



March 25, 2018

Texas Real Estate Commission
PO Box 12199
Austin, TX 78711-2188

RE: TREC Insurance and Regulation

Members of the Commission:

I am the General Counsel and Vice President for Legal Affairs for the International Association of Certified Home Inspectors (InterNACHI). InterNACHI is a nonprofit corporation with tax-exempt status as a trade association under Section 501(c)(6) of the Internal Revenue Code. InterNACHI has more than 21,500 members and is the largest association of home inspectors in the world.

I write to express InterNACHI's concerns about some of the proposed changes pertaining to the regulation of home inspectors in Texas. InterNACHI shares the concerns expressed by the Texas Professional Real Estate Inspector Association (TPREIA), which is a highly respected association that is very familiar with the home inspection industry in Texas. However, InterNACHI asked me to write to share some additional information with you.

Before I address the proposed changes, I want to provide some highly relevant background information. It is vital to understand the home inspection industry before promulgating rules that will impact Texas home inspectors and Texas consumers.

BACKGROUND

I have been InterNACHI's General Counsel since 2004. I receive phone calls from home inspectors and consumers each week involving potential claims against home inspectors. Consequently, I have tremendous knowledge on these issues. I can say with certainty that 99% of potential claims against home inspectors involve claims of less than \$5,000.00. The typical allegation is that the inspector missed something and the customer had to pay a few hundred or a few thousand dollars to repair or replace what the inspector missed. This is because the value of any individual system or component that an inspector inspects is low. Consequently, it is virtually impossible for an inspector to make a \$100,000.00 mistake. Those high dollar mistakes, when they occur, are made by architects, structural engineers, or contractors – not home inspectors.

The only time there is ever a six-figure claim against a home inspector is when a homebuyer claims they would not have purchased the home but for the inspector's failure to identify a defect. However, even in these cases, the unhappy homebuyer typically has suffered little or no actual damage because the homebuyer can generally sell the home, if they wish, for as much or more than they paid for it. Even if they sell it at a loss, that loss is not going to exceed \$100,000.00. Further, when a homebuyer brings this type of action, the homebuyer also sues the seller for failure to disclose and sues the real estate agent for negligence. In any such case, assuming the case is valid, the seller's homeowner's policy and the agent's policy will also provide a potential source of recovery.

A typical home inspector charges between \$300.00 to \$500.00 for a residential inspection. Like any business, a home inspection business incurs costs that include marketing, tools, books, travel, software, insurance, professional fees, continuing education, and so forth. There are no rich home inspectors. Many home inspectors are former contractors who are no longer to engage in such work due to health limitations. Home inspectors operate on a thin margin.

PROPOSED CHANGES AND ISSUES

Proposed Change to Rule 533.211

InterNACHI feels this proposed change is unnecessary because it is an attempt to fix something that is not broken. As stated above, 99% of all claims against home inspectors seek only a few hundred or a few thousand dollars. Given that TREC already requires \$100,000.00 in coverage, there is simply never going to be a case where insurance carrier's defense limits provision is going to impact that consumer's ability to recover on any valid claim.

InterNACHI sees no reason why home inspectors should be regulated more closely than builders, but in any event the current Recovery Fund has served its purpose and there is no evidence of any need for this proposed change.

Proposed Increase on Limits of Liability

Once again, InterNACHI feels this is an attempt to fix something that is not broken. There simply are no cases where an aggrieved consumer will be able to assert a valid claim against an inspector for damages in excess of \$100,000.00. In fact, I am unaware of any case in any jurisdiction where a consumer has recovered a judgment against an inspector in excess of that amount. Moreover, given the fact that most claim against inspectors are so small, InterNACHI fears that requiring \$300,000.00 in coverage will simply put a bright red target on the backs of home inspectors and encourage frivolous litigation.

Proposal to Prohibit Contractual Clauses that Limit Liability

This is unnecessary. Texas law already allows courts to nullify contractual provisions that are unconscionable. *In Re Olshan Foundation Repair Co., LLC.*, 328 S.W.3d 883 (Tex. 2010). Further, in Texas a liquidated damages clause is enforceable only if (1) that the harm caused by the breach is incapable or difficult of estimation, and (2) that the amount of liquidated damages

called for is a reasonable forecast of just compensation. *Phillips v. Phillips*, 820 S.W.2d 785, (Tex. 1991). InterNACHI feels Texas courts are in the best position to decide these issues on a case by case basis, and that TREC should refrain from promulgating a “one size fits all” rule on the issue.

CONCLUSION

InterNACHI shares the concerns TPREIA has expressed. The proposed changes are unnecessary. Moreover, they are likely to drive up the costs of home inspections, thereby deterring consumers from engaging a home inspector prior to making a purchase. We hope you find this information helpful.

Sincerely,



MARK COHEN
General Counsel and Vice President
For Legal Affairs

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