

## JULY 2010 MEETING

Wednesday, July 14, 2010

### TECHNICAL PROGRAM

#### Residential Construction Defect Claims - Out with the Old, In with the New

**Speaker:** William Morfey, Attorney at Law, Zimmerman, Axelrad, Meyer, Stern and Wise, P.C. Houston TX, Tel. 713-552-1234

*William Morfey is an associate attorney with Zimmerman, Axelrad, Meyer, Stern & Wise, PC. with a BA from the University of Illinois, 1997, and JD from South Texas College of Law, 2001. His practice includes a broad range of commercial litigation and trial work, including contract disputes, business torts, and construction litigation. He has handled a number of complex business litigation cases involving issues ranging from partnership disputes and recovery of fraudulently transferred assets to piercing the corporate veil and real estate fraud.*

#### PRESENTATION SUMMARY

To an audience of about 70 at the HESS Club, Mr. Morfey gave a slide presentation titled "Residential Construction Defect Claims in Texas - Out with the New, In with the Old" that focused on three goals:

- Provide brief legal education of terms for this topic
- Survey of recent changes of Texas residential construction law and
- Highlight current state residential construction law.

He discussed the two common types of Law:

- Common law (made by judges)
- Statutory law (made by legislature)

Some of the terms defined were TRCCA, TRCC, SIRP, RCLA, DTPA.

- Texas Residential Construction Commission Act
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- State Sponsored Inspection and Dispute Resolution Process
- Residential Construction Liability Act
- Texas Deceptive trade Practices - Consumers Protection Act

Mr. Morfey stated that the TRCCA is a subset of the RCLA and RCLA is a subset of DTPA.

Mr. Morfey further discussed warranty periods. He discussed two types of warranties, implied and expressed, which he defined as follows:

- Expressed warranties are those that the builder would offer in the contract - actually written in contract
- Implied warranties are those that are considered to be common - that is they exist even if not written down

Thus expressed warranties must be sufficient to meet implied warranties though there is some room for variation within this framework.

Mr. Morfey said usual implied warranty periods in Texas are:

- 1 year workmanship and materials



- 2 year - mechanical systems (HVAC, plumbing, electrical)
- 10 year - major structural

Mr. Morfey provided a brief history of the TRCCA and noted that it sunsetted (not actually abolished, they just let it die) by the Texas Legislature on Sep 1, 2009. There is a window of one year for claims after that date. There were many guidelines in TRCC but few areas for enforcement. An advisory committee to the sunset commission said the TRCC process was "fundamentally flawed" and should be abolished.

Mr. Morfey stated that there was a lot of criticism for the TRCC and specifically quoted a letter from Carol Keeton Strayhorn, Texas Comptroller of Public Accounts dated (Jan 23, 2006) including:

- 86% of owners state builders failed to fix problems
- 93% of inspections revealed at least one defect but no statutory authority to hold builders accountable
- Mandatory registration of builders does not guarantee quality building but give owner a false sense of security
- The agency functions as a builder protection agency
- TRCC needs statutory authority to make builders fix defects
- Builders should not shift fees to the homeowner and members of the commission should have no ties to the construction industry

Mr. Morfey said that after the TRCC shuts down (August 31, 2010) we will go back to using RCLA rules and experts will again be more instrumental in determining construction defects as common law will now apply for defects - including warranties implied or expressed, as there will be no method for resolution other than through the courts. He stated that the safest course of action is for builders to offer warranties and performance standards that are more restrictive than those from TRCCA. In other words, the law will revert to what it was before TRCCA was adopted, i.e. implied warranties and good workmanship of construction. Courts will probably consider TRCCA for contracts executed before Sep 1, 2009.

Mr. Morfey also discussed House Bill 2295 that, had the Texas Legislature passed it in 2009, it would have:

- Licensed builders
- Required continuing education for builders
- Provided agency authority to issue cease and desist orders
- Established construction contract forms
- Extended warranty periods
- Established homeowner recovery fund
- Required builders to pay SIRP process

He believes this bill, though not law, could raise the standard of care for upcoming homebuilding in Texas.

In closing, Mr. Morfey believes "A big battle is brewing in Austin for 2011." He said that the Texas Legislature must clean up RCLA by removing all references to TRCCA. He stated that consumer interest faction groups wary of governmental influence of builders are likely still strong. He also said there is a chance a whole new legislative model will be started in 2011, and if so, this time he hopes it will allow more technical input from the community.