In Practice

Law limits homeowners' rights to sue contractors

By James W. Martin

In the closing days of the 2003 session, the Florida Legislature adopted Senate Bill 1286 to require homeowners to give contractors 60 days written notice before filing a lawsuit for construction defects. If the governor signs the bill into law, it will immediately apply to all claims accruing after he signs, even if the contract was entered into before.

The legislative staff report says the bill "creates a process to give homeowners...the opportunity to settle legal claims related to construction defects...before a lawsuit is filed." It applies to new construction as well as remodeling. It only applies to dwellings.

It is apparent from reading the bill's process that it favors the construction industry in many ways:

• The homeowner cannot file suit for damages until first giving the contractor 60 days written notice specifying the defects. The homeowner is supposed to send the notice within 15 days after discovering the defect.

• The contractor then has five days to inspect the home, but it is not required to. The homeowner must give access during normal working hours, apparently even if the remodeling work was done at night and on weekends for the homeowner's convenience.

• After that the contractor has another five days to notify subcontractors and suppliers of defects it thinks they are responsible for, and each of them has five days to inspect the home, again during normal working hours.

• The contractor is given 25 days after receipt of notice of defects to respond to the homeowner in one of three ways: a) the contractor may offer to "remedy" the defect at no cost to the homeowner; b) the contractor may offer to "compromise and settle" the claim by monetary payment within 30 days; or c) the contractor may dispute the claim.

• All of the above is an arguably fair process, but here is where it tips to favor the contractor: The homeowner is given 15 days to reject the contractor's offer, otherwise it is deemed accepted. The only method of rejection is to return the offer to the contractor with the word "rejected" printed on it. Thus, mere inaction by the homeowner results in acceptance of the contractor's offer.

This is only the tip of the iceberg. The bill is filled with ambiguities and inconsistencies. It precludes filing suit for damages, but not for specific performance. So, in theory, if the defect is of an emergency nature and if the only contractor who could repair it is the contractor to be sued, then the homeowner could sue for specific performance without going through the pre-suit notice procedure. The problem with this is that the homeowner's claim for damages may be waived by doing so. And the homeowner could not sue for both damages and specific performance and just abate the damages portion because the bill specifically abates the "action" which is the entire suit.

The bill even requires pre-suit notice before arbitration, and it even controls over arbitration provisions in contracts. Therefore, even if the parties planned their own alternative dispute resolution mechanism by contract, this bill would take that contracted right away and require the homeowner to follow the pre-suit claims process before seeking arbitration.

There are a few words in the bill that broaden its reach beyond the usual construction situation. For example, the bill includes in its definition of "contractor" anyone that is engaged in the business of selling dwellings or attachments thereto. This is a very broad definition. It could include someone who buys and sells houses and does not live in them. It could include someone who sells interior decorations that are attached to houses.

Any suggestion that this bill creates a process for homeowners to settle claims prior to litigation without the need to hire a lawyer is misleading. From now on, every homeowner who has a construction defect must hire a lawyer to take them through the pre-suit claims process.

The legislative staff report notes that the bill's process is similar to the pre-suit screening process for medical malpractice actions. It is unlikely that any patient has ever pursued that process without a lawyer.

The bill can be read online at www.flsenate.gov. Only one senator voted against it.

James W. Martin has written legal forms, books and articles for West, ALI-ABA, and The Florida Bar Journal. *Martin consults from his St. Petersburg law office on contract, business, corporate, probate, wills, trusts, real estate and lawsuit matters. He may be reached at jim@jamesmartinpa.com.*

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