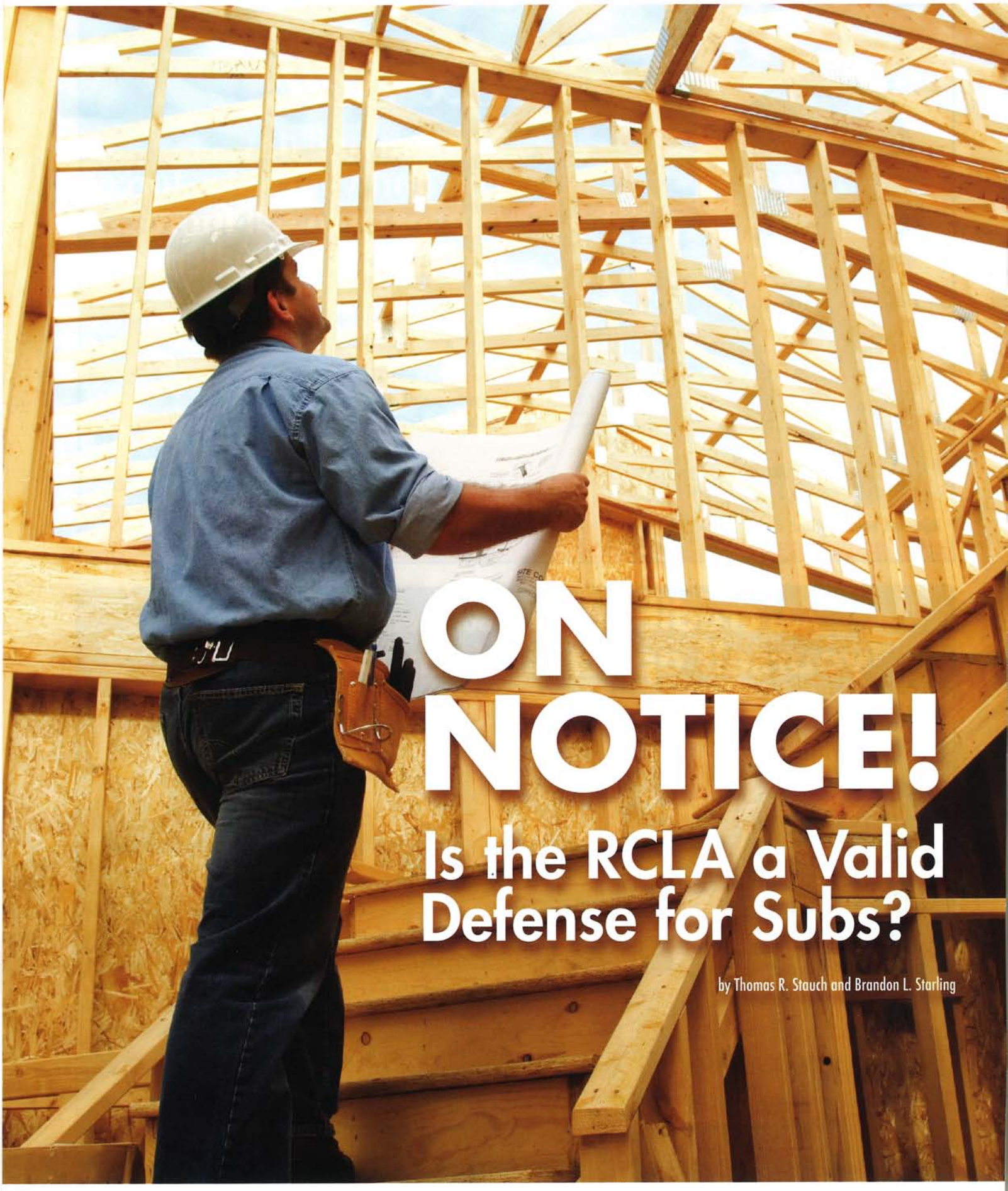

ON NOTICE!

Is the RCLA a Valid Defense for Subs?

by Thomas R. Stauch and Brandon L. Starling

Most savvy homebuilders employ the protections of the Texas Residential Construction Liability Act (RCLA) when faced with homeowner complaints of construction defects. However, those same homebuilders often face situations in which subcontractors assert the notice requirement under the RCLA. In the latter scenario, subs are aiming to limit their liability to homebuilders that fail to notify them about defects and to give them an opportunity to make repairs. But is the Act truly intended to protect subcontractors as well?

In 1989, the Texas Legislature changed the face of residential construction law when it enacted the RCLA "to provide a fair and appropriate balance to the resolution of construction disputes between a residential contractor and owner."

In essence, the Act was meant to help protect homebuilders from lawsuits filed by unhappy homeowners for alleged warranty violations or construction defects. No longer could a homeowner file suit against a builder without first following the strict notice procedures outlined in the RCLA. If procedure was neglected, the claim could be dismissed (although changes made this fall to the dismissal provision of the RCLA make it less effective for homebuilders).

Specifically, the RCLA requires homeowners to provide builders with written notice of the alleged defect, an opportunity to inspect it, and the chance to make an offer of repair or settlement—all this before they can file suit. The Texas Legislature's purpose in drafting these requirements was "to encourage pre-suit negotiations to avoid the expense of litigation."

This policy of pre-suit claim resolution would certainly seem to apply to claims by homebuilders against their subcontractors as well.

Failure to Communicate

When a homebuilder asserts a claim arising from a construction defect, quite often the problem can be traced back to the work performed by a particular subcontractor on the project. Whether or not the opportunity to issue a back charge still exists, the homebuilder now finds itself with a commercial-damages claim against its subcontractor.

Homebuilders may have a variety of reasons for failing to give notice of a defect to a subcontractor before repairing it. Some have their own warranty departments, making the repairs "in-house." Many use a variety of subcontractors, and convenience or expediency may lead to the use of another contractor. Perhaps the homebuilder has already terminated the relationship with the responsible subcontractor, and understandably has no desire to give the job to a proven poor-performer.

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On Notice

In these disputes, a question arises: Does the RCLA require homebuilders to provide the same written notice and opportunity to inspect and repair to their subcontractors?

Lawyers for subcontractors frequently cite the RCLA notice requirements in an attempt to avoid liability to the homebuilder. They say a failure to alert the sub means the homebuilder can't maintain a commercial claim for damages. Is this a valid defense?

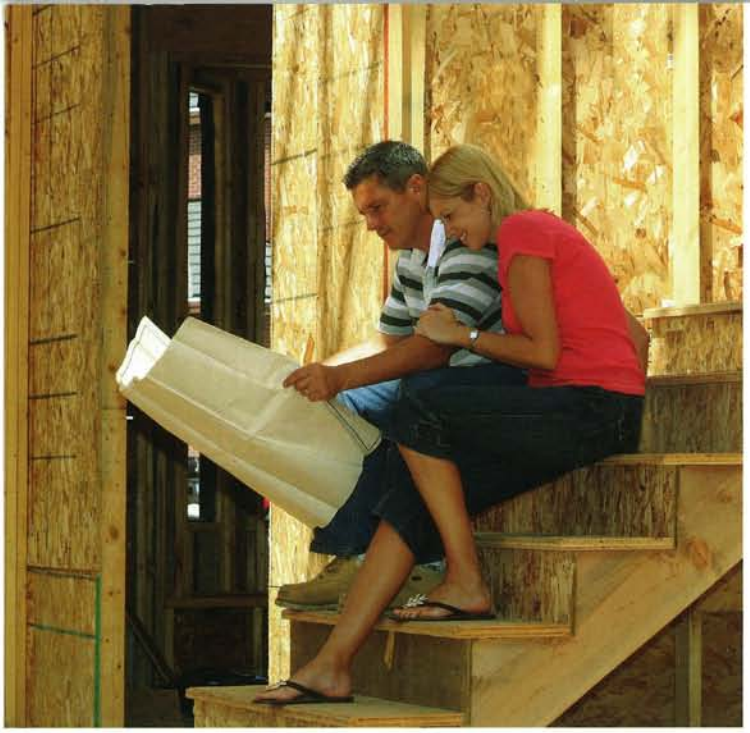
If the necessary repairs have already been made, or a different subcontractor is hired to perform them, is the homebuilder barred from recovery against its subcontractor? Surprisingly, there is no Texas case directly addressing these questions. For guidance, we must examine both the letter and spirit of the RCLA.

Definitive Builder

A closer reading of the Act's language reveals it applies expressly to construction defect claims asserted by a "claimant" against a "contractor."

The Act also seems to use the terms "claimant" and "homeowner" interchangeably. Since the RCLA governs claims against a "contractor" for damages or other relief arising from a construction defect, it's important to understand the definition of a "contractor." The term "contractor," as defined by the RCLA, means a "builder."

A "builder" has been further defined by the RCLA and the Texas Residential Construction Commission as a company or individual who, for compensation, constructs, supervises or manages the construction of a 1) new home, 2) a material improvement to a home, or 3) an improvement to the interior of an existing home when the cost of the work exceeds $20,000. Based upon these definitions and the intended purpose of the RCLA—to deter homeowner litigation against homebuilders—it would appear subcontractors are not protected.



Sub Distinction

The RCLA doesn't specifically define the term "subcontractor." However, it contains certain provisions that recognize the distinction between a contractor (homebuilder) and a subcontractor.

Given this distinction, and the fact that the primary notice provision of the RCLA applies only to claims brought against "contractors," it's reasonable to conclude that the Legislature didn't intend to confer any right of notice and repair to subcontractors. In fact, there is no mention of the term "subcontractor" in the primary notice provision.

Accordingly, the language of the RCLA suggests that a homebuilder isn't required to provide notice and an opportunity to inspect and repair to its subcontractor before filing suit to recover damages—at least not under a breach-of-contract theory.

But Wait ...

Nonetheless, there is one provision of the RCLA that may give homebuilders and their counsel some pause.

Section 27.004(p) states, "If the contractor provides written notice of a claim for damages arising from a construction defect to a subcontractor, the contractor retains all rights of contribution from the subcontractor if the contractor settles the claim with the claimant." Conversely, it follows that failure to provide written notice to the subcontractor will preclude a homebuilder from pursuing damages based upon a right of contribution.

This is significant because a contribution claim against the subcontractor for damages paid to a homeowner in settlement would necessarily be asserted in connection with extra-contractual claims such as fraud, negligence or violations of the Texas Deceptive Trade Practices Act.

So, the risk for the homebuilder that skips notice lies in the potential difference between contractual measures of damages and those afforded under tort causes of action. For example, a claim for simple repair damages arising from defectively installed tile flooring can be effectively pursued with no prior notice to the subcontractor under a breach-of-contract theory.

However, a plumbing leak resulting in extensive repair costs, alternative living expenses and claims for exposure to mold may involve damages recoverable only in tort. In such a case, written notice of the claim should be given to the subcontractor to preserve the right of contribution. The same goes for circumstances where a misrepresentation or fraudulent conduct of a subcontractor is at issue.

The RCLA doesn't elaborate on when or how to give proper notice to the subcontractor, but most homebuilders do so in writing, via certified mail with return receipt requested. The notice should be sent as soon as a homeowner claim is asserted in order to satisfy the RCLA and to avoid any prejudice to the subcontractor or its insurance carrier. Doing so not only preserves the right of contribution, but may also result in a more effective analysis of the claim, which is good news for the homebuilder.

The requirements of the RCLA don't appear to preclude a breach-of-contract action by a homebuilder who fails to give notice to its subcontractor. However, legally alerting the sub serves the same practical purpose as the homeowner-to-homebuilder notice. Since there is little risk—and a significant potential benefit—in providing notice of the claim to a subcontractor, homebuilders are encouraged to do so in all construction-defect cases. hb

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