

# *Texas Contractor Issues During Disasters: An Illustrative Guide*

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# Introduction

Unscrupulous consumer practices usually arise following natural disasters. Consumer information is essential to help prevent consumers from being defrauded. This manual is intended to assist pro bono attorneys and volunteers in providing legal assistance to disaster victims with consumer issues that could arise after a natural disaster.

## Major Consumer Issues after a Disaster

### Price Gouging

#### Illustration

**Facts:** Merchants often charge high prices for certain necessary goods in order to make a profit off of individuals affected by a disaster. Some businesses raise their prices excessively on essential goods and services like drinking water, ice, groceries, fuel, towing, and car and home repairs.

**Potential Legal Solution(s):** Charging excessive prices for necessities during an officially recognized disaster can constitute price gouging. Price gouging is illegal and the Office of the Attorney General has the authority to prosecute any business that engages in price gouging after a disaster has been declared by the governor.<sup>1</sup> Anyone who feels he or she was a victim of price gouging following a natural disaster should report the incident to the Consumer Hotline at the Office of the Attorney General.

### Home Repair Contract Problems

#### Contractors' Breach of Contract

#### Illustration

**Facts:** The client hires a contractor for a job. The client pays the contractor the full cost of the job upfront. The contractor does an incomplete or poor job, considering the cost of the job and comparable jobs.

#### Fact Pattern Variant(s):

1. If there is an explicit contract
2. If there is an express warranty
  - a. Warranties are made, but not put in writing
3. If there is no express warranty or contract
4. Homeowner pays multiple installments before the work is completed.

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<sup>1</sup>Reference: <https://www.texasattorneygeneral.gov/cpd/price-gouging>

5. Contractor forces the homeowner to sign completion papers/make a final payment.  
Contractor leaves before work is completed.

**Potential Legal Solution(s):**

- To avoid being taken advantage of by contractors requiring a significant payment up front, homeowners SHOULD pay as little up front as possible. Due to a sudden demand, they may be forced to pay more up front, but it is advised that they negotiate and pay as little upfront as possible. Approximately 10-25% is the most they should pay upfront. It is against the law for contractors in disaster areas to take any money up front unless they have had a local office in your county or a neighboring county for at least one year.
- For an incomplete or poor job, a consumer/homeowner could bring a breach of contract claim and/or breach of the “implied warranty of good and workmanlike manner” against the contractor.
- When an express warranty is made by the contractor and not fulfilled, the consumer/homeowner could bring a claim against the contractor, under the DTPA, for breach of an express warranty or misrepresentation. Generally, these cases are brought as a breach of contract case only.<sup>2</sup>
- Don’t sign completion papers before the work’s done to the homeowner’s or building inspector’s satisfaction.

**Electronic Contracts**

**Illustration:**

- The client electronically signs a contract on an iPad/electronic device and he is not given a copy.

**Home Solicitation Contracts**

**Illustration:**

A "home solicitation transaction" takes place whenever a consumer purchases goods or services for more than \$25 payable in cash or installments at a place other than the seller's place of business.

Products frequently sold "from door to door" include home improvements, such as siding and storm windows, funeral service contracts, living trusts, books, and magazines. Door-to-door sales are especially common in areas that have been hard hit by storms, where nearly every house needs some kind of clean-up or repair.

**Potential Legal Solution(s):**

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<sup>2</sup> Reference: TX. Bus. & Comm. Code § 17.46 <http://www.statutes.legis.state.tx.us/Docs/BC/htm/BC.17.htm>

Under Texas law, the door-to-door seller must advise the homeowner orally and in writing of the right to cancel the sale within three days. He or she must also give a contract or receipt stating the date of the sale, the name and address of the merchant, and a statement of the right to cancel the contract which includes the address where to send the cancellation notice. The contract or receipt and the notice of the right to cancel must be in the same language as that principally used in the sales presentation.<sup>3</sup>

Consumers have a 3-day right to cancel sales made at any facility other than the seller's permanent place of business. Such locations may be the consumer's residence or places rented on a temporary or short-term basis, such as hotel rooms or convention centers.<sup>4</sup>

### **Door-to-Door Repair**

If you are insured, call your insurance adjuster and have them make an estimate of the damage and probable repair cost. This will give you a benchmark estimate, prepared by a professional, when you negotiate with contractors.

Be especially suspicious of door-to-door salespeople who make "low-ball" estimates, refuse to leave a contract overnight so you have time to review it, or try to sell their services to you by playing on your emotions.<sup>5</sup>

### **Cancelling a Sale**

If the salesperson provided you with the right forms, to cancel the sale you may simply sign the one titled "notice of cancellation," date it, and mail it back to the seller. To obtain a full refund, you must do this before midnight of the third business day after the sale. Keep a copy of the form.

If the salesperson did not provide a cancellation form, you may still cancel your contract. You must cancel in writing. Be sure to keep a copy of the contract and your letter notifying the seller of the cancellation.

After you cancel, the seller has ten business days to refund your money, return any note you may have signed concerning the sale, and return any trade-in items. The seller must restore your property to its original condition if any "improvements" were made to it and you want it restored.<sup>6</sup>

### **Contractor Insurance/FEMA Proceeds Contingency Agreements**

**Facts:** Contractors show up to replace roofs after a disaster. Client signs a contract giving all the insurance or FEMA proceeds to the contractor. Contractor takes a long time to complete job.

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<sup>3</sup>Reference: <https://www.texasattorneygeneral.gov/cpd/door-to-door-sales>

<sup>4</sup>Reference: <https://www.texasattorneygeneral.gov/cpd/the-3-day-right-to-cancel-a-purchase>

<sup>5</sup>Reference: <https://www.texasattorneygeneral.gov/cpd/disaster-scams>

<sup>6</sup>Reference: <https://www.texasattorneygeneral.gov/cpd/the-3-day-right-to-cancel-a-purchase>

### **Fact Pattern Variants:**

1. Client tries to cancel the contract soon after signing it but there is a clause in the contract giving nearly half of the insurance check as a cancellation fee.
2. Signs over FEMA proceeds
3. Signs over insurance proceeds
  - a. Insurance does not pay for all the contractor repairs.

### **Potential Legal Solution(s):**

- Homeowner and the contractor should agree on the timeframe for completion of the work. The homeowner should ensure the contract includes a clause that allows for cancellation of the contract if the work is not completed within the timeframe specified.
- Homeowner should negotiate and pay as little of the total cost upfront as possible.
- Contractor must inform the homeowner of the 3-day right to cancel the contract. This applies only if it was a door-to-door contractor.<sup>7</sup>

## **Contractor Fraud**

Contractor fraud is “an illegal act committed by a contractor involving the misrepresentation to a customer of services to be performed and/or project remuneration. [It] occurs in the form of underperformance, use of poor quality or recycled materials, inflating costs, or abandonment.”<sup>8</sup>

### **Fraudulent Contractor’s Common Practices**<sup>9</sup>

Fraudulent contractors show up frequently after natural disasters, and prey on survivors at their most desperate moments. Fraudulent contractors often use threats and intimidation and go after vulnerable individuals, such as the elderly. Indications of contractor fraud include:

- Contractors offering discounts for referring other customers;
- Contractors requiring an immediate decision;
- Contractors requiring significant payment up front, only accepts cash, or suggests that the customer borrow from a lender the contractor knows;
- Contractors providing written contracts that do not include verbal agreements;
- Contractors asking the customer to get the right permit(s);
- Contractor offers “lifetime warranty/guaranty”
- Contractor tells the homeowner that their home will be used as a demonstration at a “greatly reduced rate.”
- Contractor does not have a listed business number in the local telephone directory;

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<sup>7</sup> Tex. Bus. & Com. Code § 601.051 (LexisNexis, Lexis Advance through the 2017 Regular Session and 1st C.S., 85th Legislature)

<sup>8</sup> [www.businessdictionary.com/...ontractor-fraud.html](http://www.businessdictionary.com/...ontractor-fraud.html)

<sup>9</sup> See generally <https://www.consumer.ftc.gov/articles/0242-hiring-contractor>

- Contractors reveal unforeseen problems that need extra work and cost; and
- Contractors buying extra materials to sell you for a cheap price.

### **Steps to Avoid Home Repair Contract Scams**

Homeowners can take steps to protect themselves from being taken advantage of by unscrupulous contractors.<sup>10</sup>

- To avoid being taken advantage of by contractors requiring a significant payment up front, homeowners should negotiate and pay as little of the total cost upfront as possible. Preferably no more than 10-25% of the total price. It is against the law for contractors in disaster areas to take any money up front unless they have had a local office in your county or a neighboring county for at least one year.<sup>11</sup>
- Before signing a final contract, homeowners should make sure everything they want, and agree to, is included in the contract. Further, homeowners should also ensure that the contractor is bonded and insured.
- Homeowners should request that the contractor get a builder's permit because this will protect them from unlicensed contractors. Unlicensed contractors may cut corners in their workmanship. If a building permit is obtained, a building inspector will conduct inspections of the work that is done, preventing the cutting of corners in performing the work.
  - A building permit will be needed for any new construction or demolition, as well as for any structural alterations to an existing structure in Texas. This includes building small structures like decks and pools, and alterations like interior and exterior remodeling, electrical, plumbing, and mechanical work. Typically, contractors are required to obtain the necessary permits. However, it is ultimately the responsibilities of homeowners to know what permits are needed and whether they have been "pulled." The local Building Department can tell homeowners what permits will be needed for their projects.<sup>12</sup>
  - If a contractor refuses to obtain the necessary building permits, it may be a red flag indicating he/she is unlicensed. The State of Texas DOES NOT require that all contractors be licensed.<sup>13</sup> After the dissolution of the Texas Residential Construction Commission on September 1, 2009, Texas no longer requires that contractors register their businesses with the state. Whether a contractor is licensed can be determined on the Texas Department of Licensing and Regulations,<sup>14</sup>however not all contractors need a license.

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<sup>10</sup>Reference: <https://www.texasattorneygeneral.gov/files/cpd/disaster.pdf>

<sup>11</sup> Tex. Bus. & Com. Code § 58.002 (LexisNexis, Lexis Advance through the 2017 Regular Session and 1st C.S., 85th Legislature)

<sup>12</sup>Reference: <https://www.houstonpermittingcenter.org/http://www.eng.hctx.net/permits/>

<sup>13</sup>Reference: [Office of the District Attorney, Harris County, Home Construction, Remodeling, and Repair](#)

<sup>14</sup>Website at: <http://www.tdlr.texas.gov/verify.htm>.



- To prevent a contractor from doing work that the homeowner has not agreed to, the homeowner should make sure the contract requires that the homeowner and the contractor both sign before anything is charged or worked on.
- Homeowners should not buy services or materials on the spot or on an impulse. They should always do their research and make sure the contractor has a good reputation. They should find out whether the contractor has a report with the Better Business Bureau (BBB) (the numbers and types of complaints, and the reports of government actions).

### **Illustration**

#### **Facts:**

- The client signs a contract with the contractor for repairs and pays all of the money upfront. The contractor never shows up to complete the contract.

#### **Fact Pattern Variants:**

- Bait and Switch
- A roofing contractor went from neighborhood to neighborhood offering to do free roof inspections. The contractor made claims to the homeowners that their original contractors used inadequate roofing materials. He offers to inspect the homeowners' homes at no cost, and if damage is found, he can offer significant discounts on the repair costs because his crew is already in the neighborhood repairing other homes. He also offered reduced costs on the materials claiming he could buy in larger quantities for multiple homes in the neighborhood.

An elderly woman agreed to the free inspection of her roof. The contractor claimed to have found shingles that were weak and poorly attached. He claimed if there was "a good wind and rainstorm and there would most certainly be major damage." The elderly woman paid the contractor \$7,500 to repair her roof, which he claimed was a 20% discount for signing up right then and ordering the same shingles as three other families.

In reality, the woman's roof was never faulty, and the \$7,500 price was twice what the work should have cost. Furthermore, since there was no grade of shingles specified in the contract, the roofer was free to use the cheapest grade he could find. In the end, the woman ended up with a worse roof than what she started with.

#### **Protections:**

A home solicitation (door-to-door) transaction occurs when a consumer purchases goods or services at a place other than the seller's place of business (see door-to-door sales above). In order for the contract to be valid

A door-to-door salesman must give written notice of the 3-day right to cancel the contract.<sup>15</sup>

- The contract must be in the same language as principally used during the oral transaction, state the date of the sale, state the name and address of the merchant, include a cancellation form, and state the address where you would send your cancellation notice.
- If this information is not included, the contract is not valid.

## Refinancing Schemes

### Illustration:

### Facts:

- A home improvement company offers financing. Contractor has homeowner sign a credit contract to pay a certain price for the work plus a finance charge, then immediately sells the right to collect on the contract for 20-50% less than the contract price.
  - That usually means you could have gotten the work done for 20-50% less by paying cash or arranging financing yourself.

### **Potential Legal Solution(s):**

- Homeowners should get at least two contractor estimates before hiring a contractor to perform the repairs.
- The Truth In Lending Act requires a three day delay for the sale of commercial paper because client has a three day right to cancel the contract.<sup>16</sup>

## Mechanic's Lien

A mechanic's lien (also referred to as a materialman's lien or construction lien) is defined as a charge or encumbrance against the title to real property (land or improvements) created by law to secure persons who have either labored, or who have provided labor, materials, machinery, fixtures, or tools to erect or repair (or remodel) improvements to land.

In Texas, mechanic's liens are created both by statute (The Property Code) and by the Texas Constitution. A statutory mechanic's lien secures the payment for (a.) the labor done or material furnished for the construction or repair of improvements, (b.) any material specially fabricated for the project, even if that material was never delivered or incorporated into the construction project, less the fair salvage value of the material; and (c.) the preparation of plans or a plat by an architect, engineer, or surveyor, provided such was done under a written contract with the owner. (Texas Property Code §53.021 and §53.023). Under the Constitution, a person who is entitled to

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<sup>15</sup> Tex. Bus. & Com. Code § 601.051 (LexisNexis, Lexis Advance through the 2017 Regular Session and 1st C.S., 85th Legislature)

<sup>16</sup> 12 C.F.R. § 226.23

a lien is granted one in an amount equal to the value of the labor done and/or the value of the material furnished. (Tex. Const. Art. XVI, § 37 and 50).

## Insurance Problems

### Facts:

- Contractor does not have disability insurance covering his workers. One of contractor's workers gets injured while remodeling property. Worker may have legal remedies against homeowner.

### Protections:

- Check your homeowner's insurance policy to see if it includes coverage for workers.
- Purchase a supplemental policy or rider that covers workers performing repairs and remodeling.

## Identity Theft

Disaster victims may need to provide their personal information to get relief benefits from government agencies or other organizations, or to get replacement identification documents. Identity thieves may pose as government officials or representatives of government agencies.

As you work with contractors and others to repair your home, you may be asked for information so a credit check can be performed. Be certain the business is legitimate before you give out your Social Security number and other personal information. If in doubt, do not give your information.

You should examine your bank statements, credit card statements, and other statements closely for unauthorized purchases or withdrawals. About 60 days after the disaster, you should request copies of your credit report from all three major credit bureaus-Experian, Trans Union and Equifax. All three credit bureaus will provide hurricane victims with a free copy of their credit report.

If you believe that someone is committing identity theft against you or may commit identity theft against you in the future, you may want to add an Initial Security Alert to your personal credit report. This alert will remain on your report for 90 days and will notify anyone who reviews your report to take extra steps to verify your identity before granting credit. You need to request the security alert with only one credit bureau. It will automatically notify the other two to place an alert on your file. Be aware that adding an alert to your credit report may prevent you from

opening an account unless the creditor is able to get in touch with you and positively confirm your identity and that you are applying for credit.

## Creditor Issues

### Facts:

- Homeowner gets behind on mortgage payments and receives insurance proceeds for damaged home. Mortgager takes proceeds to pay for delinquent mortgage payments. No money remains for repairs.
- The contractor performs work and the homeowner cannot pay the contractor's bill immediately. Contractor executes a lien against the homestead.

### Protections:

- Apply for an SBA loan within 60 days of the disaster. This money can be used for repairs.
- Homeowners can file for bankruptcy or use homestead protection to obtain more time to pay.
- Homeowners can request written notice of bank's policy regarding insurance proceeds. Once that is obtained, the homeowner must try to negotiate and get money for all repairs.<sup>17</sup>

## Home Inspection Issues

### Facts:

- Contractor does not bother to get proper permits. City cites homeowner. Burden is on homeowner to get the permit.

### Protections:

- Review your contract to make sure the contractor was required to pay for required permits.
- File against the contractor in JP Court.
- JP court can make the contractor pay for permits and fines, and even redo work done without the necessary permits.

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<sup>17</sup> Tex. Ins. Code §§ 557.002 and 557.003.

# REMEDIES UNDER TEXAS LAW

This section breaks down the relevant Texas substantive law available to attorneys in litigating contractor disputes that may arise after a natural disaster. Homeowners who have been victims of contractor fraud may seek relief under the Deceptive Trade Practices Act (“DTPA”), and under contract and tort law.

## Texas Business & Commerce Code Remedies

### Price Gouging

The term ‘false, misleading, or deceptive acts or practices’ includes, but is not limited to:

- Taking advantage of a disaster declared by the governor under 418, Government Code, by:
  - Selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or
  - Demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.”

### Disaster Remediation Contracts: TX. Bus. & Comm.Code § 58.001.

#### Applicability of Chapter.

1. Except as provided by Subsection b, this chapter applies to a contract between a person and a disaster remediation contractor for the performance of disaster remediation services on property owned or leased by the person.
2. This chapter does not apply to a contract between a person and a disaster remediation contractor for the performance of disaster remediation services on property owned or leased by the person, if the contractor maintains, for at least one year preceding the date of the contract, a physical business address in:
  - a. The county in which the property is located; or
  - b. A county adjacent to the county in which the property is located.

#### Disaster Remediation Contract Requirements: Conduct Prohibited.

1. A contract subject to this chapter must be in writing.
2. A disaster remediation contractor:
  - a. May not require a person to make a full or partial payment under a contract before the contractor begins work;
  - b. May not require that the amount of any partial payment under the contract exceed an amount reasonably proportionate to the work performed, including any materials delivered; and

- c. Shall include in any contract for disaster remediation services the following statement in conspicuous, boldfaced type of at least 10 points in size: "This contract is subject to Chapter 58, Business & Commerce Code. A contractor may not require a full or partial payment before the contractor begins work and may not require partial payments in an amount that exceeds an amount reasonably proportionate to the work performed, including any materials delivered."

#### Waiver Of Chapter Prohibited.

A person may not waive this chapter by contract or other means. A purported waiver of this chapter is void.

#### **Voidable Contracts**

##### TX. Bus. & Comm.Code § 272.001.Voidable Contract Provision.<sup>18</sup>

- This section applies only to a construction contract concerning real property located in this state.
- If a construction contract or an agreement collateral to or affecting the construction contract contains a provision making the contract or agreement or any conflict arising under the contract or agreement subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by a party obligated by the contract or agreement to perform the work that is the subject of the construction contract.<sup>19</sup>

#### **Breach of Warranty**

##### *Express Warranty*

##### TX. Bus. & Comm. Code § 2.313.EXPRESS WARRANTIES BY AFFIRMATION, PROMISE, DESCRIPTION, SAMPLE.<sup>20</sup>

1. Express warranties by the seller are created as follows:
  - a. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - b. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
  - c. Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

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<sup>18</sup>Source: <http://www.statutes.legis.state.tx.us/Docs/BC/htm/BC.272.htm>

<sup>19</sup>SB 807, Effective 09/01/17

<sup>20</sup>Source: <http://www.statutes.legis.state.tx.us/SOTWDocs/BC/htm/BC.2.htm#2.313>)

2. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

### ***Implied Warranty of Merchantability***

#### **TX. Bus. & Comm. Code §2.314.IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE.**

1. Unless excluded or modified (Section 2.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
2. Goods to be merchantable must be at least such as
  - a. Pass without objection in the trade under the contract description; and
  - b. In the case of fungible goods, are of fair average quality within the description; and
  - c. Are fit for the ordinary purposes for which such goods are used; and
  - d. Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - e. Are adequately contained, packaged, and labeled as the agreement may require; and
  - f. Conform to the promises or affirmations of fact made on the container or label if any.
3. Unless excluded or modified (Section 2.316) other implied warranties may arise from course of dealing or usage of trade.

### ***Implied Warranty for a Particular Purpose***

**TX. Bus. & Comm. Code §2.315.IMPLIED WARRANTY:FITNESS FOR PARTICULAR PURPOSE.** Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

### ***Exclusion or Modification of Warranties***

#### **TX. Bus. & Comm. Code § 2.316.EXCLUSION OR MODIFICATION OF WARRANTIES.**

Subject to Subsection c, to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous,

and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." Notwithstanding Subsection b:

- Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
- An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

## Common Law Remedies

### Tort Law

#### **Fraud**

The elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

#### **Negligence**

The Restatement (Second) of Torts defines negligence as "conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. "The Wex Legal Dictionary further explains negligence as "a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of actions, but can also consist of omissions (a failure to act) when there is some duty to act (e.g., a duty to help victims of one's previous conduct).

In a successful negligence suit, the plaintiff must prove each of the following elements:

1. a duty of care owed by the defendant to the plaintiff;
2. a breach of that duty;



3. cause –
  - a. an actual causal (cause-in-fact) connection between the defendant’s conduct and the resulting harm;
  - b. proximate cause, which relates to whether the harm was foreseeable; and damages resulted from the defendant’s conduct.

In a suit for negligence, the plaintiff’s damages recovery can be reduced, according to the percentage of the plaintiff’s responsibility, if the plaintiff contributed to the harm suffered. The plaintiff’s recovery will be barred if the plaintiff was 50% or more responsible for the harm suffered.

## **Contract Law**

### **Breach of Contract**

The essential elements in a suit for breach of contract are: a) the existence of a valid contract; b) the plaintiff performed or tendered performance; c) the defendant breached the contract; and d) the plaintiff was damaged as a result of the breach<sup>21</sup>

1. A valid contract would exist if: a) it states the work to be performed by the contractor; b) the cost of the work; c) the timeframe/date for completion of the work; and d) it is signed by the homeowner and the contractor.
2. The contract should include all verbal agreements between the homeowner and the contractor.

*CASE SCENARIO 1: A homeowner entered into a contract with a contractor for remediation of water damage to the home. The contract stated that the contractor would perform remediation and contents manipulation. It also stated that insurance proceeds would be payable to the contractor as they were received, unless full payment had been made by the homeowner prior to the work being started. The contract was signed at the homeowner’s residence, but it did not contain a cancellation clause or cancellation form, nor did it state that a lien could be placed on the home for an unpaid debt.*

*The contractor only performed part of the work stated in the contract. However, the contractor filed an affidavit claiming a mechanic’s/materialman’s lien on the property for \$73,485. The contractor met with the homeowner concerning the project in May 2004, but did not file the lien until December 2004.*

The homeowner filed a motion for declaratory judgment to declare the contractor’s lien invalid, because the contractor breached the contract. The contract was breached by the contractor because all of the work contracted for was not performed. The contractor’s lien was invalid for a number of reasons.

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<sup>21</sup> *Mensa-Wilmot v. Smith Int’l, Inc.*, 312 S.W.3d 771, 781 (Tex. App. 2009), quoting, *Bank of Tex. v. VR Elec., Inc.*, 276 S.W.3d 671, 677 (Tex. App.--Houston [1st Dist.] 2008, pet. denied)

- First, because the contract did not state that a lien could be placed on the property for an unpaid debt, as is required by the Texas Property Code.
- Second, the contract did not give the homeowner notice of the 3-day right to cancel the contract (see Sec. 2.3), and the contract was not executed at a third-party lender's office, an attorney's office, or a title company, as required by Art. 16 § 50(a)(5)(C) and (D) of the Texas Constitution.
- Third, the lien was not filed by the contractor timely, which means no later than the 15<sup>th</sup> day of the third calendar month after the day on which the indebtedness accrued. The lien was filed seven months after the last meeting with the homeowner.
- Finally, the homeowner did not breach the contract by not paying insurance proceeds to the contractor before the lien was filed. As of the filing of the lien, the homeowner had not received any insurance proceeds. Furthermore, the contractor failed to substantially perform, according to the contract.

### **Defenses to a Contract**

Once it is determined that the basic elements of a contract exist, it must be determined whether there are any defenses that call into question the validity of the contract. There are some defenses that make the contract automatically unenforceable (void) and other defenses that give the parties the option not to enforce the contract (voidable). The following list is not an exhaustive list of contract defenses.

1. Legality of the contract – If the subject matter of the contract is illegal, a valid, enforceable contract does not exist.
2. Capacity of the parties – In order to be bound a contract, the parties must be competent to enter into the legal arrangement. Under age persons, persons who are mentally ill, and intoxicated persons are usually not bound by the contracts they enter. However, a minor may have the option of enforcing a contract under some circumstances.
3. Mistake, Duress, and Fraud – (a) A mistake can be a mutual mistake or a unilateral mistake. A mutual mistake is a mistake by both parties to a contract on an important issue, which makes the contract unenforceable. However, a unilateral mistake is by only one party, and does not necessarily make the contract void.
  - a. Duress is the use of force or pressure by one party to make the other party agree to the contract. The force does not have to be physical – it may be mental pressure. The use of duress makes the contract voidable by the party under duress.
  - b. Fraud is the intentional misrepresentation of an important issue of the contract. The presence of fraud in contractual proceedings makes the contract voidable by the party upon whom the fraud was perpetrated.

### **Damages/Remedies**

1. In a breach of contract case, the damages that the non-breaching party may be entitled to may depend on the terms of the contract, the subject matter of the contract, and the

damages incurred as a result of the breach of the contract. Available damages may include, but are not limited to: Liquidated Damages - money payable to the injured party, determined either by a contract stipulation regarding a possible breach, or by a court judgment.

2. Specific Performance - when a court orders a performance to be executed as stated in the contract. This usually occurs in real estate transactions.
3. Consequential and Incidental Damages - money to compensate foreseeable losses caused by the breach.
4. Compensatory Damages – money to compensate for the monetary loss.
5. Loss of Use – money to compensate for the time it takes to repair the damages.
6. Rescission – when the contract is cancelled and the money that was paid is returned.
7. Restitution – is recovery based on the gain that was received by the party that breached the contract.
8. Temporary Restraining Order (TRO)

### **Mitigation of Damages**

Under the mitigation of damages doctrine, a person who has suffered an injury or loss should take reasonable action, where possible, to avoid additional injury or loss. The failure of a plaintiff to take protective steps after suffering an injury or loss can reduce the amount of the plaintiff's recovery.<sup>22</sup>

### **Breach of Implied Warranty of Good and Workmanlike Repair**

- Arises from Texas common law and generally applies to repairs and modifications to tangible goods or real property.<sup>23</sup>
  - “We recognized the existence of "an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner" in *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987). We defined good and workmanlike as "that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work." *Id.* at 354. We further held that the implied warranty "may not be waived or disclaimed." *Id.* at 355.”<sup>24</sup>

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<sup>22</sup>Reference: <http://legaldictionary.thefreedictionary.com/Mitigation+of+Damages>

<sup>23</sup>See *Melody Home Mfg. v. Barnes*, 741 SW 2d 349, 354 (Tex. 1987) (“We hold that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA.”)

<sup>24</sup> *Gonzales v. Sw. Olshan Found. Repair Co., LLC*, 400 S.W.3d 52, 56 (Tex. 2013)

- “We do not require repairmen to guarantee the results of their work; we only require those who repair or modify existing tangible goods or property to perform those services in a good and workmanlike manner.”<sup>25</sup>
- “‘Repair’ is the restoration of damaged, broken, or failed device to return it to its original intent. A ‘modification’ includes any change or alteration that introduces new elements into the details of the subject matter or cancels some of them, but leaves the general purpose and effect of the subject matter intact.”<sup>26</sup>
- Express warranties can supersede the Implied Warranty of Good and Workmanlike Manner if the express warranty explicitly describes the manner, performance or quality of the services to be provided.<sup>27</sup>
- The plaintiff must establish that the defendant sold repair or modification services to the plaintiff.

## Texas Property Code Remedies

### Mechanic’s Lien

#### TX. Prop. Code §53.021.PERSONS ENTITLED TO LIEN.

1. A person has a lien if:
  - a. The person labors, specially fabricates material, or furnishes labor or materials for construction or repair in this state of:
    - i. A house, building, or improvement;
    - ii. A levee or embankment to be erected for the reclamation of overflow land along a river or creek; or
    - iii. A railroad; and
  - b. The person labors, specially fabricates the material, or furnishes the labor or materials under or by virtue of a contract with the owner or the owner's agent, trustee, receiver, contractor, or subcontractor.<sup>28</sup>

#### TX. Prop. Code § Sec. 53.254.HOMESTEAD.

To fix a lien on a homestead, the person who is to furnish material or perform labor and the owner must execute a written contract setting forth the terms of the agreement.

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<sup>25</sup> *Melody Home Mfg. v. Barnes*, 741 SW 2d 349, 355

<sup>26</sup><http://thelawdictionary.org/repair/>  
<http://legal-dictionary.thefreedictionary.com/Modification>

<sup>27</sup>See *Gonzales v. Sw. Olshan Found. Repair Co., LLC*, 400 S.W.3d 52, 53 (Tex. 2013)(“[W]e hold that parties cannot disclaim but can supersede the implied warranty for good and workmanlike repair of tangible goods or property if the parties' agreement specifically describes the manner, performance, or quality of the services.”)

<sup>28</sup>Reference:<http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.53.htm>

- The contract must be executed before the material is furnished or the labor is performed.
- If the owner is married, the contract must be signed by both spouses.
- If the contract is made by an original contractor, the contract inures to the benefit of all persons who labor or furnish material for the original contractor.
- The contract must be filed with the county clerk of the county in which the homestead is located. The county clerk shall record the contract in records kept for that purpose.
- An affidavit for lien filed under this subchapter that relates to a homestead must contain the following notice conspicuously printed, stamped, or typed in a size equal to at least 10-point boldface or the computer equivalent, at the top of the page:

"NOTICE: THIS IS NOT A LIEN. THIS IS ONLY AN AFFIDAVIT CLAIMING A LIEN."

- For the lien on a homestead to be valid, the notice required to be given to the owner under Section 53.252 must include or have attached the following statement:

"If a subcontractor or supplier who furnishes materials or performs labor for construction of improvements on your property is not paid, your property may be subject to a lien for the unpaid amount if:

- After receiving notice of the unpaid claim from the claimant, you fail to withhold payment to your contractor that is sufficient to cover the unpaid claim until the dispute is resolved; or
- During construction and for 30 days after completion of construction, you fail to retain 10 percent of the contract price or 10 percent of the value of the work performed by your contractor.

"If you have complied with the law regarding the 10 percent retainage and you have withheld payment to the contractor sufficient to cover any written notice of claim and have paid that amount, if any, to the claimant, any lien claim filed on your property by a subcontractor or supplier, other than a person who contracted directly with you, will not be a valid lien on your property. In addition, except for the required 10 percent retainage, you are not liable to a subcontractor or supplier for any amount paid to your contractor before you received written notice of the claim."<sup>29</sup>

### **Property Subject to Lien**

#### **TX. Prop. Code §53.022.PROPERTY TO WHICH LIEN EXTENDS.**

1. The lien extends to the house, building, fixtures, or improvements, the land reclaimed from overflow, or the railroad and all of its properties, and to each lot of land necessarily connected or reclaimed.

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<sup>29</sup>Reference: <http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.53.htm>

- a. The lien does not extend to abutting sidewalks, streets, and utilities that are public property.
- b. A lien against land in a city, town, or village extends to each lot on which the house, building, or improvement is situated or on which the labor was performed.
- c. A lien against land not in a city, town, or village extends to not more than 50 acres on which the house, building, or improvement is situated or on which the labor was performed.<sup>30</sup>

### **Payment Secured by Lien**

#### **TX. Prop. Code §53.023.PAYMENT SECURED BY LIEN.**

The lien secures payment for:

- The labor done or material furnished for the construction or repair;
- The specially fabricated material, even if the material has not been delivered or incorporated into the construction or repair, less its fair salvage value; or
- The preparation of a plan or plat by an architect, engineer, or surveyor in accordance with Section 53.021(c).

### **Limitations of the Mechanic's Lien**

#### **TX. Prop. Code §53.024.LIMITATION ON SUBCONTRACTOR'S LIEN.**

The amount of a lien claimed by a subcontractor may not exceed:

- An amount equal to the proportion of the total subcontract price that the sum of the labor performed, materials furnished, materials specially fabricated, reasonable overhead costs incurred, and proportionate profit margin bears to the total subcontract price; minus
- The sum of previous payments received by the claimant on the subcontract.<sup>31</sup>

### **Required Notices**

#### **TX. Prop. Code § 53.055.NOTICE OF FILED AFFIDAVIT.**

1. A person who files an affidavit must send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later than the fifth day after the date the affidavit is filed with the county clerk.
  - a. If the person is not an original contractor, the person must also send a copy of the affidavit to the original contractor at the original contractor's last known business or residence address within the same period.

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<sup>30</sup>Reference:<http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.53.htm>

<sup>31</sup>Reference:<http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.53.htm>

TX. Prop. Code § 53.056.DERIVATIVE CLAIMANT:NOTICE TO OWNER OR ORIGINAL CONTRACTOR.

1. Except as provided by Subchapter K, a claimant other than an original contractor must give the notice prescribed by this section for the lien to be valid.
  - a. If the lien claim arises from a debt incurred by a subcontractor, the claimant must give to the original contractor written notice of the unpaid balance. The claimant must give the notice not later than the 15th day of the second month following each month in which all or part of the claimant's labor was performed or material delivered. The claimant must give the same notice to the owner or reputed owner and the original contractor not later than the 15th day of the third month following each month in which all or part of the claimant's labor was performed or material or specially fabricated material was delivered.
  - b. If the lien claim arises from a debt incurred by the original contractor, the claimant must give notice to the owner or reputed owner, with a copy to the original contractor, in accordance with Subsection b.
  - c. To authorize the owner to withhold funds under Subchapter D, the notice to the owner must state that if the claim remains unpaid, the owner may be personally liable and the owner's property may be subjected to a lien unless:
    - i. The owner withholds payments from the contractor for payment of the claim; or
    - ii. The claim is otherwise paid or settled.
  - d. The notice must be sent by registered or certified mail and must be addressed to the owner or reputed owner or the original contractor, as applicable, at his last known business or residence address.
  - e. A copy of the statement or billing in the usual and customary form is sufficient as notice under this section.<sup>32</sup>

**Residential Lien Notice (Notice to Trap Funds)**

TX. Prop. Code § 53.081.AUTHORITY TO WITHHOLD FUNDS FOR BENEFIT OF CLAIMANTS.

1. If an owner receives notice under Section 53.056, 53.057, 53.058, 53.252, or 53.253, the owner may withhold from payments to the original contractor an amount necessary to pay the claim for which he receives notice.

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<sup>32</sup>Reference: <http://www.statutes.legis.state.tx.us/Docs/PR/htm/PR.53.htm>

- a. If notice is sent in a form that substantially complies with Section 53.056 or 53.252, the owner may withhold the funds immediately on receipt of the notice.
- b. If notice is sent under Section 53.057, the owner may withhold funds immediately on receipt of a copy of the claimant's affidavit prepared in accordance with Sections 53.052 through 53.055.
- c. If notice is sent under Section 53.058, the owner may withhold funds immediately on receipt of the notices sent under Subsection e of that section. If notice is sent as provided by Section 53.253 b, the owner may withhold funds immediately on receipt of the notice sent as required by Section 53.252.

## INITIAL CLIENT CONSULTATION

### **General Attorney Information**

There is some general information attorneys should gather from the clients they serve in disaster cases in order to assess the clients' cases. This information includes:

- Written agreement/contract with the initial contractor, including the contract price;
- Contractor's name and address;
- Contractor's business license number;
- Receipts/cancelled checks for monies paid;
- Receipts for materials purchased/expenses;
- Insurance information or FEMA assistance information;
- Pictures of damage before any repair and pictures of any repair work begun, finished, or improperly performed;
- Estimates from other contractors to correct improper work by the original contractor;
- All correspondence with the original contractor and other contractors
- Inspection reports; and
- Name and address of any other attorneys contacted or legal services sought.<sup>33</sup>

During the initial consultation with a client for a breach of a construction contract issue, there is certain documents and information that should be collected from the client.

### **Documents**

Some of the documents that should be collected are:

- Written estimate from the contractor, and any other written estimates obtained
- Contract or agreement with the contractor

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<sup>33</sup>Reference: [Contractor Disputes Handbook, The Pro Bono Project, New Orleans, LA.](#)



- Copy of the contractor's license
- All receipts from the contractor (for materials purchased or payments for work)
- Copies of cancelled checks to the contractor/subcontractors
- Communications with the contractor (letters, emails, notes, etc.,)
- Any pictures of the property (before & after the initial contractor's work, & after the second contractor's work)
- Second contractor's estimate
- Contract with the second contractor
- Insurance company information
- FEMA information

## Information

The following information and questions should be gathered and asked of the client about the contractor dispute issue. This information may or may not be an exhaustive list. The circumstances of each homeowner/contractor dispute may dictate the need for other information or questions.

The following questionnaire is intended only to serve as a guide to initiate the fact-finding process. However, the questionnaire may be downloaded and used as is, or copied and pasted into another document and adapted as may be necessary.

The questionnaire, along with the other information in this section, was adapted from the **Contractor Disputes Handbook** created by **The Pro Bono Project of New Orleans, Louisiana.**

# INITIAL CLIENT CONSULTATION

## Standard Forms

### HOMEOWNER/CONTRACTOR DISPUTE QUESTIONNAIRE

#### 1. HOMEOWNER INFORMATION

_____	_____	_____
FIRST NAME	MIDDLE NAME	LAST NAME
_____		_____
ADDRESS		CITY, STATE ZIP CODE
_____	_____	_____
PHONE	ALT. PHONE	EMAIL
_____		
ADDRESS OF THE PROPERTY SUBJECT TO THE DISPUTE		

#### 2. CONTRACTOR INFORMATION

_____	_____	_____
FIRST NAME	MIDDLE NAME	LAST NAME
_____		
BUSINESS NAME(if applicable)		
_____	_____	_____
ADDRESS	CITY, STATE ZIP CODE	PHONE
_____	_____	_____
CONTRACTOR'S LICENSE # / STATE	ORIGINAL CONTACT DATE	

3. Did you receive a written estimate from the contractor? Y / N
4. Do you have a written contract from the contractor? Y / N
5. Did you sign the contract? Y / N
6. Did the contractor sign the contract? Y / N  
(PROVIDE A COPY OF THE CONTRACT)

7. Was the contractor recommended to you? Y / N  
 If yes, list the name(s)/phone #'s of the person(s) who recommended the contractor.
1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
8. Do you have a copy of the contractor's license? Y / N  
 (IF YES, PROVIDE A COPY.)
9. What was your method of payment?  Cash  Check (#\_\_\_\_)  Money Order  
 Credit Card  Other \_\_\_\_\_
10. What is the total payment you have made to the contractor? \_\_\_\_\_
11. What was the date of the last payment to the contractor? \_\_\_\_\_
12. Do you have receipts for all payments paid to the contractor? Y / N  
 (IF YES, PROVIDE COPIES OF RECEIPTS.)
13. Do you have receipts for payments for materials/other expenses? Y / N  
 (IF YES, PROVIDE COPIES OF RECEIPTS.)
14. To what degree was the work performed by the contractor?  
 Completed (Date \_\_\_\_\_)  Partially Completed (Date \_\_\_\_\_)  
 No work performed at all
15. Was all worked performed agreed upon by you and the contractor? Y / N
16. Was any work performed that was not agreed upon? Y / N  
 (IF YES, LIST THE WORK AND DATES PERFORMED.)
1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_
5. \_\_\_\_\_

17. Did the contractor take money, then leave the job and not return? Y / N
18. What was the agreed upon completion date for the work? \_\_\_\_\_
19. Did you receive insurance proceeds to pay for the work? Y / N  
(IF YES, LIST INSURANCE AGENCY(IES) & PROVIDE COPIES OF POLICIES.)
1. \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
INSURANCE CO.NAME PH. # POLICY NO.
2. \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
INSURANCE CO.NAME PH. # POLICY NO.
20. Do you have a copy of the insurance adjuster's report(s)? Y / N  
(IF YES, PROVIDE A COPY(IES)).
21. Did you receive proceeds from an agency to pay for the work? Y / N  
(IF YES, LIST THE AGENCY(IES) & PROVIDE COPIES OF REPORTS.)
1. \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
AGENCY NAME PH. # REPORT/APP. NO.
2. \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
AGENCY NAME PH. # REPORT APP. NO.
22. Did you have to hire another contractor to finish or repair the work? Y / N  
(IF YES, COMPLETE THE INFORMATION BELOW.)

2<sup>ND</sup> CONTRACTOR INFORMATION

\_\_\_\_\_  
FIRST NAME MIDDLE NAME LAST NAME

\_\_\_\_\_  
BUSINESS NAME(if applicable)

\_\_\_\_\_  
ADDRESS CITY, STATE ZIP CODE PHONE

\_\_\_\_\_  
CONTRACTOR'S LICENSE # / STATE ORIGINAL CONTACT DATE

23. Do you have a copy of the second contractor's license? Y / N  
(IF YES, PROVIDE A COPY.)
24. Did you have a written estimate and contract with the second contractor? Y / N  
(IF YES, PROVIDE COPIES.)

25. Did the second contractor complete the work? Y / N
26. What date was the work completed? \_\_\_\_\_

## SAMPLE: NOTICE OF INTENTION TO FILE A MECHANIC'S LIEN

TO: (name of owner)  
(address)

Notice is hereby given that the undersigned, (name) intends to file a mechanic's lien for (amount) Dollars, on real property owned by you and commonly known as (street address) . The legal description for said property is as follows:

The filing of said lien, pursuant to (cite statute), is for the purpose of securing payment of amounts due for (services) performed by the undersigned within the last (number) days, in accordance with the (written or oral) agreement entered into on (date) between you and the undersigned.

Date \_\_\_\_\_

(Signature) \_\_\_\_\_

# IMPORTANT CONTRACTOR FRAUD WEBSITES

The following is a list of helpful websites that offer important information and/or assistance to help viewers/disaster survivors/attorneys avoid or address contractor fraud.

Contractor Fraud Alliance	<a href="http://www.contractorfraud.net/index.htm">http://www.contractorfraud.net/index.htm</a>
Federal Trade Commission	<a href="https://www.consumer.ftc.gov/articles/0242-hiring-contractor">https://www.consumer.ftc.gov/articles/0242-hiring-contractor</a>
Ft. Worth, TX. (Contractor Registration)	<a href="http://fortworthtexas.gov/planninganddevelopment/permits/contractor-registration/">http://fortworthtexas.gov/planninganddevelopment/permits/contractor-registration/</a>
Greater Houston Builders Association	<a href="http://www.ghba.org/">http://www.ghba.org/</a>
Home Advisor	<a href="http://www.homeadvisor.com/">http://www.homeadvisor.com/</a>
HomeOwners for Better Building	<a href="http://www.hobb.org/">http://www.hobb.org/</a>
Houston Permitting Center	<a href="http://www.houstonpermittingcenter.org/code-enforcement/permits-section.html">http://www.houstonpermittingcenter.org/code-enforcement/permits-section.html</a>
Hud.gov	<a href="http://portal.hud.gov/hudportal/HUD?src=/complaints/decpccontract">http://portal.hud.gov/hudportal/HUD?src=/complaints/decpccontract</a>
Identity Theft	<a href="https://identitytheft.gov/">https://identitytheft.gov/</a>
Lone Star Legal Aid	<a href="http://www.lonestarlegal.org/">http://www.lonestarlegal.org/</a>
National Association for the Remodeling Industry	<a href="http://www.nari.org/">http://www.nari.org/</a>
Office of the District Attorney, Houston, TX.	<a href="http://app.dao.hctx.net/FAQs/4/Other_Divisions/6/Consumer_Fraud.aspx">http://app.dao.hctx.net/FAQs/4/Other_Divisions/6/Consumer_Fraud.aspx</a>
Rebuilding Together Houston	<a href="http://rebuildinghouston.org/">http://rebuildinghouston.org/</a>

State Bar of Texas	<a href="https://www.texasbar.com/">https://www.texasbar.com/</a>
Texas Department of Insurance	<a href="http://www.tdi.texas.gov/index.html">http://www.tdi.texas.gov/index.html</a>
Texas Department of Licensing and Regulations	<a href="http://www.tdlr.texas.gov/index.htm">http://www.tdlr.texas.gov/index.htm</a>
Texas Law Help	<a href="http://texaslawhelp.org/">http://texaslawhelp.org/</a>
The Attorney General of Texas	<a href="https://texasattorneygeneral.gov">https://texasattorneygeneral.gov</a>
USA.gov	<a href="https://www.usa.gov/state-consumer">https://www.usa.gov/state-consumer</a>