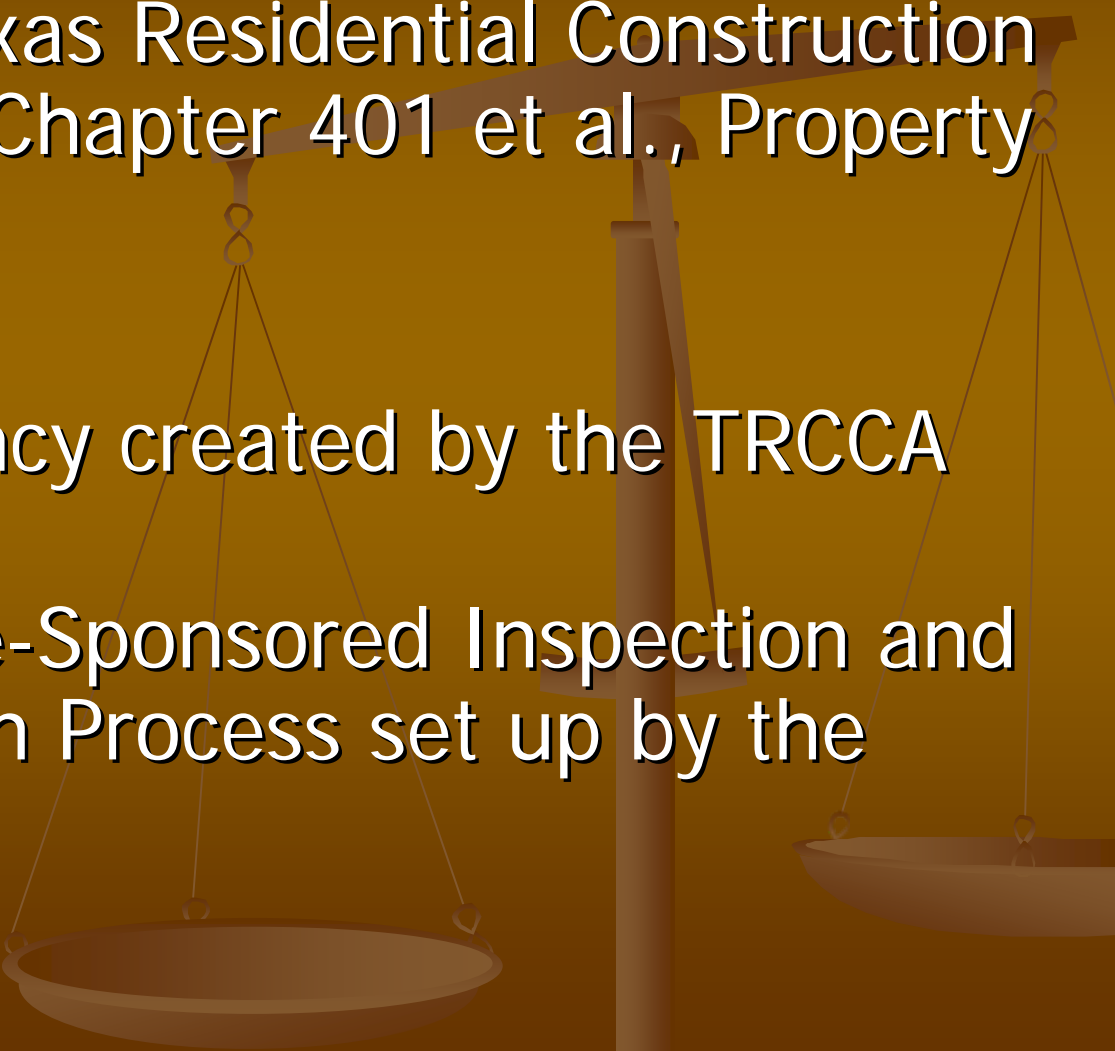


Moving forward

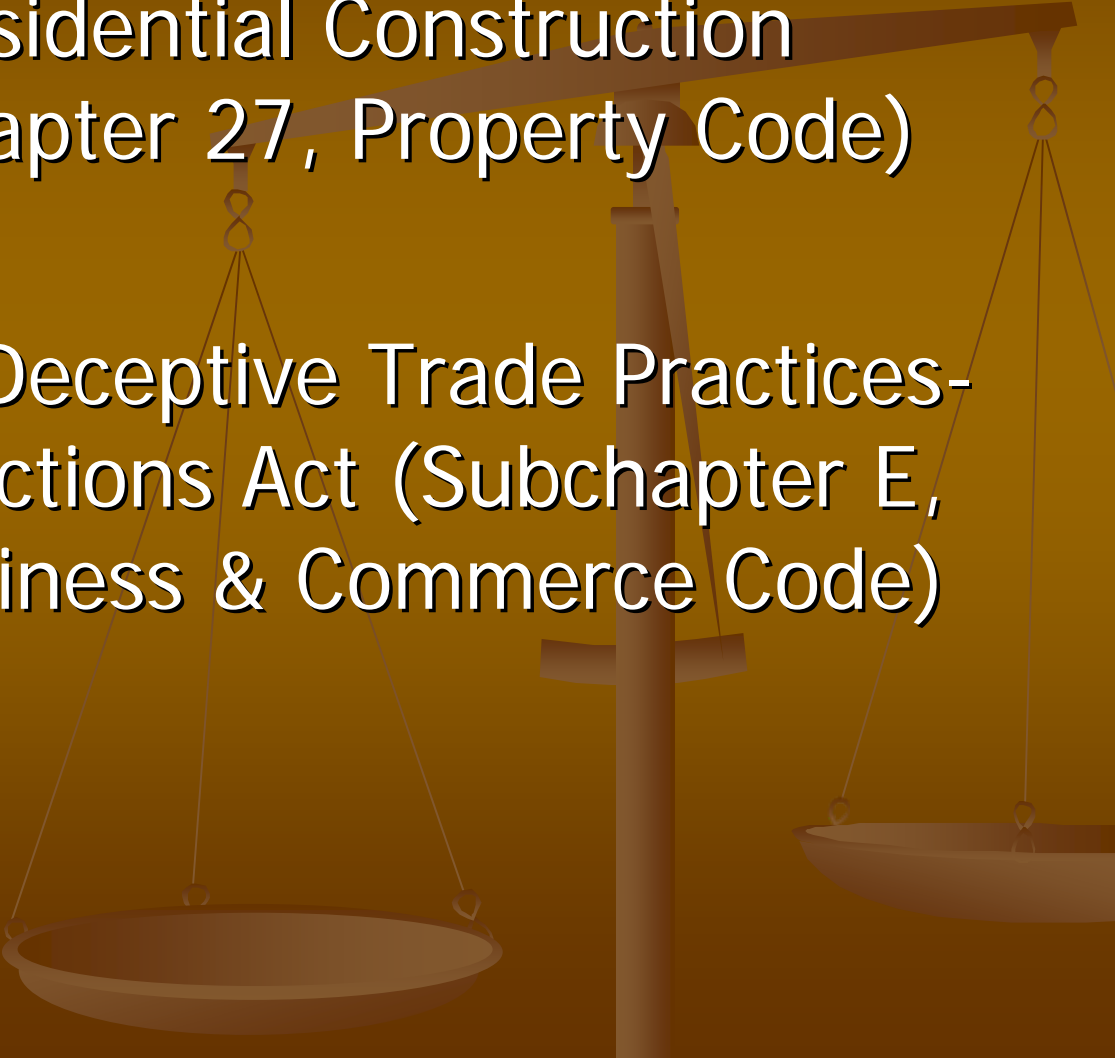
- Let's get our bearings by looking at the statutory framework first.
- Then we will take a look at the common law aspects of residential construction defect law in which technical opinions play a major role.



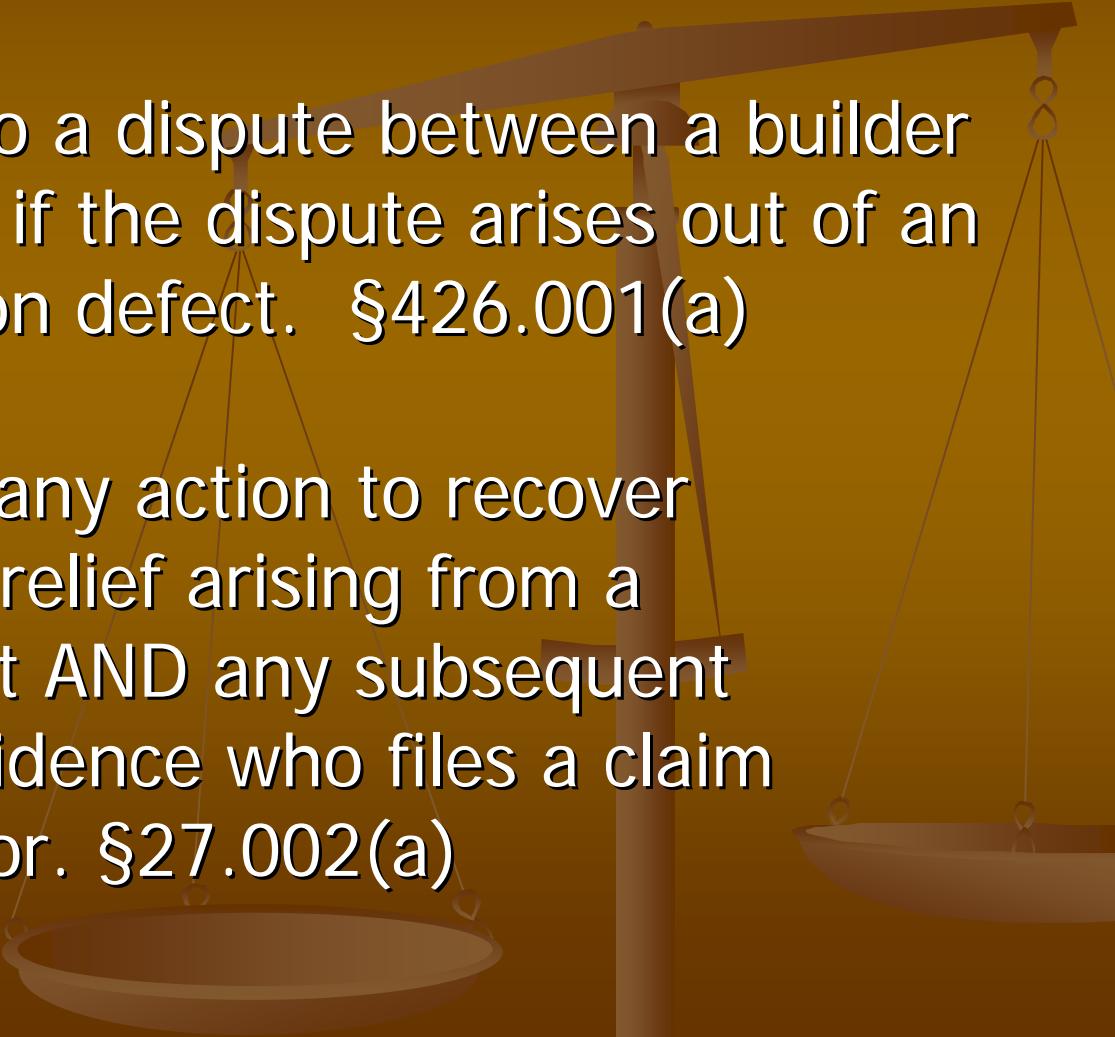
First Things First – The Acronyms

- **TRCCA** – The Texas Residential Construction Commission Act (Chapter 401 et al., Property Code)
 - **TRCC** – The agency created by the TRCCA
 - **SIRP** – The State-Sponsored Inspection and Dispute Resolution Process set up by the TRCCA
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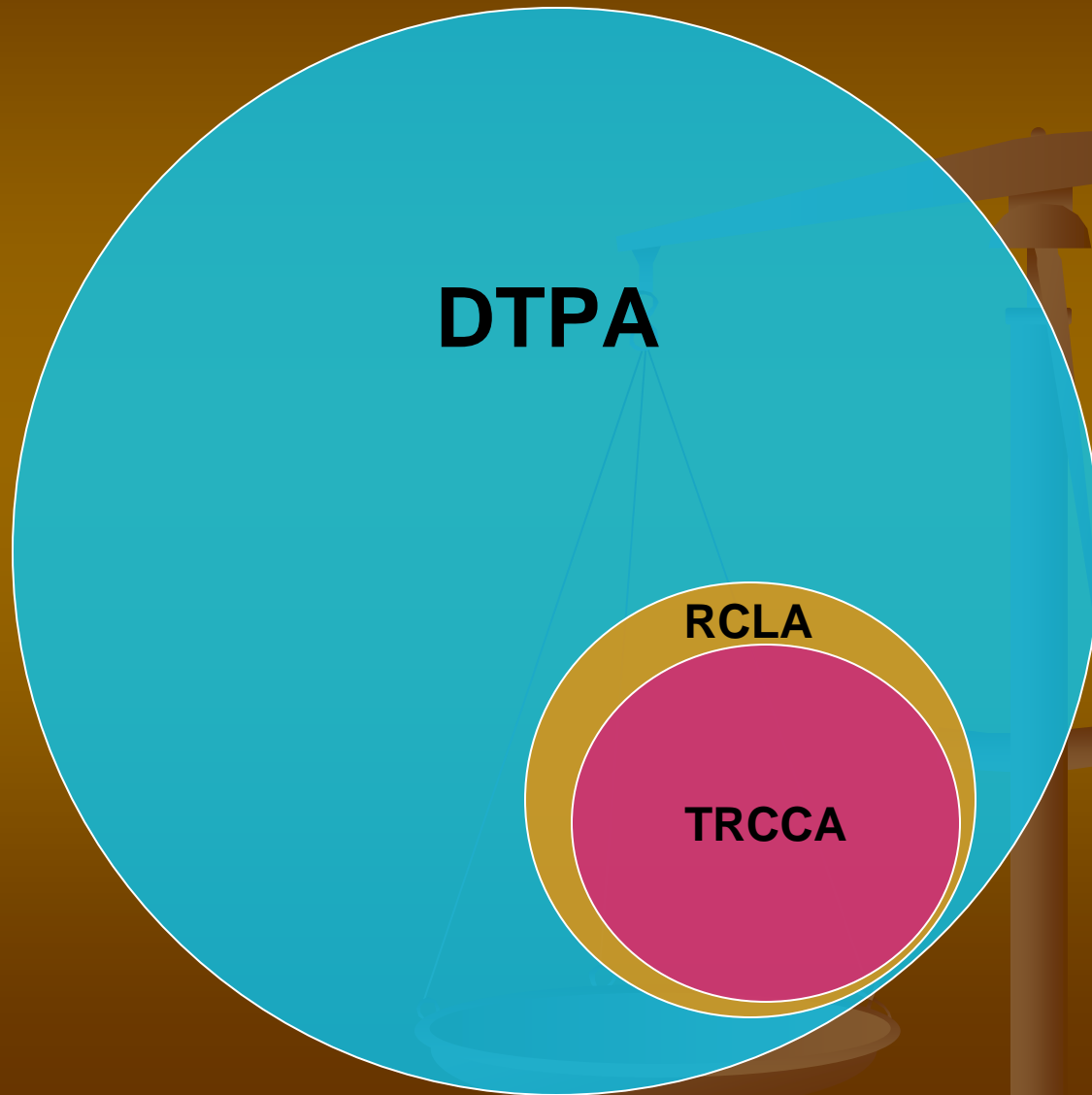
First Things First – The Acronyms

- **RCLA** – The Residential Construction Liability Act (Chapter 27, Property Code)
 - **DTPA** – Texas Deceptive Trade Practices-Consumer Protections Act (Subchapter E, Chapter 17, Business & Commerce Code)
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Second Things Second – The Scope of the Law

- TRCCA – applied to a dispute between a builder and a homeowner if the dispute arises out of an alleged construction defect. §426.001(a)
 - RCLA – applies to any action to recover damages or other relief arising from a construction defect AND any subsequent purchaser of a residence who files a claim against a contractor. §27.002(a)
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Relationship of Statutes



DTPA

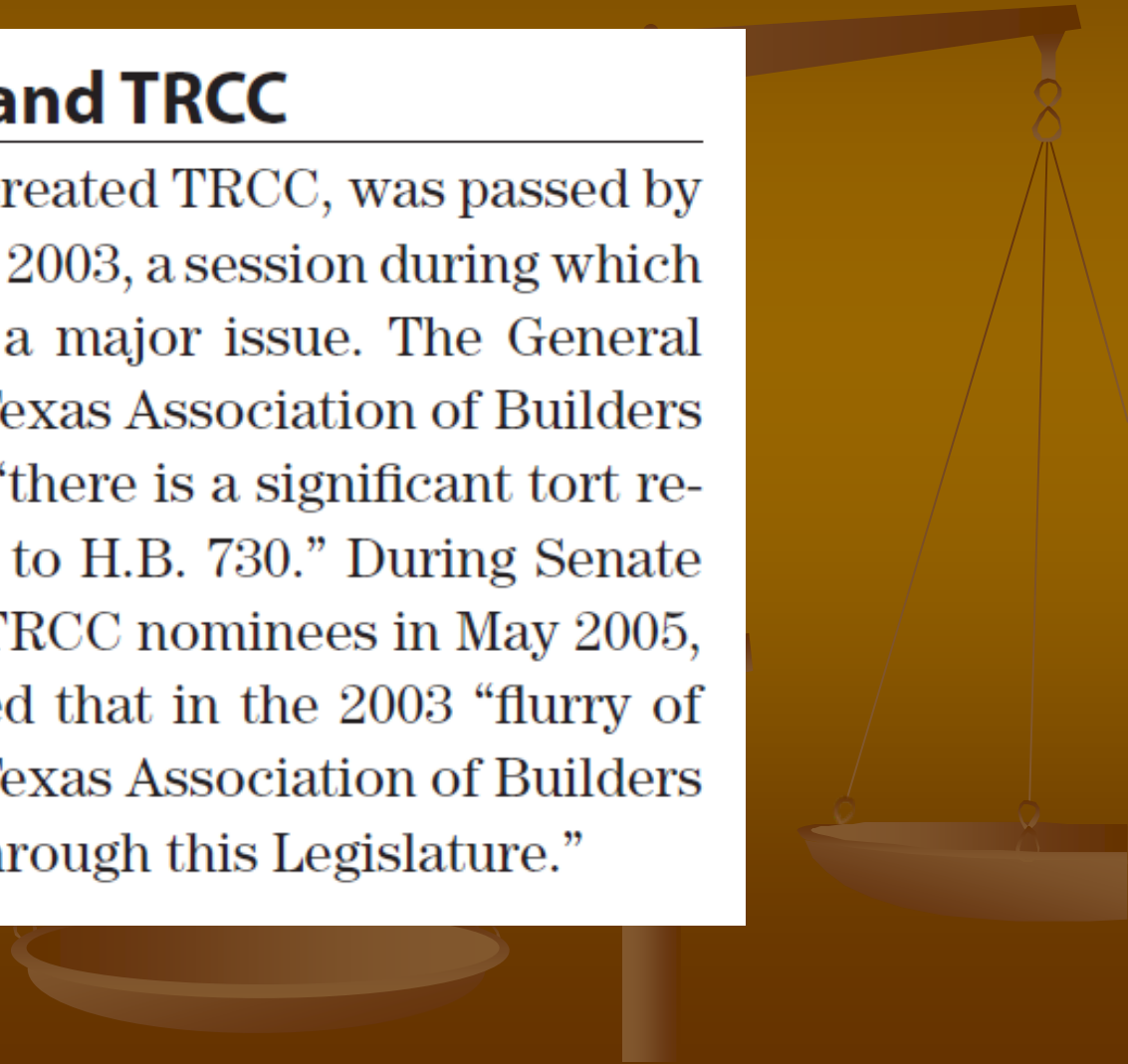
RCLA

TRCCA

TRCCA passed in 2003

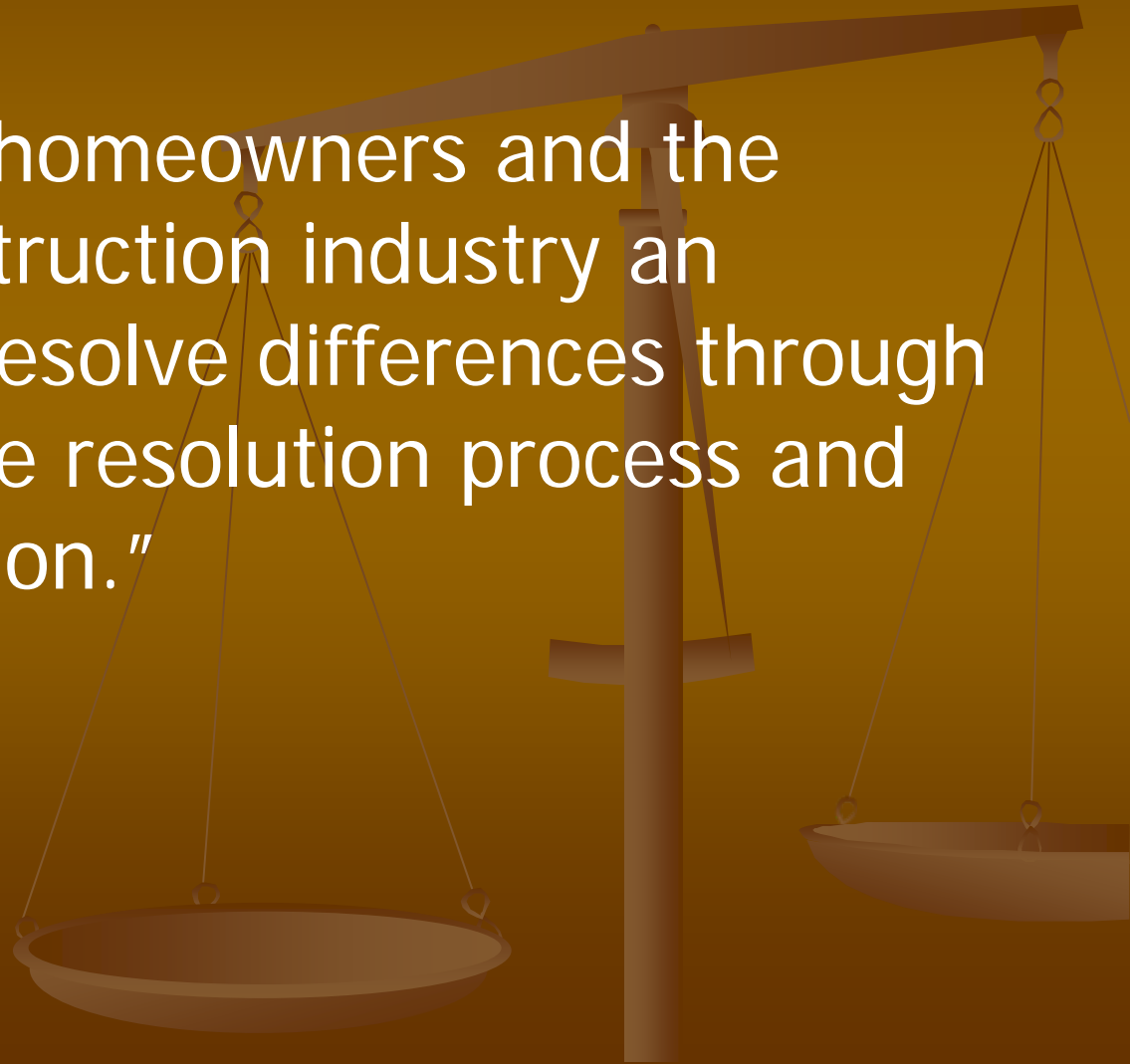
Tort Reform and TRCC

H.B. 730, which created TRCC, was passed by the Legislature in 2003, a session during which tort reform was a major issue. The General Counsel for the Texas Association of Builders has written that “there is a significant tort reform component to H.B. 730.” During Senate confirmation of TRCC nominees in May 2005, one senator noted that in the 2003 “flurry of tort reform, the Texas Association of Builders pushed the bill through this Legislature.”



TRCC Mission Statement

- “Provide Texas homeowners and the residential construction industry an opportunity to resolve differences through a neutral dispute resolution process and ongoing education.”



WHY have both the TRCCA and the RCLA? (The Good, The Bad, and The Ugly)

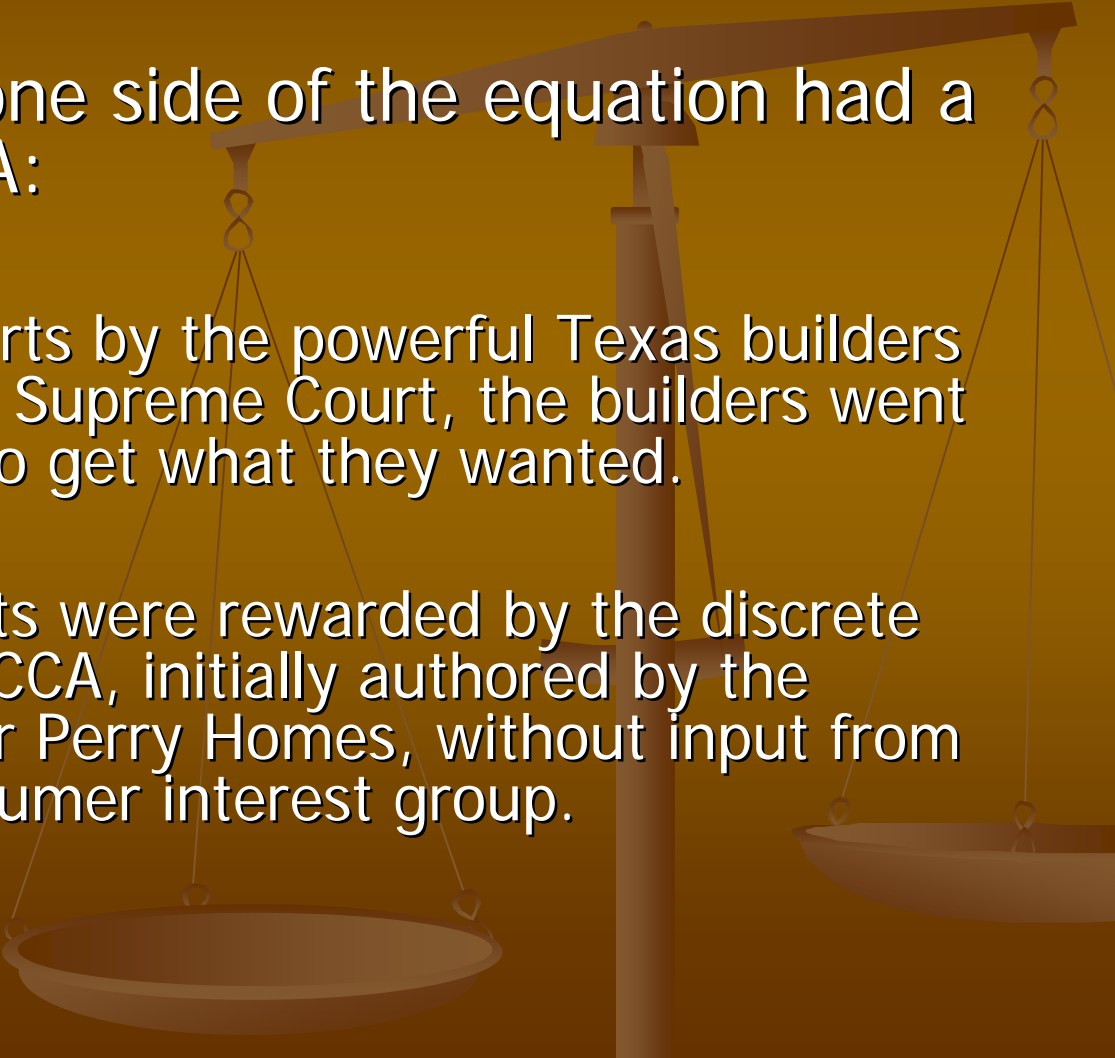
- The GOOD - the TRCCA addresses three general areas that are not part of the RCLA:
 - 1) Registration of homebuilders;
 - 2) Establishment of warranty and building performance standards, and;
 - 3) Establishment of state-sponsored "dispute resolution" process
- 

WHY have both the TRCCA and the RCLA? (The Good, The Bad, and The Ugly)

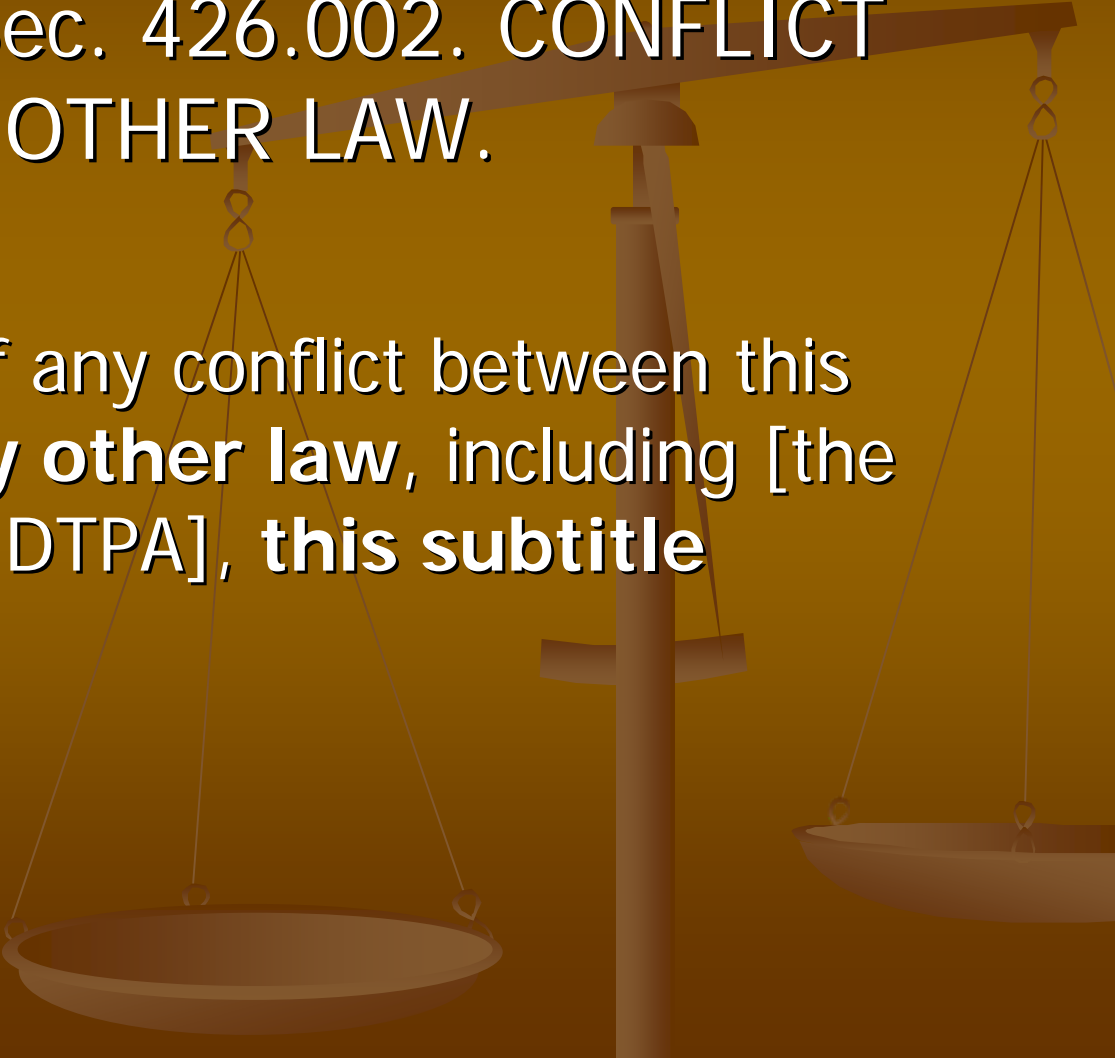
The BAD - the TRCCA *very poorly* addresses three general areas that are not part of the RCLA:

- 1) “Anyone” can be a homebuilder;
- 2) The warranty and building performance standards are minimal with many gaps, and;
- 3) The state-sponsored “dispute resolution” process does not resolve disputes (the TRCC cannot force a builder to fix defects)

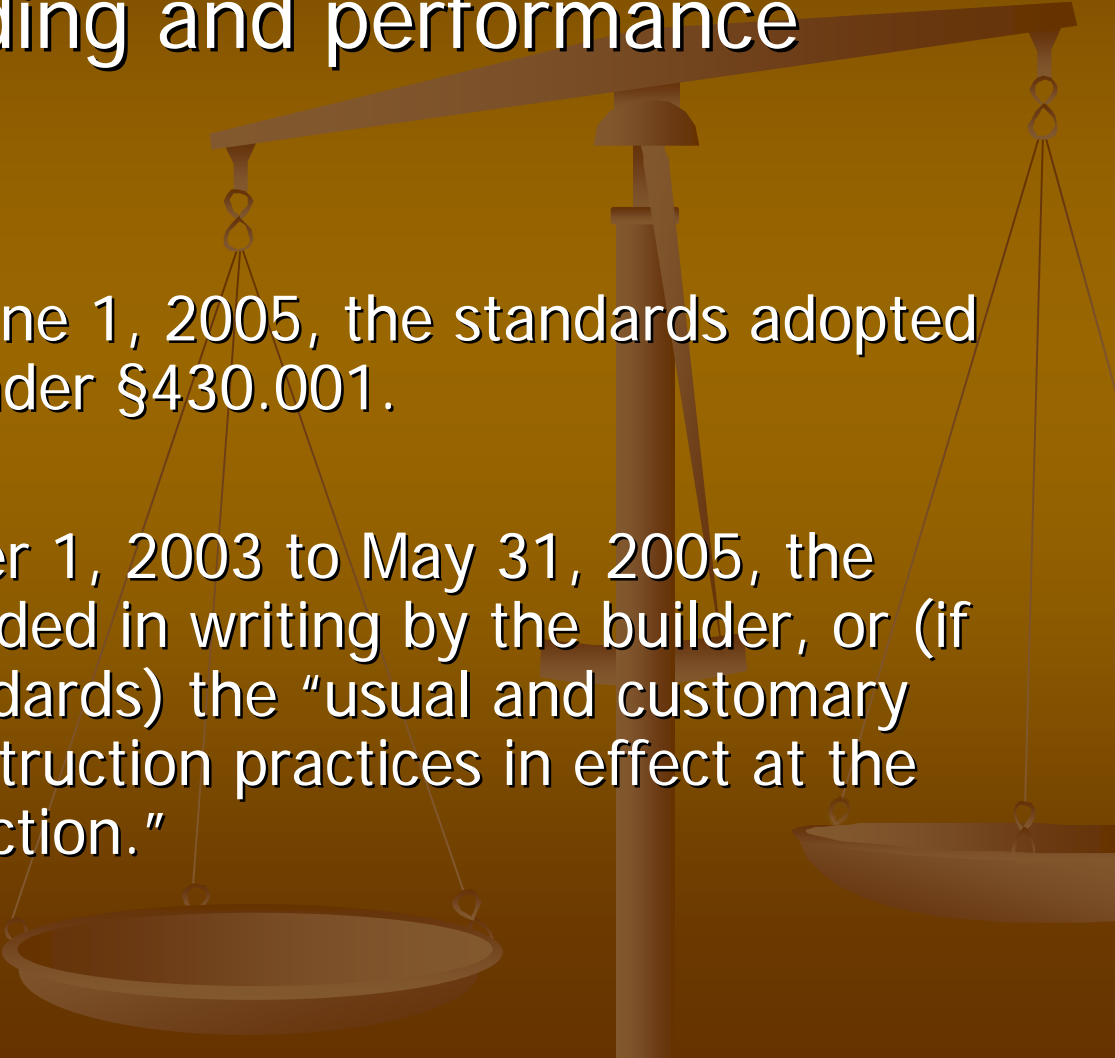
WHY have both the TRCCA and the RCLA? (The Good, The Bad, and The Ugly)

- The UGLY – only one side of the equation had a voice in the TRCCA:
 - After lobbying efforts by the powerful Texas builders failed in the Texas Supreme Court, the builders went to the legislature to get what they wanted.
 - The builders' efforts were rewarded by the discrete passage of the TRCCA, initially authored by the general counsel for Perry Homes, without input from even a single consumer interest group.
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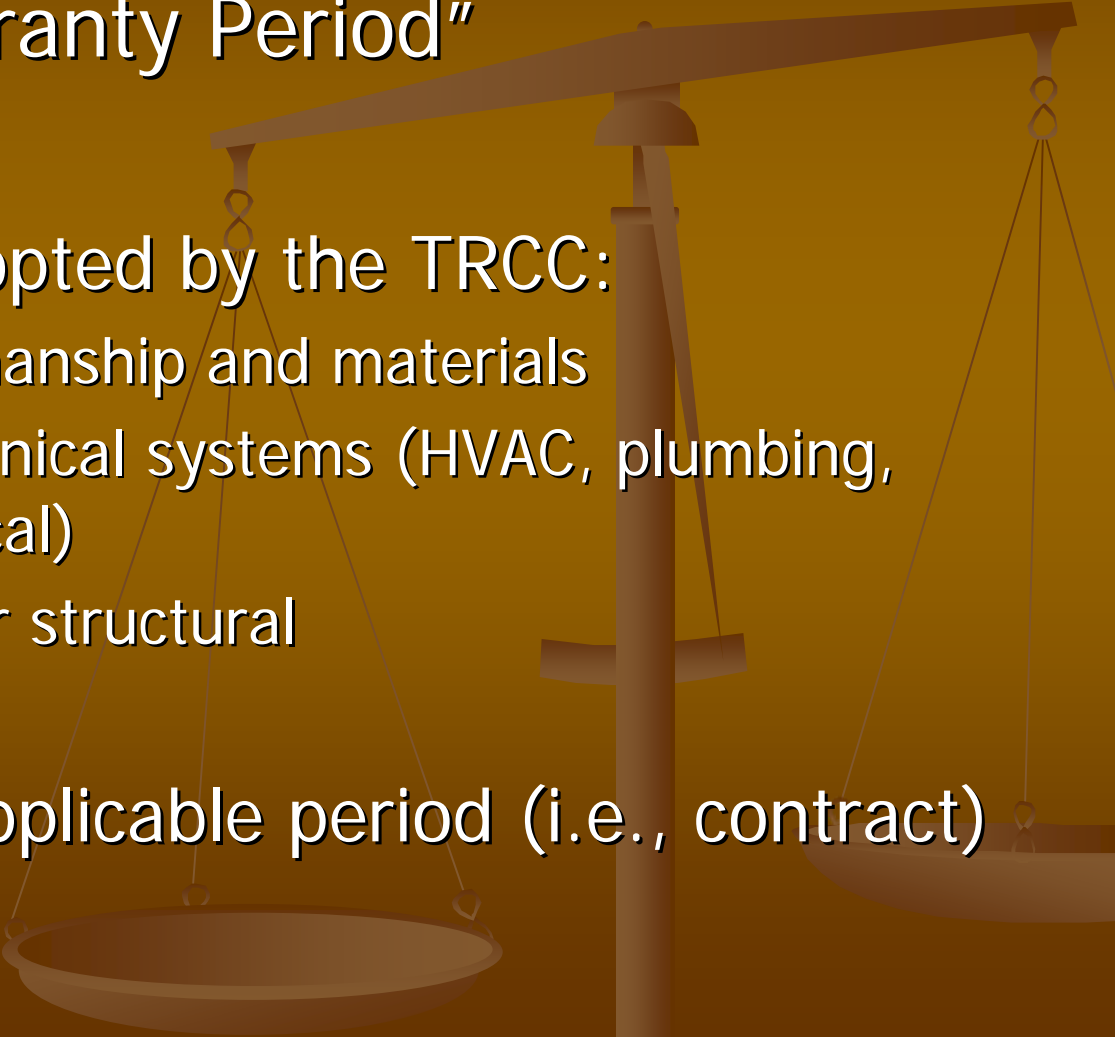
Supremacy of the TRCCA

- Property Code Sec. 426.002. CONFLICT WITH CERTAIN OTHER LAW.
 - To the extent of any conflict between this subtitle and **any other law**, including [the RCLA] and [the DTPA], **this subtitle prevails.**
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A Few More Definitions

- “Applicable building and performance standards”:
 - On and after June 1, 2005, the standards adopted by the TRCC under §430.001.
 - From September 1, 2003 to May 31, 2005, the standards provided in writing by the builder, or (if no written standards) the “usual and customary residential construction practices in effect at the time of construction.”
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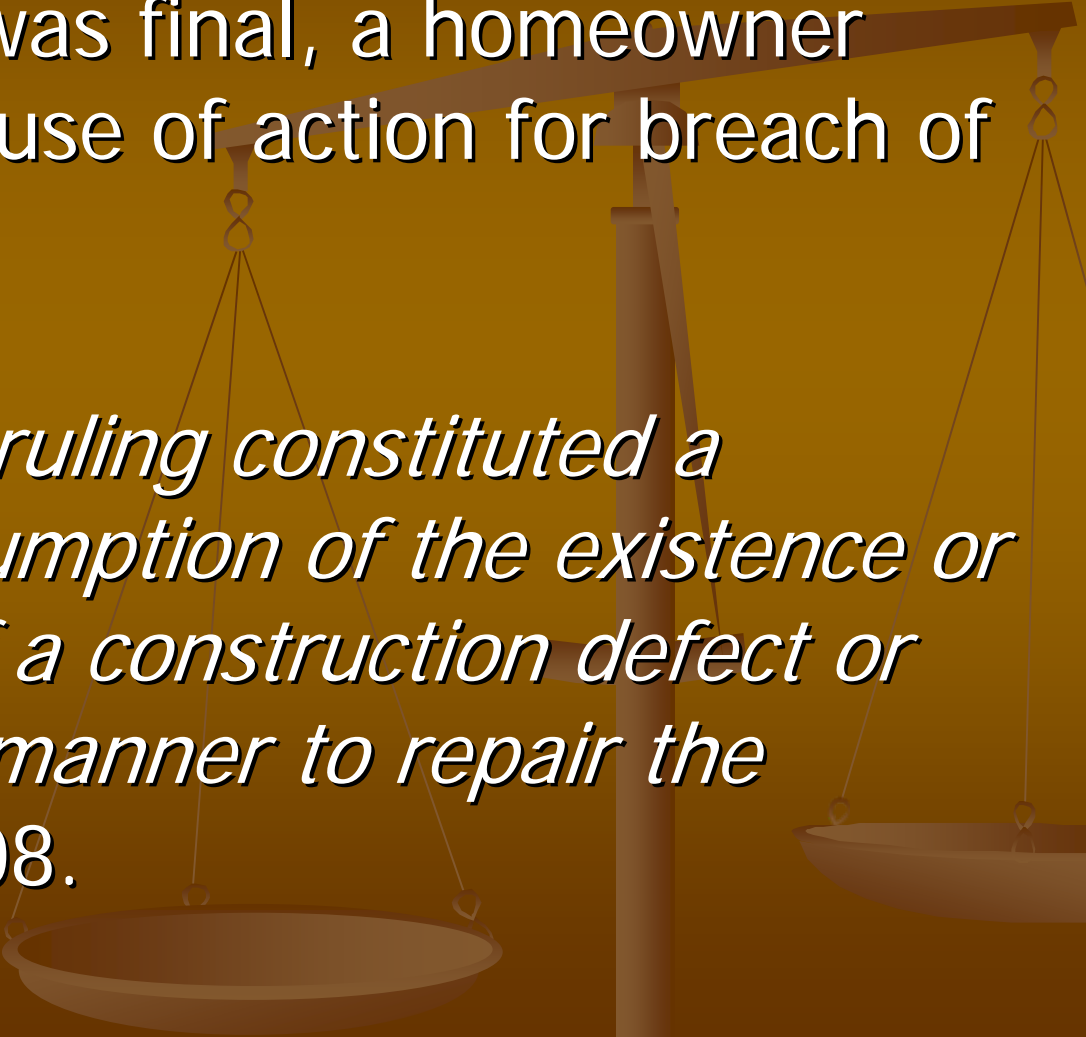
A Few More Definitions

- “Applicable Warranty Period”
 - The periods adopted by the TRCC:
 - 1 year – workmanship and materials
 - 2 year – mechanical systems (HVAC, plumbing, electrical)
 - 10 year – major structural
 - OR any other applicable period (i.e., contract)
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The SIRP Process

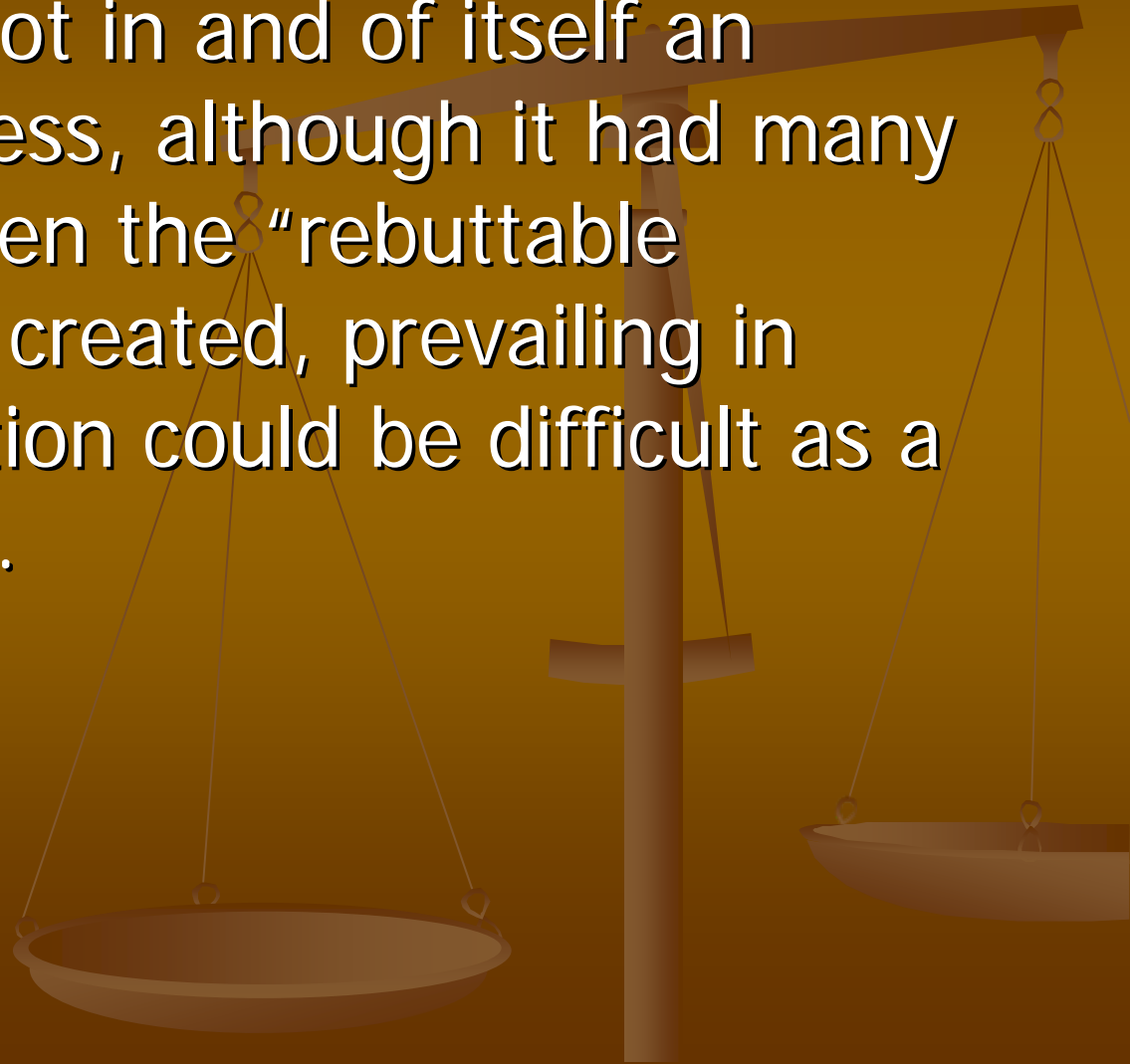
- The **homeowner** had to comply with the SIRP process before initiating an action (lawsuit, arbitration) for damages or other relief arising from an alleged construction defect.
- The SIRP had to be requested on or before the second anniversary of the date of discovery of the conditions claimed to be evidence of the construction defect *but not later than the 90th day after the date the applicable warranty period expires.* §426.006.

Effect of the SIRP Finding

- Once the SIRP was final, a homeowner could bring a cause of action for breach of warranty.
 - *The inspector's ruling constituted a rebuttable presumption of the existence or nonexistence of a construction defect or the reasonable manner to repair the defect. §426.008.*
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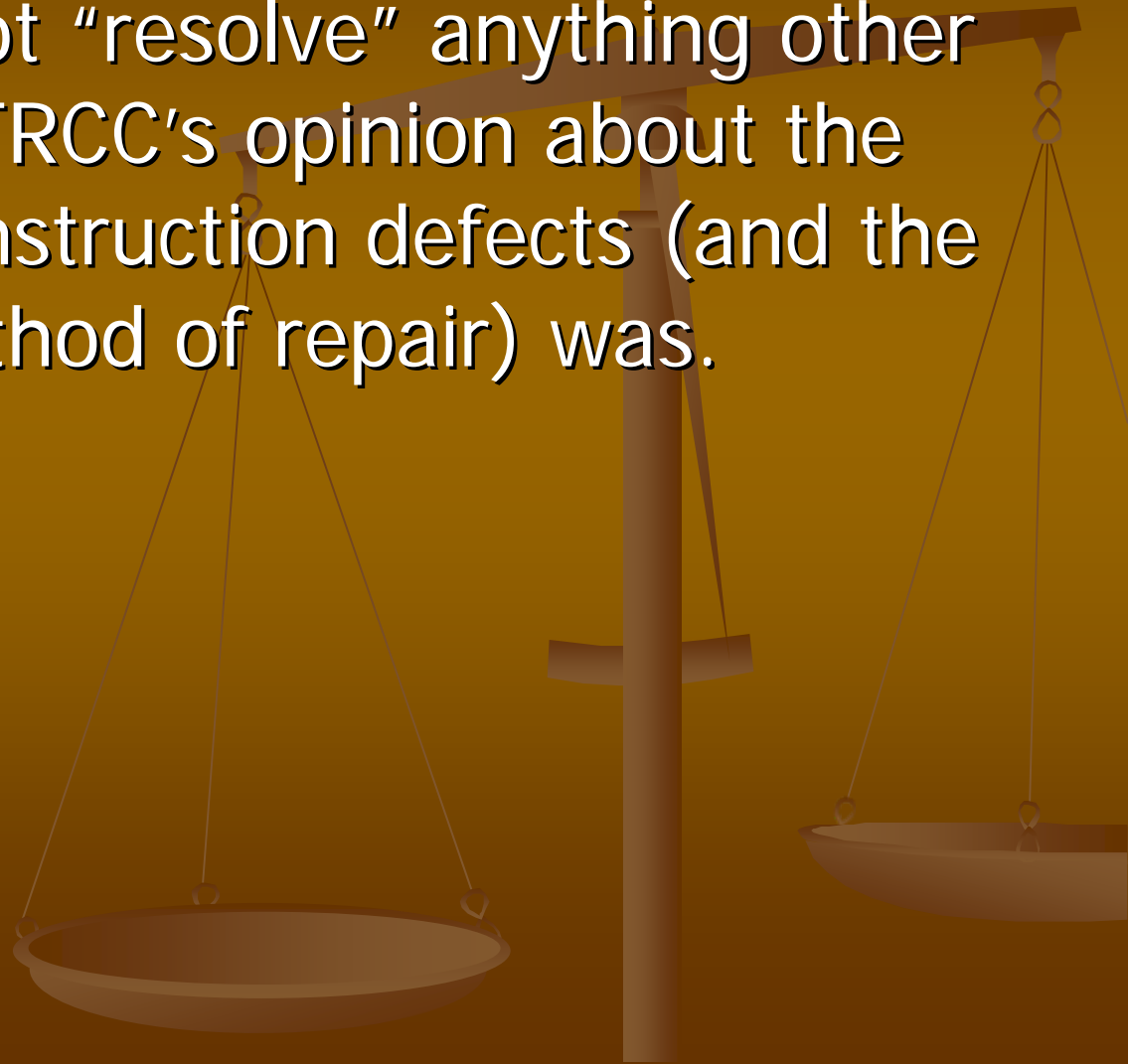
State Arbitration?

- The SIRP was not in and of itself an arbitration process, although it had many similarities. Given the “rebuttable presumption” it created, prevailing in further legal action could be difficult as a practical matter.

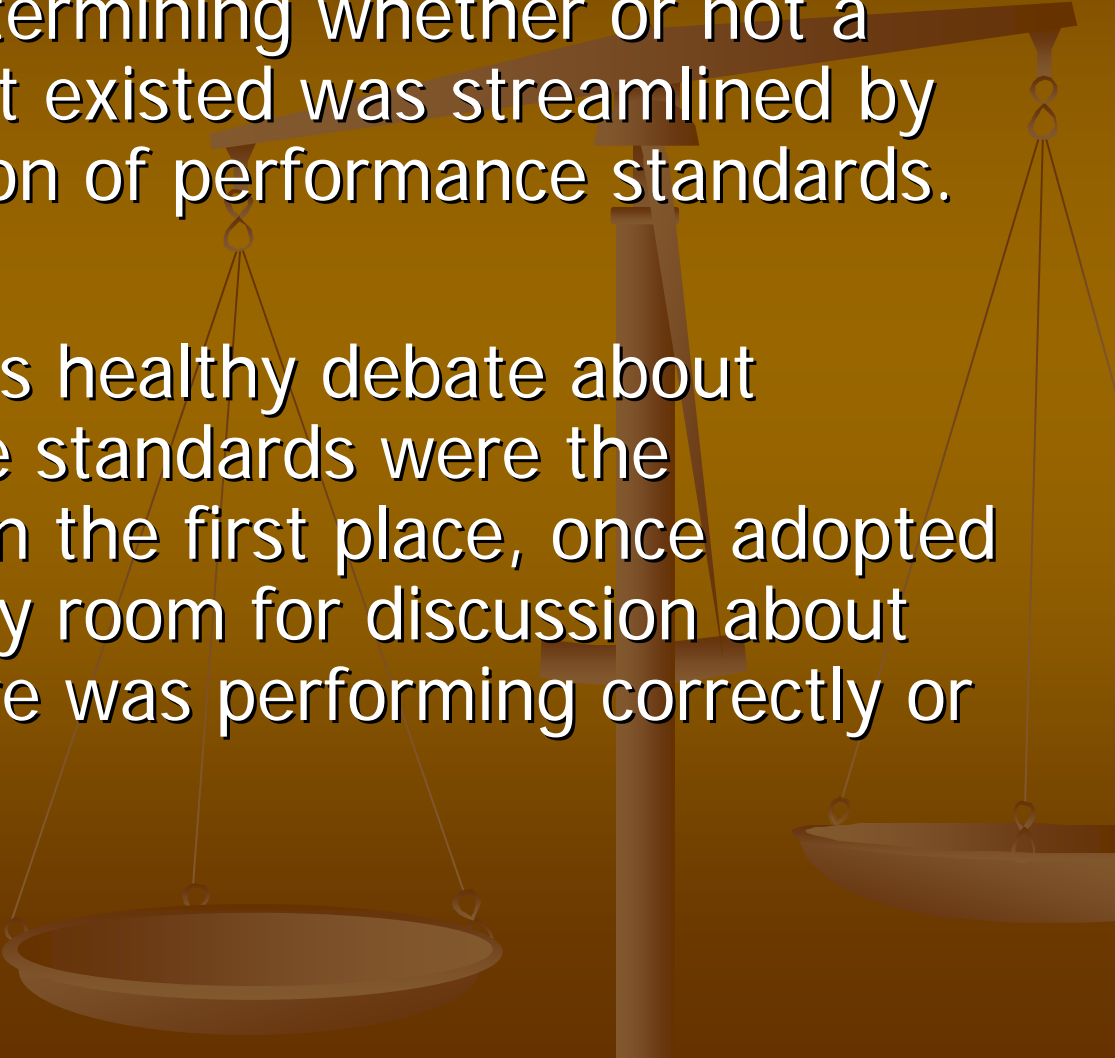


#1 Problem?

- The SIRP did not “resolve” anything other than what the TRCC’s opinion about the existence of construction defects (and the appropriate method of repair) was.
- However . . .



TRCC Warranty Standards

- The process of determining whether or not a construction defect existed was streamlined by the TRCC's adoption of performance standards.
 - Although there was healthy debate about whether or not the standards were the appropriate ones in the first place, once adopted they left little if any room for discussion about whether a structure was performing correctly or not.
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Sustained attack on the TRCCA



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Carole Keeton Strayhorn
Texas Comptroller of Public Accounts

January 23, 2006

In a homeowner survey conducted by my office, I found that 86 percent of homeowners who responded said their builder failed to fix construction defects in their homes. And that was after going through the mandated State Sponsored Inspection and Dispute Resolution process that verified the defects.

Subcommittee on Government Efficiency and Operations, I can fully appreciate your interest in the matters about which you have inquired. As Texas Comptroller, I have carried on the tradition and practice of responding to all requests from members of the Texas Legislature for assistance that has long existed at the Comptroller's office, and I appreciate the confidence that your request exhibits in the abilities of my staff to assist you. I have completed this research and enclose the findings.

According to TRCC, 93 percent of its inspections confirm at least one construction defect, yet they have no statutory authority to hold builders accountable for shoddy building practices.

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According to TRCC, 93 percent of its inspections confirm at least one construction defect, yet they have no statutory authority to hold builders accountable for shoddy building practices.

The majority of homeowners who responded to my survey are disappointed and angry that the costly and bureaucratic TRCC process does nothing to ensure their construction defects are

I am concerned that mandatory registration of builders does not guarantee quality building and in fact may give homeowners a false sense of security by making it appear that the state is somehow endorsing registered builders. The act's mandated limited state warranties are tied to

their impact on homeowners, but according to engineering experts, the standards adopted by the builder-dominated commission are "overly lenient" and "need fine-tuning."

The Honorable Todd Smith
January 23, 2006
Page Two

After reviewing TRCC and its enabling statute, it is clear that the agency functions as a builder protection agency. It is doubtful TRCC will significantly impact the Texas economy. But the economic impact on the homeowner with a defective home can be devastating.

To balance the needs of both the homeowner and the homebuilder, TRCC should at least have statutory authority to make builders fix defects confirmed through its process.

At the very least, the agency should not shift builder fees to the homeowner, should not allow public members of the commission to have ties to the construction industry and should enforce builder registration laws.

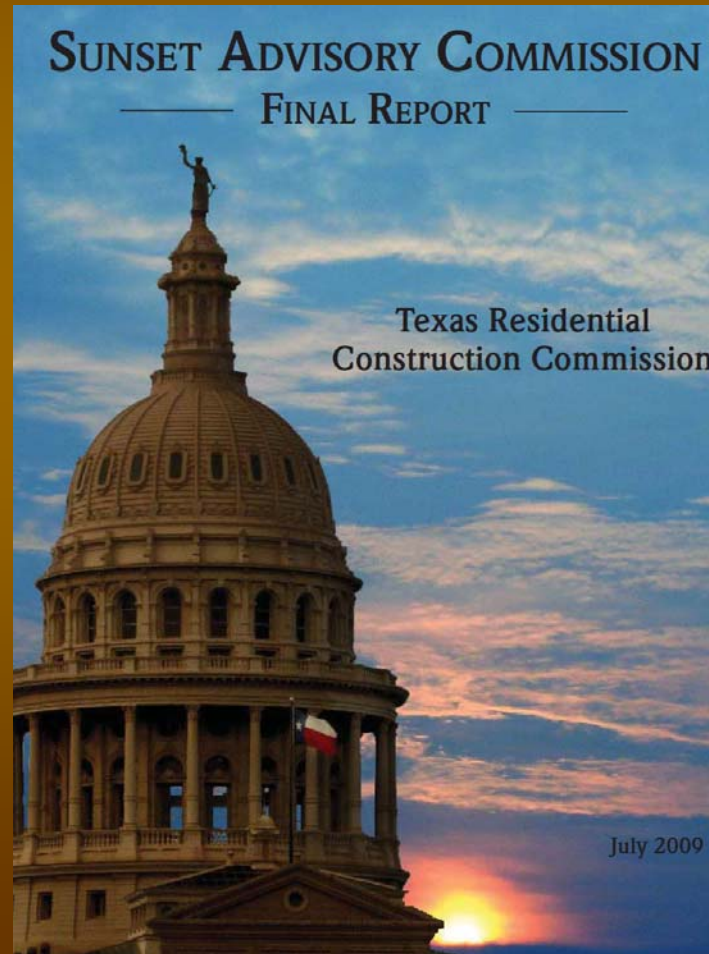
Exhibit 1

Summary of TRCC's Powers and Responsibilities


TRCC Can...	TRCC Cannot...
Register builders and new homes.	Perform SIRP inspections on homes built before September 1, 2003.
Administer the SIRP for post-construction defects of new homes and improvements exceeding \$20,000.	Take enforcement action on homeowner complaints dealing with contract disagreements, homes under construction or homes left unfinished.
Issue an inspection report that determines whether alleged construction defects exist.	Take enforcement action against a builder for failure to repair defects confirmed through the SIRP process or for failing to comply with building standards.
Take enforcement action against builders that fail to comply with fee and registration requirements, or engage in fraud or deceit in dealings with TRCC or homeowners.	Prevent an unregistered builder from engaging in residential construction activities covered under TRCC's statute.
Set registration fees for builders, homes, arbitrators, third-party inspectors and warranty companies.	Mediate or arbitrate a homeowner dispute.
Set state-mandated limited warranties and building performance standards for homes and duplexes.	Protect homeowners should a builder file bankruptcy or leave the state.

Sources: *Texas Residential Construction Commission and Carole Keeton Strayhorn, Texas Comptroller of Public Accounts.*


July 2009 – Sunset Advisory Report




Sunset Advisory Observations




Current regulation of the residential construction industry is fundamentally flawed and does more harm than good.



The current registration system does not prohibit bad builders from continuing to work in Texas' building industry.



Builders are subject to the least restrictive form of regulation—registration.



In total, only 12 percent of State Inspections performed were resolved as a result of the Process.

The Sun Sets

Summary of Legislative Action

H.B. 2295 McClendon (Hegar)



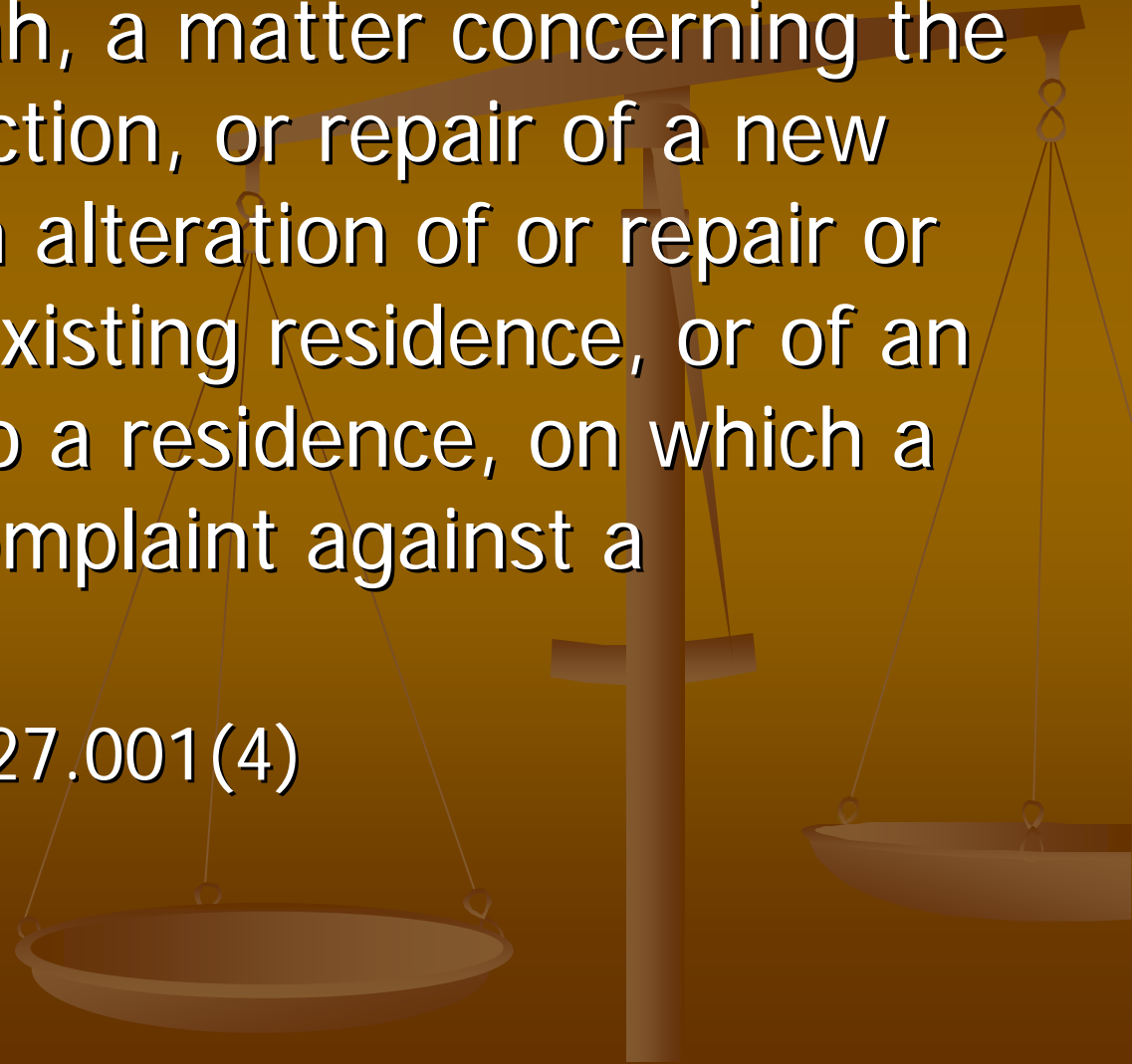
House Bill 2295 contained the Sunset Commission's recommendations on the Texas Residential Construction Commission, as well as additional statutory modifications made by the Legislature. However, the Legislature did not pass H.B. 2295, and the Commission was not continued in separate legislation. According to the Texas Residential Construction Commission Act, and pending further legislation, the Commission will be abolished and the Act will expire on September 1, 2009. At that time, according to the Sunset Act, the Commission may continue in existence until September 1, 2010, to wind down its activities.

What Now?

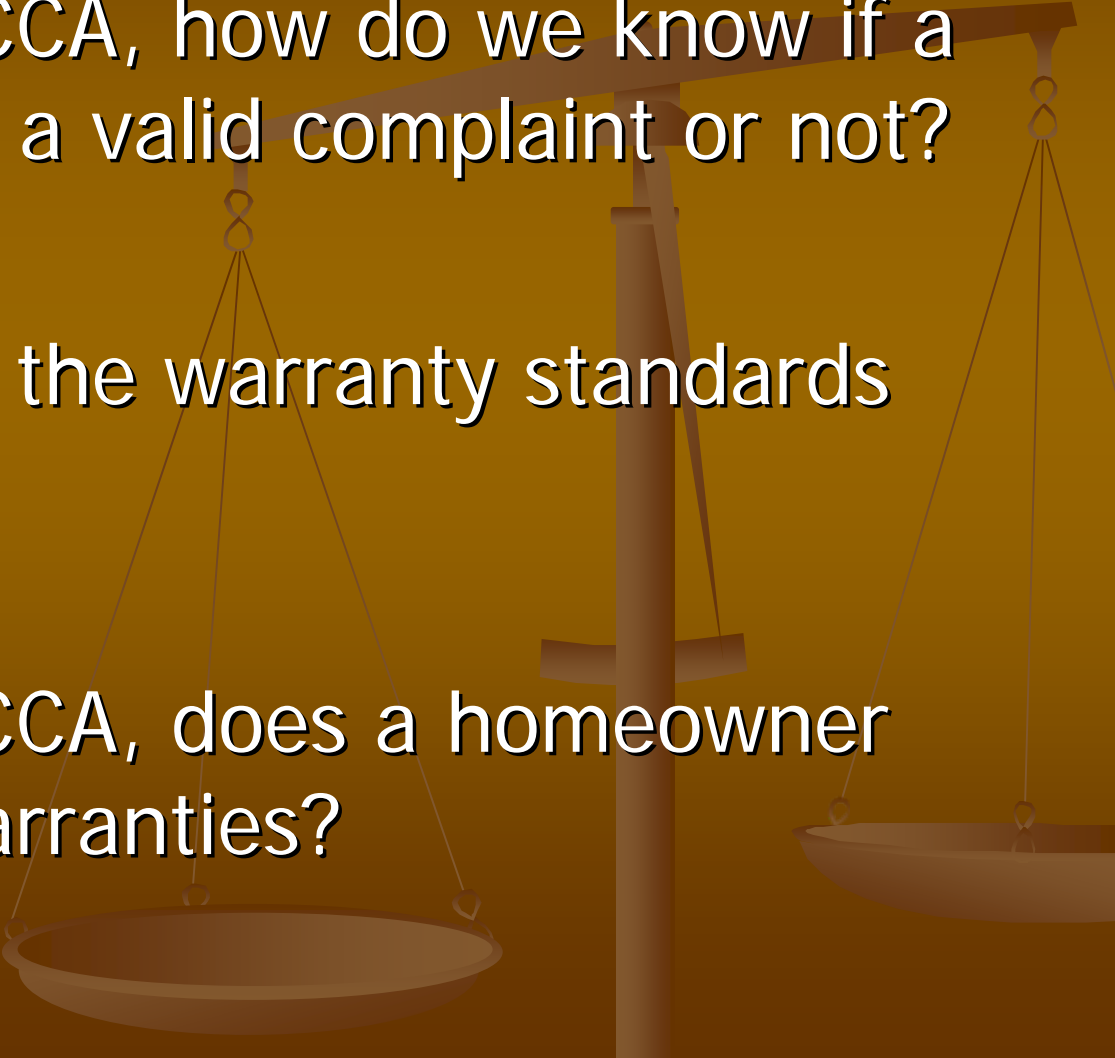
- With the exit of the TRCC and all of its statutory rules, we are back to the old way of doing things through the RCLA.
 - The RCLA never disappeared, even though it was eclipsed almost entirely for six years by the TRCCA.
 - In those instances where the RCLA references the TRCCA, you skip right over those words.
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What is a construction defect under the RCLA?

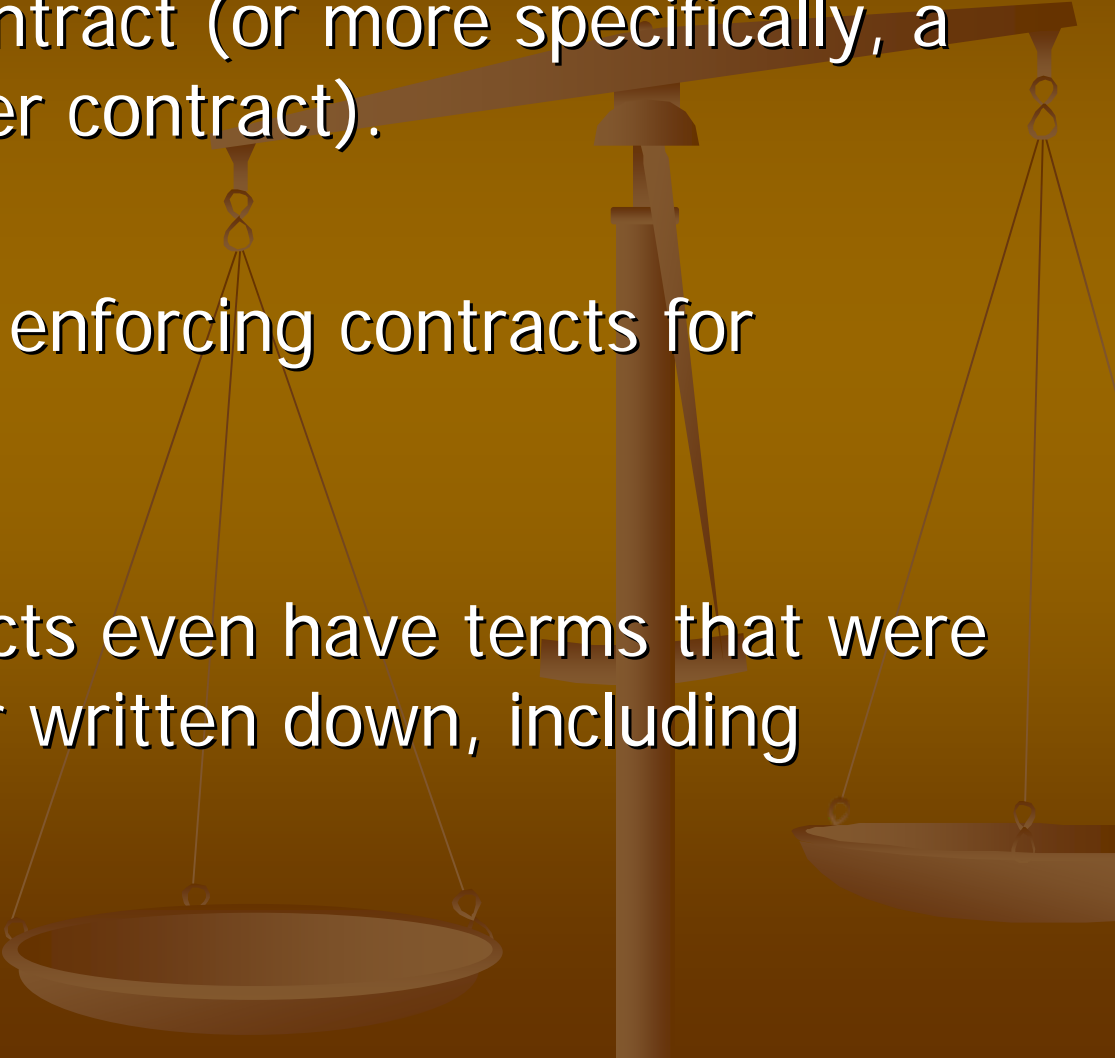
- “ Blah, blah, blah, a matter concerning the design, construction, or repair of a new residence, of an alteration of or repair or addition to an existing residence, or of an appurtenance to a residence, on which a person has a complaint against a contractor.”
 - Property Code 27.001(4)



Fundamental Questions

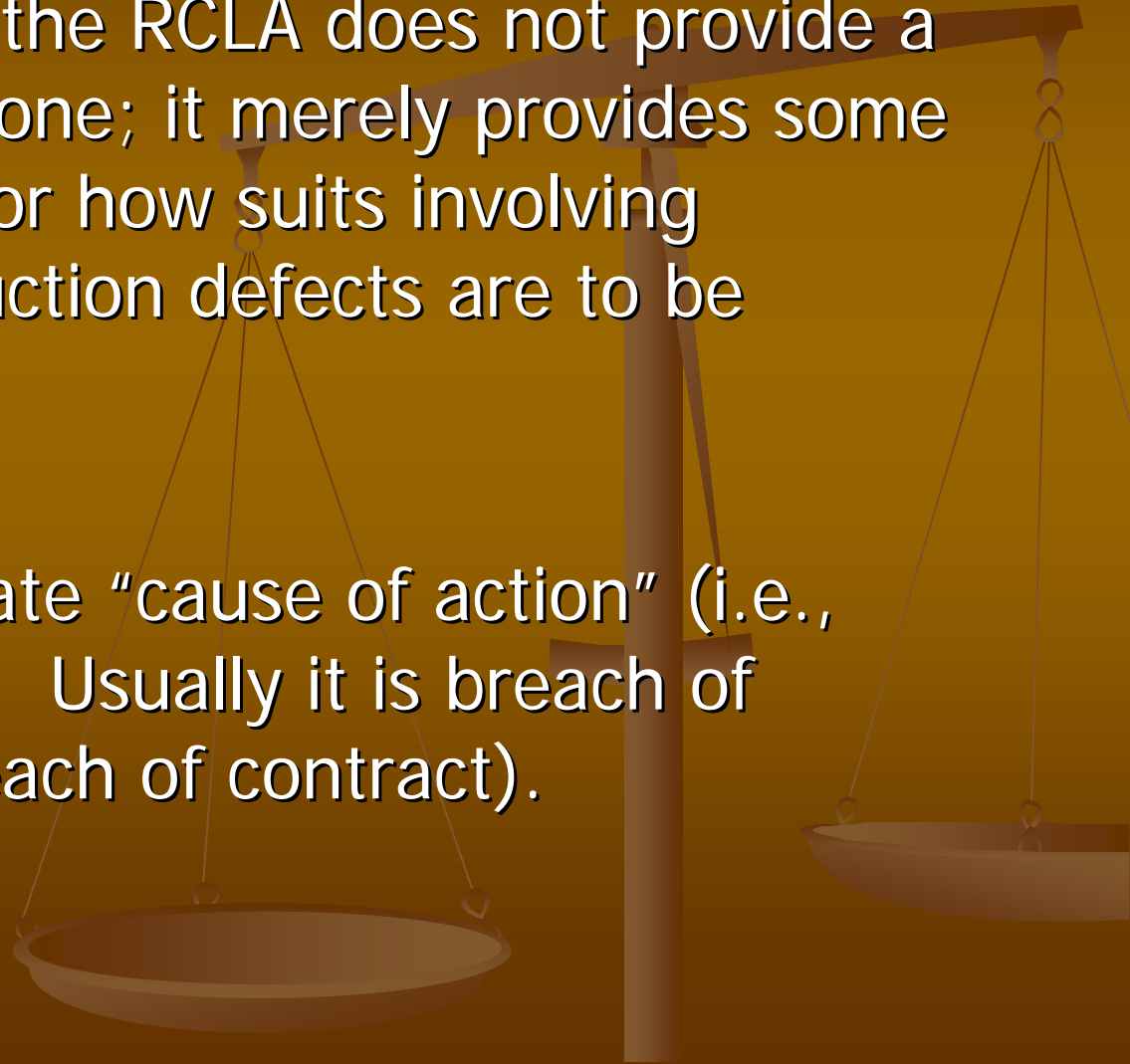
- Without the TRCCA, how do we know if a homeowner has a valid complaint or not?
 - Where did all of the warranty standards go?
 - Without the TRCCA, does a homeowner even get any warranties?
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Common Law to the rescue

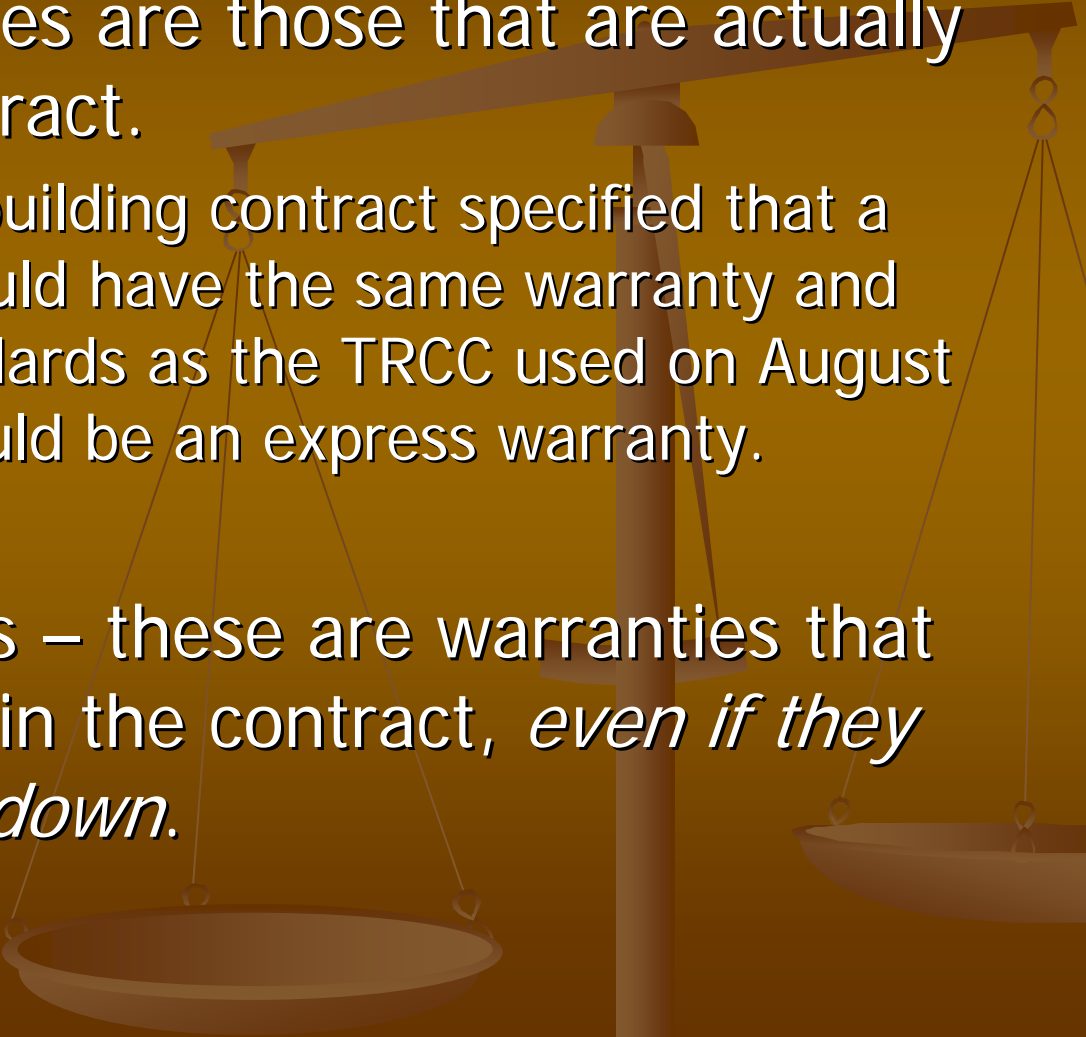
- A warranty is a contract (or more specifically, a term within a larger contract).
 - Judges have been enforcing contracts for centuries.
 - Sometimes contracts even have terms that were never discussed or written down, including warranty terms.
- 

The RCLA as an outline

- By its own terms, the RCLA does not provide a basis to sue someone; it merely provides some mandatory rules for how suits involving residential construction defects are to be conducted.
- You need a separate “cause of action” (i.e., basis) for the suit. Usually it is breach of warranty (i.e., breach of contract).

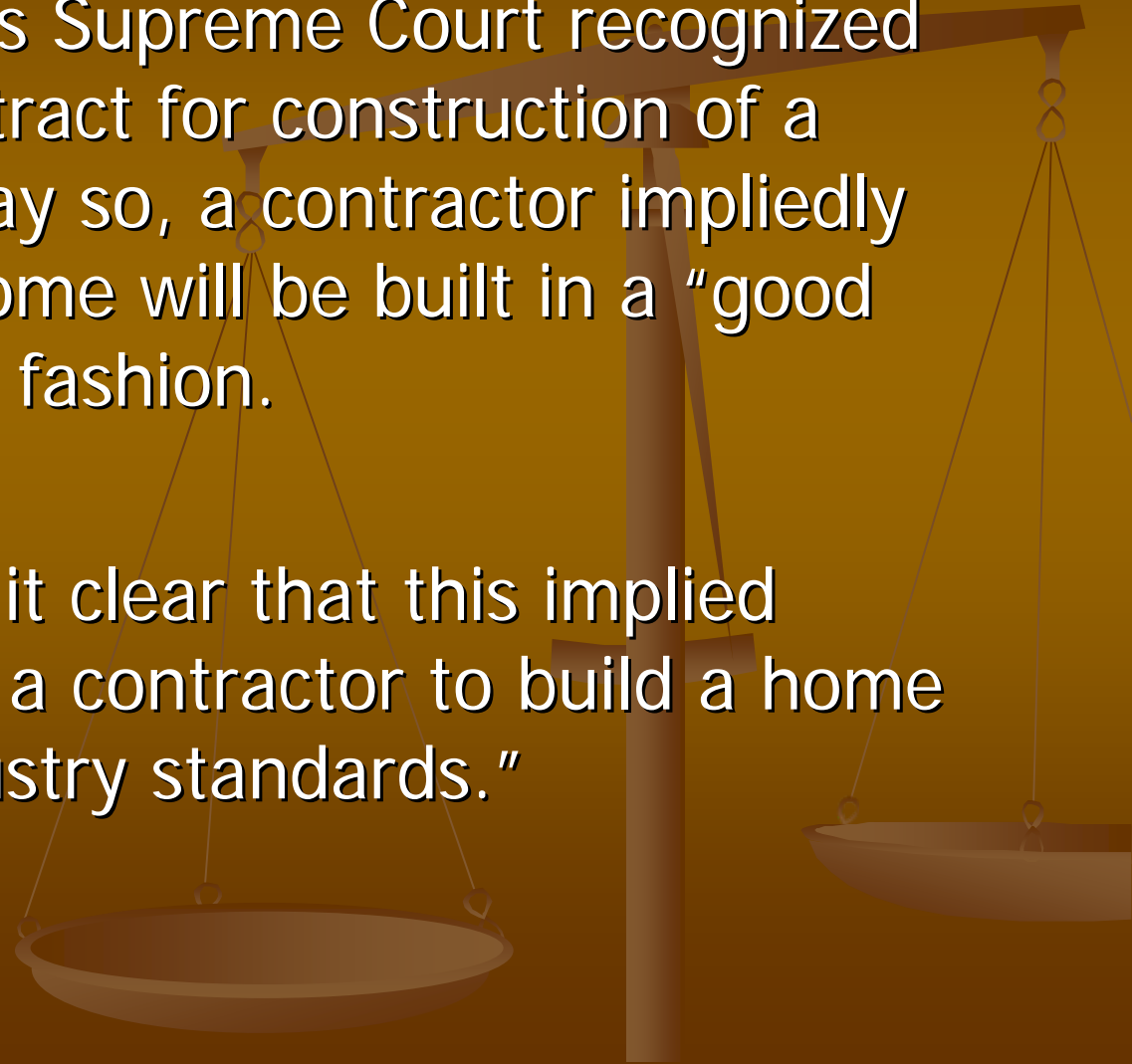


A bit more law - Warranties

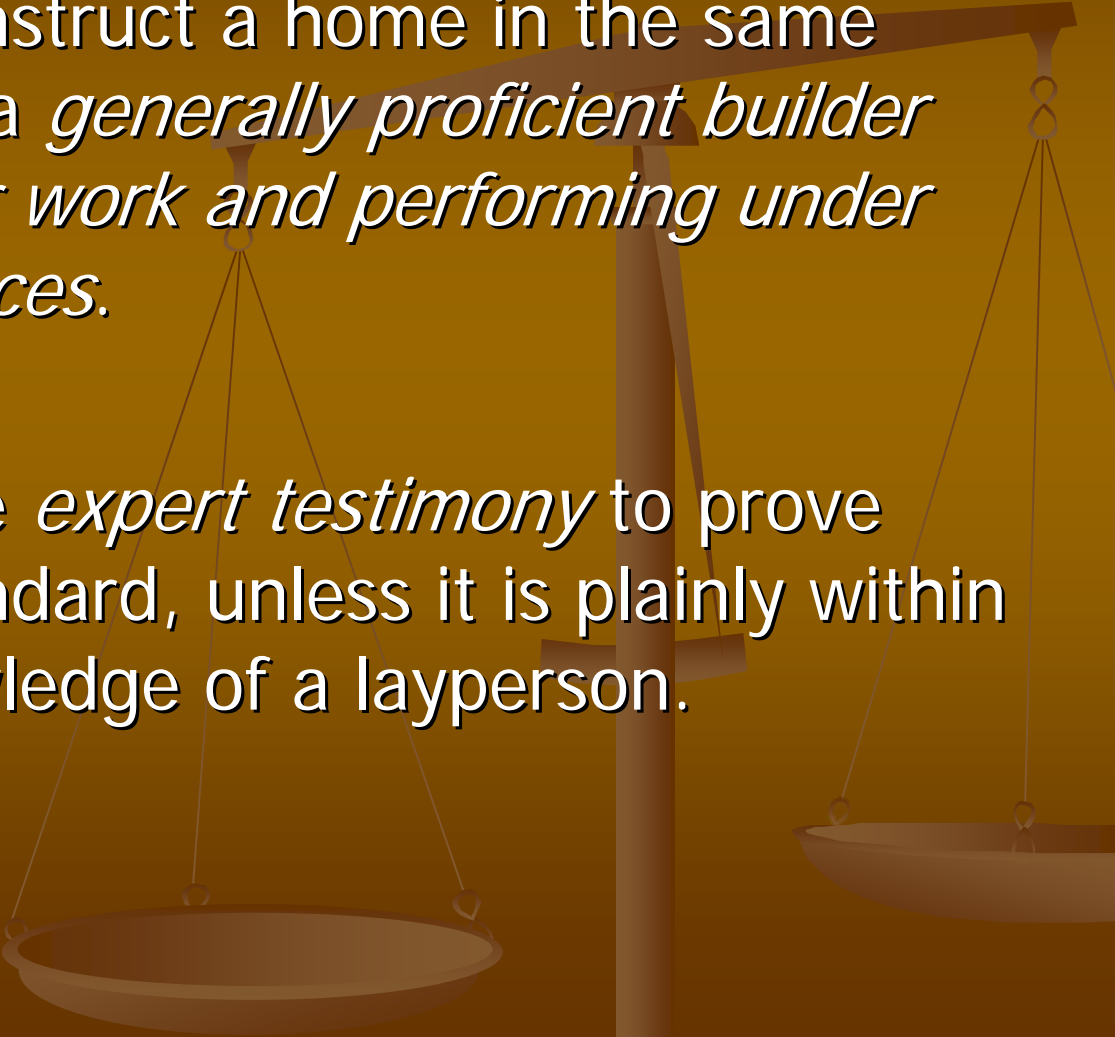
- “Express” warranties are those that are actually written in the contract.
 - For instance, if a building contract specified that a new residence would have the same warranty and performance standards as the TRCC used on August 31, 2009, that would be an express warranty.
 - Implied Warranties – these are warranties that the law says exist in the contract, *even if they are never written down.*
- 

Implied Warranty of Good and Workmanlike Construction

- In 1968, the Texas Supreme Court recognized that even if a contract for construction of a residence didn't say so, a contractor impliedly warrants that a home will be built in a "good and workmanlike" fashion.
- Later cases made it clear that this implied warranty requires a contractor to build a home according to "industry standards."



Implied Warranty of Good and Workmanlike Construction (cont'd)

- A builder must construct a home in the same manner as would a *generally proficient builder engaged in similar work and performing under similar circumstances*.
 - A litigant must use *expert testimony* to prove the applicable standard, unless it is plainly within the common knowledge of a layperson.
- 

Expert testimony



- “If scientific, technical, or other specialized knowledge will assist [the judge or jury] to understand the evidence or determine a fact in issue (e.g., whether a residence was built in a good or workmanlike fashion; how a defect can be fixed; how much it will cost to fix), a witness qualified as an expert by knowledge, skill, experience, training or education may testify there to in the form of opinion or otherwise”

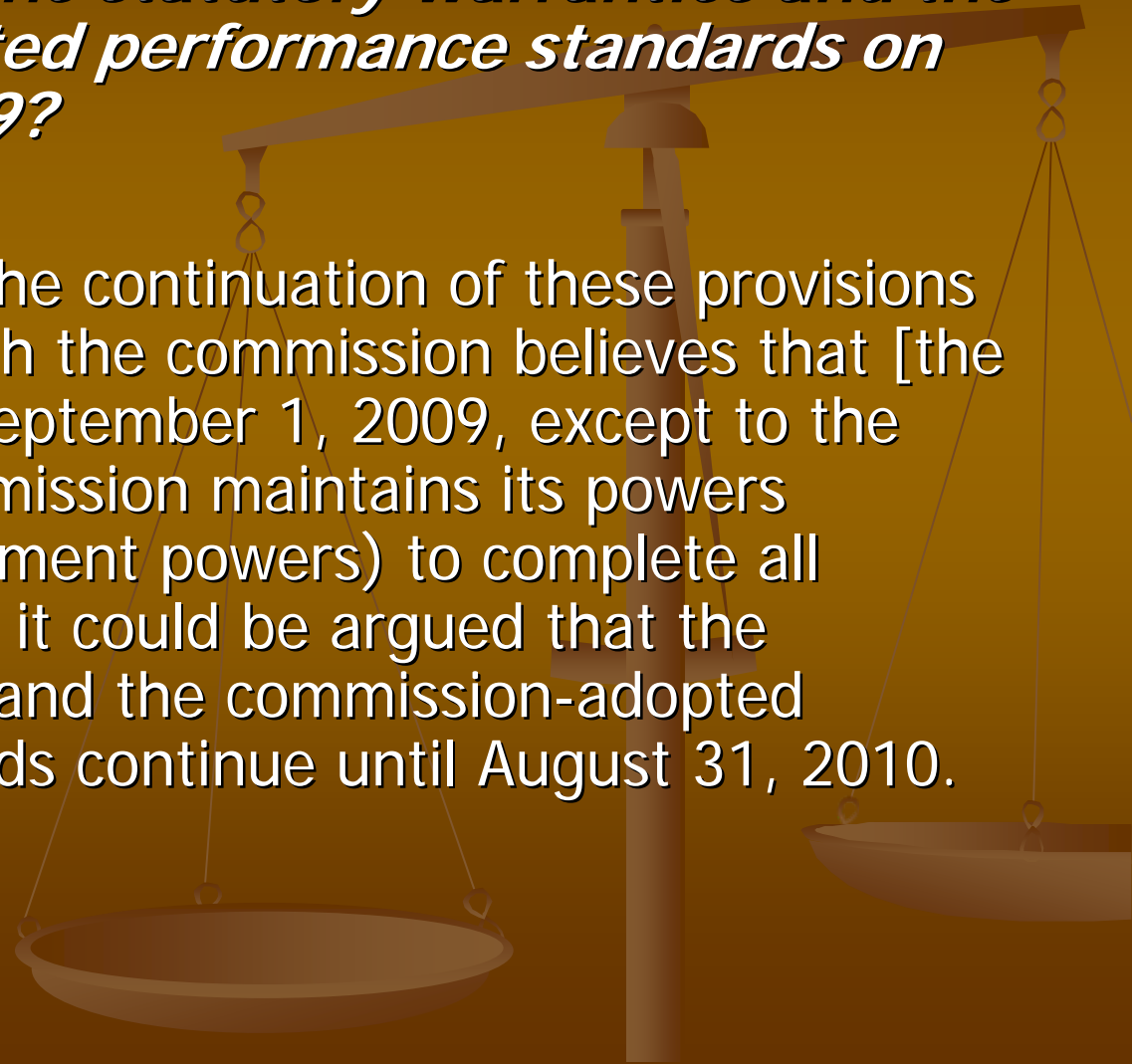
Bottom line



- Whereas the TRCCA effectively reduced the role of technical experts to that of advocates for SIRP resolution purposes, going forward that will not be the case, at least not for the foreseeable future (more on that in a bit).
- As a result of the sunset of the TRCCA, residential construction defect claims have once again become a “battle of the experts.”
- The technical expert must assist the attorney and their mutual client in determining the applicable building standards, whether those standards were violated, and how best to remedy any violation.

What about the TRCC warranties?

- *What happens to the statutory warranties and the commission-adopted performance standards on September 1, 2009?*
- The question about the continuation of these provisions is debatable. Although the commission believes that [the TRCCA] expires on September 1, 2009, except to the degree that the commission maintains its powers (including its enforcement powers) to complete all preexisting business; it could be argued that the statutory warranties and the commission-adopted performance standards continue until August 31, 2010.



Cont'd

- "The safest course of action is for a builder or remodeler to issue warranties and performance standards that are more restrictive than those in [the TRCCA]. You can download a word version of the document [here](#) and then increase a coverage period or tighten a performance standard to place into your agreements for the next year."

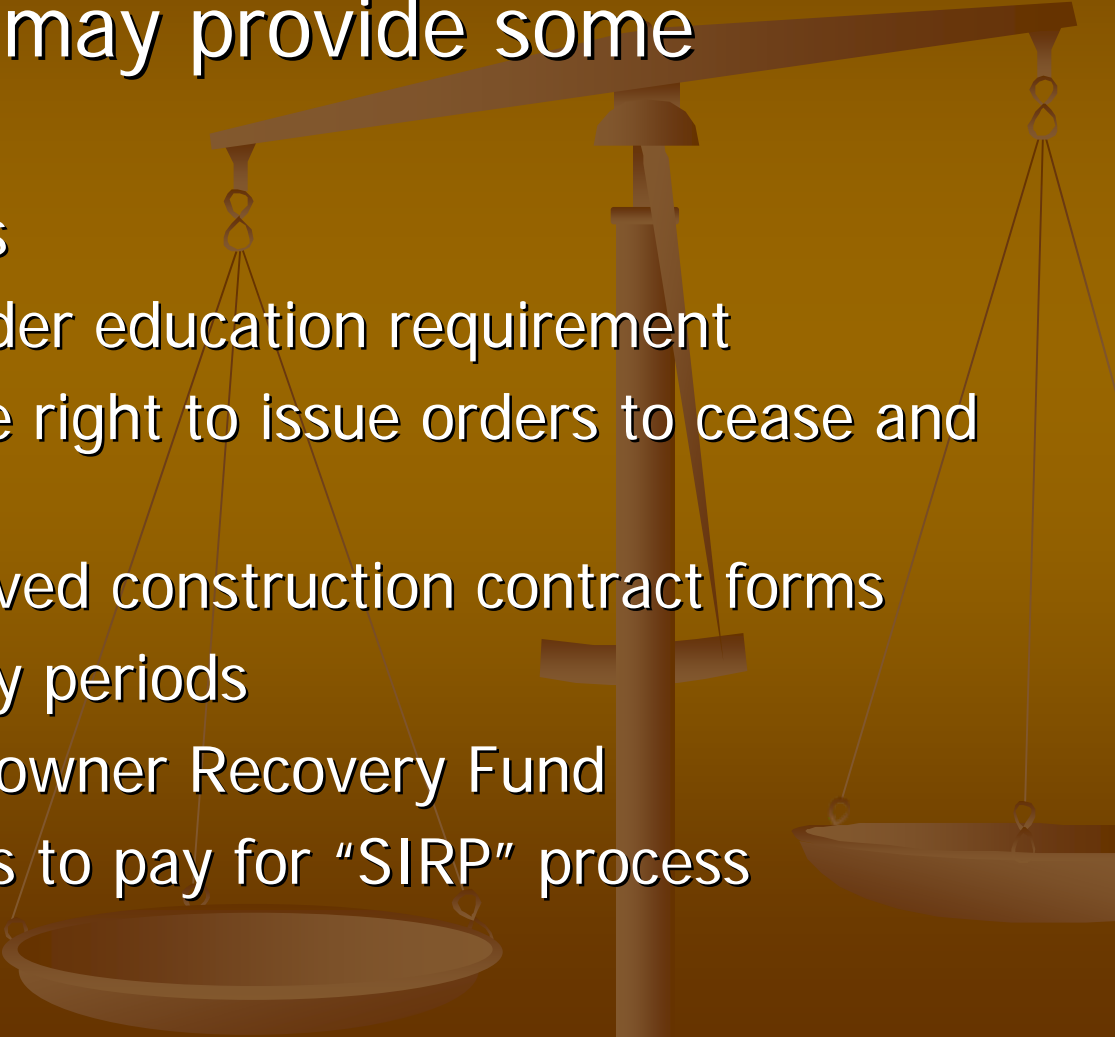
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- “If it is finally held that the law that created the statutory warranties and supported the commission’s adoption of performance standards will no longer be in effect, the law will revert to what it was before the enactment of Title 16. Prior to the enactment of Title 16, the courts recognized the implied warranty of good workmanship in construction and the implied warranty of habitability. The courts also recognized that the parties to a written contract could create an express warranty in lieu of the common-law implied warranties if the implied warranties are properly disclaimed and replaced with a suitable express warranty terms.”

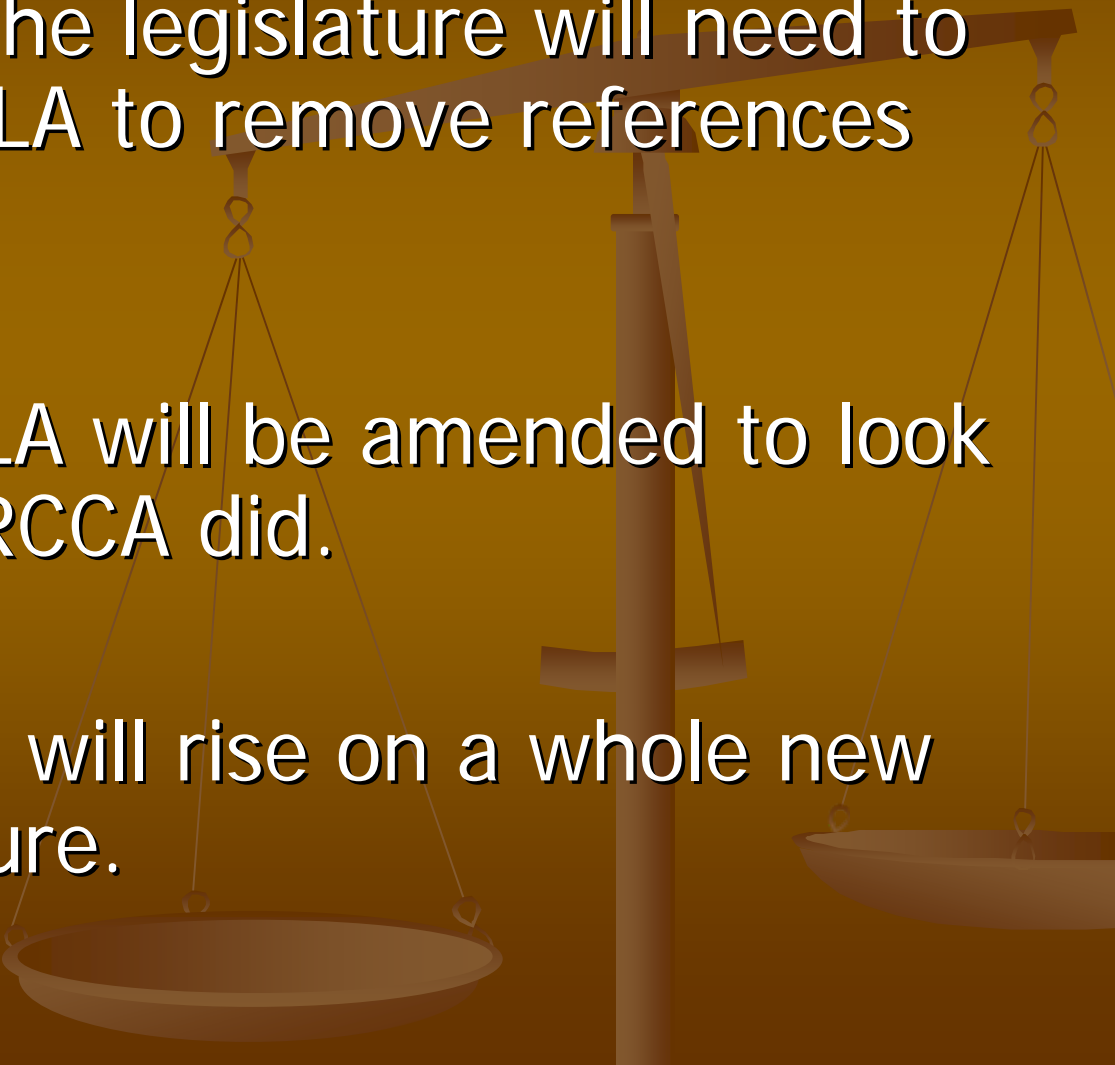
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- *Will a court recognize the statutory warranties and commission-adopted performance standards, even if the commission no longer exists?*
- “For contracts executed before September 1, 2009, or work commenced before that date, courts will consider the law in effect at that time. So, if [the TRCCA] was still in effect when the parties signed a contract for new home construction or transferred title on new home construction, the statutory warranties created by [the TRCCA] and the commission-adopted performance standards still apply.”

What is on the horizon?

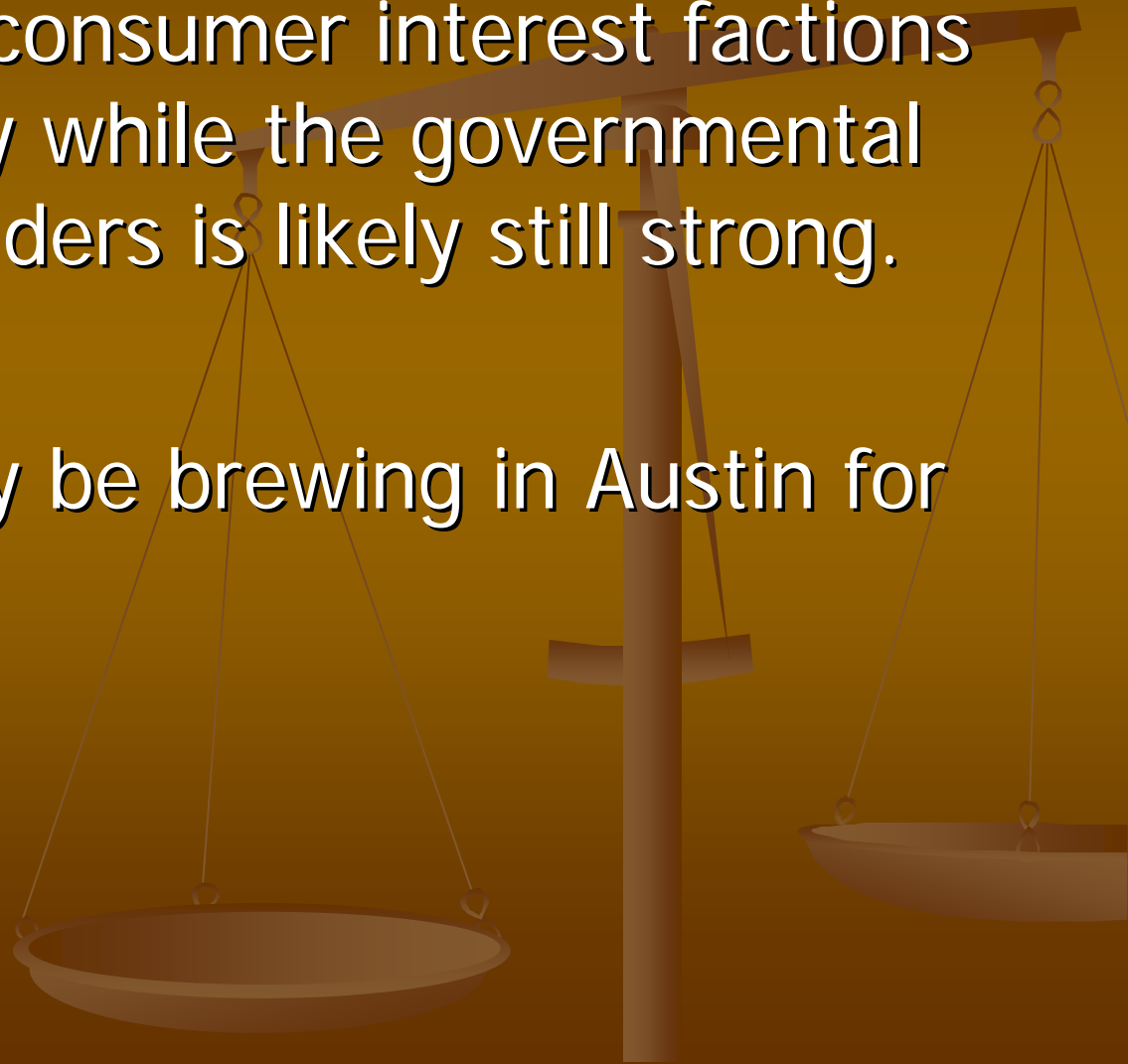
- House Bill 2295 may provide some guidance:
 - License builders
 - Continuing builder education requirement
 - Give agency the right to issue orders to cease and desist
 - Establish approved construction contract forms
 - Extend warranty periods
 - Establish Homeowner Recovery Fund
 - Require builders to pay for "SIRP" process
- 

What is on the horizon?

- At a minimum, the legislature will need to clean up the RCLA to remove references to the TRCCA.
 - Perhaps the RCLA will be amended to look more like the TRCCA did.
 - Perhaps the sun will rise on a whole new legislative creature.
- 

What is on the horizon?

- At a minimum, consumer interest factions groups are wary while the governmental influence of builders is likely still strong.
- A big battle may be brewing in Austin for 2011.



The End

