

NARI OF CENTRAL OHIO

Presents

**Ohio Revised Code Chapter 4722
How to Comply with the New Home
Construction Law Act**

Speaker:

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Overview

- Review of Ohio Home Construction Service Law
 - Implementing legislation removed qualifying home construction contracts from Consumer Sales Practices Act
 - Contract requirements
 - Enforcement
- Review of Proposed Standard Building Contract

Home Construction Service Law

- Home construction service contracts are excluded from CSPA if:
 - The cost of the services is \$25,000 or greater; and
 - The supplier maintains general liability insurance of \$250,000 or more.
- The contract must be in writing and contain certain statutorily required provisions.
- Prohibitions on suppliers from engaging in specified activities.

Why do I care if the CSPA applies?

Consumer Sale Practices Act

- **History**

- Enacted in 1970's
- Originally legislative commentary suggested that real estate transactions are not covered
- Lands sales are excluded
- First applied to residential construction services in 1993

CSPA – Prohibitions

- Prohibits supplier from committing an unfair or deceptive act in a consumer transaction
- Prohibits unconscionable acts

Definitions:

- “Consumer transaction” means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things.
- Excludes transactions now covered by the Home Construction Service Law.
- “Supplier” means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions.

Deceptive Acts = representing any of the following:

- That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have.
- That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not.
- That the subject of a consumer transaction is new, or unused, if it is not.
- That the subject of a consumer transaction is available to the consumer for a reason that does not exist.

Deceptive Acts (cont'd)

- That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not.
- That replacement or repair is needed, if it is not.
- That a specific price advantage exists, if it does not.
- That the supplier has a sponsorship, approval, or affiliation that the supplier does not have.
- That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

“Shoddy” workmanship = Deceptive Acts

Ohio Courts have held that failure to perform construction services in a workmanlike manner (i.e., “shoddy” workmanship) is a deceptive act under the CSPA.

Unconscionable Acts – Consider:

- Status of the Consumer - physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement
- Excessive price – are similar services readily available at a much lower price?
- Are the services unnecessary to the consumer?
- Are the services too expensive for the consumer?
- One-sided boilerplate contract language
- Misleading statements
- Refusal to provide refund

Definition of Home Solicitation Sales

A sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business.

Home Solicitation Sales

- Buyer has 3 days to rescind a Home Solicitation Sales Contract
- Places obligations on seller with respect to Home Solicitation Sales Contract
- Failure to comply with statutory obligations is a “deceptive act” under CSPA

Seller's Obligations

- Written contract with name and address of seller, signed and dated by buyer
- Buyer must receive a copy of the contract
- Notice of Cancellation Form must be attached to the contract
- Contract may not include cognovits provisions or any waiver of buyer's rights

Seller's Obligations (cont'd)

Contract must contain the following notice (bold, 10-point font):

“You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation for an explanation of this right.”

CSPA Remedies

- Ohio Attorney General - authorized to investigate alleged deceptive practices
 - Injunctive relief
 - Civil penalties
- Private Cause of Action
 - Rescission (must occur within reasonable time period);
or
 - Recover actual economic damages (Treble Damages)
 - Up to \$5,000 non-economic damages
 - Injunctive Relief
 - Attorney's Fees

Supplier's Right to Cure

- Offer of Cure – Sent within 30 days of suit.
- Response – within 30 days of receipt
- If offer is rejected, and award at trial is not greater than offer, the consumer will not be entitled to treble damages or attorney's fees.

Illustration

- Builder installs drive-way that splays in one panel. Builder and owner dispute whether the entire drive-way needs replaced (or if the splayed panel even needs replaced).
 - Cost to Replace Drive-Way = \$10,000.00
 - Cost to Litigate to Conclusion < \$20,000.00
 - Exposure < \$50,000.00 (3Xs cost to replace drive-way, plus owner's legal fees)

Home Construction Service Contracts Do Not Fall Under CSPA

Definition of Home Construction Service

- Construction of a residential building
- Includes one-, two- or three- family dwellings and accessory construction
- Includes construction on common areas of condominiums.

Requirements of Contract:

- Parties' names, addresses, and telephone numbers
- Supplier's taxpayer identification number
- Address of the property where the home construction will occur
- Description of construction services
- Anticipated date of commencement and completion
- Estimated cost
- Identification of costs not included in estimate
- Copy of the supplier's certificate of insurance
- Dates signatures of parties

Supplier Prohibitions and Obligations:

- Must have proscribed contract
- Must provide notice of excess costs (unless it is a cost-plus contract)
- Must advise owner if work cannot be completed without incurring excess costs
- Must not charge for excess work not approved by owner
- Must not make false representations
- Must perform home construction service in *workmanlike manner*
- Must not seek waiver of owner's rights provided by the statute
- Must disclose if someone other than the supplier will complete any part of the services if the contract disclaims any warranty for the service.

Excess Costs:

Supplier must provide owner notice if costs will exceed estimate by \$5,000 over the course of the entire project prior to performing work related to excess costs.

“EXCESS COSTS

IF AT ANY TIME A HOME CONSTRUCTION SERVICE REQUIRES EXTRA COSTS ABOVE THE COST SPECIFIED OR ESTIMATED IN THE CONTRACT THAT WERE REASONABLY UNFORESEEN, BUT NECESSARY, AND THE TOTAL OF ALL EXTRA COSTS TO DATE EXCEEDS FIVE THOUSAND DOLLARS OVER THE COURSE OF THE ENTIRE HOME CONSTRUCTION CONTRACT, YOU HAVE A RIGHT TO AN ESTIMATE OF THOSE EXCESS COSTS BEFORE THE HOME CONSTRUCTION SERVICE SUPPLIER BEGINS WORK RELATED TO THOSE COSTS. INITIAL YOUR CHOICE OF THE TYPE OF ESTIMATE YOU REQUIRE:

..... written estimate oral estimate”

- Not applicable to cost-plus contracts

Definition of Workmanlike Manner

“Workmanlike manner” means the home construction service supplier has engaged in construction that meets or exceeds the minimum quantifiable standards promulgated by the Ohio home builders association.

- Compliance with Residential Code of Ohio (“RCO”)
- If not in RCO, then pursuant to manufacturer’s instructions and specifications
- If not in RCO or written manufacturer’s instructions and specifications, then pursuant to OHBA Minimum Standards.

http://www.ohiohba.com/files/Workmanlike_standards.pdf

Down Payments

- Supplier cannot receive a down payment greater than 10% of the contract price (not applicable to cost plus contracts)
- Supplier may receive a down payment of up to 75% for special order items that are not returnable or usable by supplier
- Supplier can receive payments from construction loans.

HCSL Remedies

- Ohio Attorney General - authorized to investigate alleged deceptive practices
 - Injunctive relief
 - civil penalties
- Private Cause of Action
 - Rescission (must occur within reasonable time period); **or**
 - Recover actual economic damages
 - Up to \$5,000 non-economic damages
 - Injunctive Relief
 - Attorney's Fees

Review of the Standard Building Contract

1. Definition of the Service
2. Setting the Contract Price
 - a. Cost Plus a Fee
 - b. Fixed Fee
3. Changes must be in writing
4. No possession until full payment
5. Contractor to keep real estate lien free
6. Must carry insurance of at least \$250,000

7. Owner to carry casualty insurance
8. Commencement and Completion Dates
 - a. Contractor not responsible for delays beyond contractor's control
 - b. Written notice when complete – 7 days to inspect and 10 days to provide punch list
9. Keep it clean
10. Arbitration or litigation?
11. Limited Warranty
12. No sale until full payment
13. Substitutions (similar quality and cost)

14. Occupancy Prior to Final Completion
15. Default
16. Utilities
17. Merger Clause/Entire Agreement

Signature Block – must include name, address, telephone number and tax identification number

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Thank You

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