

BUSINESS LITIGATION ALERT

JUNE 2009

Contractors Must be Mindful of the New Jersey Consumer Fraud Act and Home Improvement Practices Act Requirements

Prudent contractors are familiarizing themselves with the Consumer Fraud Act (“CFA”) and the Home Improvement Practices Act (“HIPA”).

As the recent decisions of New Jersey courts demonstrate, when claims are filed against contractors, the consumer often prevails and the penalties are harsh. In order to avoid needless and expensive litigation, contractors should vigilantly comply with the requirements.

The CFA is a sweeping measure intended to protect consumers from fraud by persons engaged in the sale of goods and services, and from “unconscionable” commercial practices, misrepresentations, and omissions. “Unconscionability” is defined as “a lack of good faith, honesty in fact and observance of fair dealing.” The CFA prohibits any unconscionable commercial practice, such as deception, fraud, and misrepresentation in connection with the sale or advertisement of any merchandise. It also forbids the knowing concealment of a material fact with the intent to have others rely on such a concealment. Importantly, the CFA does not require a person to actually be misled, deceived, or damaged. As long as one of the aforementioned acts occurs, it is considered a violation of the CFA.

Of specific concern to New Jersey contractors, New Jersey courts have construed the CFA broadly to give consumers maximum protection. There is obviously little room for error on the part of contractors. Not only was the CFA drafted with a broad brush, it was given teeth to punish those contractors who fail to comply. If a contractor does not conform to the CFA, it may be exposed to treble damages, attorneys’ fees, and court costs. Treble damages means that actual monetary losses proven by the consumer will be tripled by the court.

In addition to the CFA, HIPA applies to any home improvement contractor doing “home improvements.” “Home improvement” includes almost all construction work that is not construction of a new residence. Critically, a violation of HIPA is also a violation of the CFA, and therefore, subjects the contractor to the strict penalties of the CFA.

HIPA requires all home improvement contracts in excess of \$500 to be in writing. All changes to the terms and conditions (change orders) of such contracts must also be in writing. The contracts and changes must be signed by all parties to the contract and must be in legible and understandable language. Further, home improvement contracts must include:

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- The legal name and business address of the sales representative or agent who solicited or negotiated the contract for the seller;
- A [detailed] description of the work to be done and the principal products and materials to be used;
- The total price to be paid by the buyer, including all finance charges including hourly rates;
- A start and end date for the work to be done;
- A description of any mortgage or security interest to be taken in connection with the financing or sale of the home improvement; and
- Any guarantee or warranty with respect to any products, materials, labor or services made by the seller.

If there is neither a written contract nor written change order, the contractor is automatically liable for consumer fraud. Intent is not a requirement nor an element of proof for a plaintiff.

HIPAA also sets forth specific performance and notice obligations. The following are considered violations of HIPAA:

- Failure to begin or complete work on the date or within the time period specified in the contract unless the delay is for reason beyond the seller's control.
 - Any changes in the dates or time periods stated in a written contract shall be agreed to in writing.

- Failure to give timely written notice to the buyer of reasons beyond the seller's control for any delay in performance, and when the work will begin or be completed.

HIPAA also requires a contractor to refrain from starting work on a project until all state and local building codes are met and all construction permits are issued. Where final inspections are required, copies of inspection certificates must be provided to the buyer prior to final payment or when requested by the buyer. If guarantees and warranties are involved in the project, a contractor must give a written copy to the buyer. It must be specific and include any exclusions or limitations as to the scope or duration. Copies of the warranties or guarantees must be provided to the buyer at the time the contractor places a bid and at the time of contracting.

Again, failure to comply with the above requirements is also a violation of the CFA, subjecting the contractor to its harsh penalties.

In conclusion, contractors must be knowledgeable of CFA and HIPAA because they are held strictly responsible for its content. We advise contractors to:

- Become familiar with the law and amend their practices in accordance with the CFA and HIPAA.
- Use a written contract in every case and ensure that all details required by the CFA are included, i.e. the list of 6 specific items that must be in home improvement contracts.
- Keep written change order forms on hand to be used on site.

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- Inform the customer of any delays in performance of the work with specific reasons for each delay. If performance dates must change, put them in writing and have them signed by both the contractor and consumer.
- DO NOT start work on a project unless all permits have been issued. Give copies of all inspection certificates to the consumer right after you receive them.
- If you are guaranteeing or warranting any of your work, a copy of such a guarantee or warranty must be given to the consumer at the time you bid for the work and at the time you execute the contract. Additionally, if you use any products or materials in the project that come with a warranty, you must also give the consumer a copy of the warranty when you install it.

The attorneys at BAR have extensive experience with the CFA and HIPA and are willing to help familiarize you with the law, review your contracts and change orders, and review any of your business practices to ensure you are in compliance.

- James P. Sasso, Esq.

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