

Time to Review Purchase and Sale Agreements?

Clauses may soon need to align with the Homeowner Protection Act of 2007

IN A DYNAMIC LEGAL environment, proactivity is the cornerstone of protecting your business interests from assault by plaintiffs' attorneys. Recent legislative developments surrounding House Bill 23-1192 ("HB 23-1192") have spotlighted the significance of ongoing vigilance. Section 1 of HB 23-1192 would have reduced the standards applicable to proving Colorado Consumer Protection Act ("CCPA") claims, established as a deceptive trade practice the act of including in a contract any term that is substantively unconscionable or void as against public policy, and removed the public impact element of a CCPA claim. Luckily, the Legislature removed Section 1 prior to HB 23-1192 becoming law.

Had Section 1 become law, having any clause in a purchase and sale agreement found to violate the Homeowner Protection Act of 2007 ("HPA") would, essentially, become a de facto violation of the



CCPA, giving rise to an award of treble damages and attorneys' fees in any litigation with an owner, including construction defect claims. The HPA makes void as against public policy "any express waiver of, or limitation on, the legal rights, remedies, or damages provided by the 'Construction Defect Action Reform Act,' or provided by the [CCPA], or on the ability to enforce such legal rights, remedies or damages within the time provided by applicable statutes of limitation or repose." C.R.S. § 13-20-806(7)(a).

Typical clauses that would likely violate the HPA include "as-is" language, waivers/disclaimers of implied warranties, limitations on damages or the time in which an owner must bring a claim that is shorter than provided in Colorado law, or a true right to repair as a condition precedent on an owner's right to bring a claim.

The removal of Section 1 from HB 23-1192 offers a temporary

reprieve, yet it serves as a reminder that legal dynamics can shift swiftly. Plaintiffs' attorneys will undoubtedly continue to explore avenues for change in Colorado law to tip the scales in favor of their clients. Given this background and likely continued legislative assault on the homebuilding industry, we advocate for a proactive approach among all homebuilders in Colorado. Now is the time to meticulously scrutinize your purchase and sale agreements to identify any clauses that may run afoul of the HPA and seriously consider eliminating or reforming them now. This effort may very well help you stay one step ahead of the plaintiffs' attorneys. ○

Please feel free to reach out to me at (303) 987-9813 or by email at mc-lain@hhmlaw.com if you would like to explore revamping your building practices in order to make yourself a hardened target.

