

# MEMORANDUM

To: Medina County Home Builder's Association Board of Directors

From: Douglas Krause, Carrington Homes, Inc.

Re: Ohio Home Construction Service Suppliers Act

Date: March 20, 2013

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I am writing to each of you in furtherance of our discussion at the Medina County Home Builder's Association Board of Directors meeting held March 13, 2013. In 2012, Governor Kasich signed into law the Home Construction Service Suppliers Act (the "HCSSA"). All "home construction service contracts" signed after August 31, 2012, are subject to the HCSSA. The HCSSA is very beneficial for Ohio builders in that all new home construction service contracts are exempt from application of the Ohio Consumer Sales Practice Act. The Ohio Consumer Sales Practices Act is a powerful weapon that has been wielded against many contractors and builders in Ohio, including some of the members of the Medina County Home Builder's Association. Frequently, warranty disputes were escalated into law suits alleging violations of the Ohio Consumer Sales Practices Act and seeking treble damages (i.e. three times the actual damages) plus attorney's fees. As a result of the HCSSA, home builders using a contract that meets the standards of a "home construction service contract" will no longer be subject to the "treble damages" provisions of the Ohio Consumer Sales Practice Act.

In order to qualify as a "home construction service contract," the contract must be between an owner and a supplier of "home construction services" for the performance of "home construction services", including such services rendered based on a cost-plus contract, for an amount exceeding Twenty-Five Thousand and No/100 Dollars (\$25,000.00). "Home construction service" only includes the construction of a one-, two-, or three-family residence and does not include any work in a structure that contains four or more dwelling units unless the construction work is for an individual dwelling unit or for the common area of a condominium property.

If the cost of any home construction service is equal to or greater than Twenty-five thousand and No/100 Dollars (\$25,000.00), the HCSSA requires a written agreement between the owner and the home construction services supplier. This written agreement **must include all of the following**: (1) the name, physical business address, business telephone number and taxpayer identification number of the supplier; (2) the name, address, and telephone number of the owner; (3) the address or location of the property where service will be rendered; (4) a general description of the service, including the goods and services to be furnished; (5) the anticipated date or time period for the commencement and completion of service; (6) the total estimated cost of construction along with any additional costs such as installation or delivery; (7) a certificate of insurance demonstrating supplier's general liability coverage of at least Two

Hundred Fifty Thousand and No/100 Dollars (\$250,000.00); and (8) the dated signatures of the owner and the supplier. **[Note, pursuant to Ohio Revised Code Section 4722.02(C), the items listed in (1)-(8) are not required to be included in a cost-plus contract (i.e. a contract entered into between and owner and a home construction service supplier under which the payment to the supplier is based on the cost of a product plus the supplier's rate for labor to install the product plus an agreed percentage of profit or stipulated fee).]**

In addition, if the total amount of reasonably unforeseen, but necessary, excess costs of construction exceed Five Thousand and No/100 Dollars (\$5,000.00) over the course of the entire home construction contract, the supplier must provide the owner with a written or oral estimate of such costs as the owner so chooses. To determine the type of notice that an owner requires when the costs of a home construction service exceed the estimate provided in the contract, **the contract must include a statement in substantially the following language:**

**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

In order to keep the statement as conspicuous as possible, the statement should be all caps and bold. **[Note, pursuant to Ohio Revised Code Section 4722.02(B) (3), if the home services contract stipulates that the specified cost of the home construction service is a firm price and the home construction service supplier will not charge the owner with any excess costs, the home construction service supplier does not need to comply with the notice requirements set forth above. In addition, pursuant to Ohio Revised Code Section 4722.02(C) the above notice requirements are not applicable to a cost plus contract.]**

The HCSSA explicitly prohibits the following unfair practices:

- Failure to enter into a written home construction contract before commencing work.
- After entering into a written home construction contract and before commencing any work that is related to an excess cost, fail to provide an estimate of the excess costs in the manner required by the written home construction contract (oral or written as elected by the owner).
- Acceptance of a down payment exceeding ten percent (10%) of the total contract price prior to the commencement of construction. **[Note: This requirement does not apply to a cost-plus contract and does not apply to a down payment of not more than seventy-five percent (75%) of the total cost of any special order item that is not otherwise returnable or usable before the home**

**construction service supplier's performance that is required by the written contract begins.]**

- Failure to disclose that completion of work may not be possible absent the approval of excess costs and that charges may be incurred for any disassembly, reassembly, or partially completed work. **[Note: This requirement does not apply to a cost-plus contract.]**
- Charge for an unapproved excess cost. **[Note: Does not apply to a cost-plus contract.]**
- Falsely represent the nature and/or status of any repairs or work.
- Failure to perform the construction in a workmanlike manner.
- Failure to tender to the owner, within a reasonable time and upon the owner's request, any replaced parts, unless the supplier plans to rebuild or sell the parts or return the parts to the manufacturer in connection with a warranty, and the supplier informs the owner of such plans prior to commencing any repair or service.
- Failure to fully refund owner within a reasonable time for any good or service not provided by supplier for which the owner has paid.
- Failure to provide the owner, within a reasonable time and upon the owner's request, with an itemized receipt for any item retained by supplier for repair or services. The receipt must include the identity of the party performing repair or services, the name and dated signature of the party accepting the items from the owner, and a description, including the make and model number of the item, and the repair or services to be performed. **[Note: Builders should create a form receipt for such situations in order to lessen the likelihood that this requirement is overlooked.]**
- Require construction to be contingent upon an owner's waiver of any rights under the HCSSA.
- Falsely represent that any repairs, services, or work are necessary to comply with the residential building code.
- Falsely represent that an item being inspected or diagnosed is either in dangerous condition or that its continued use may be harmful.
- Intentionally understate or intentionally misstate the estimated cost of construction.
- Intentionally misrepresent any part of the transaction, or the nature or quality of the work or materials.
- Failure to provide the owner within a reasonable time with a copy of any document the owner has signed or initialed.
- Failure to disclose to the owner any repair or services to be completed by a third-party when the contract disclaims any warranty of repair or service by a third-party.
- Falsely represent that repairs or services must be performed away from the owner's property.

Pursuant to Ohio Revised Code Sections 4722.06 and 4722.07, the Ohio Attorney General retains substantially the same powers and remedies available to the Ohio Attorney General under the Ohio Consumer Sales Practices Act.

Pursuant to Ohio Revised Code Section 4722.08, in addition to actual economic damages, an owner is entitled to the following relief:

1. Non-economic damages up to \$5,000
2. Contract termination
3. Attorney's fees

For your convenience, a copy of the Home Construction Service Suppliers Act is attached to this Memorandum. Please discuss this issue with your respective attorneys to ensure that your contracts comply with, and you receive the benefits of, the Home Construction Service Suppliers Act.

-- Doug K.

## **Chapter 4722: HOME CONSTRUCTION SERVICE SUPPLIERS**

### **4722.01 Definitions.**

As used in this chapter:

(A) "Costplus contract" means a contract entered into between an owner and a home construction service supplier under which payment to the supplier is based on the cost of a product plus the supplier's rate for labor to install the product plus an agreed percentage of profit or a stipulated fee.

(B) "Home construction service" means the construction of a residential building. "Home construction service" does not include construction performed on a structure that contains four or more dwelling units, except for work on an individual dwelling unit within that structure, or construction performed on the common area of a condominium property.

(C) "Home construction service contract" means a contract between an owner and a supplier to perform home construction services, including services rendered based on a cost-plus contract, for an amount exceeding twenty-five thousand dollars.

(D) "Home construction service supplier" or "supplier" means a person who contracts with an owner to provide home construction services for compensation and who maintains in force a general liability insurance policy in an amount of not less than two hundred fifty thousand dollars.

(E) "Owner" means the person who contracts with a home construction service supplier. "Owner" may include the owner of the property, a tenant who occupies the dwelling unit on which the home construction service is performed, or a person the owner authorizes to act on the owner's behalf to contract for a home construction service, and any other person who contracts for a home construction service.

(F) "Residential building" means a one-, two-, or three-family dwelling and any accessory construction incidental to the dwelling. "Residential building" does not include any of the following:

- (1) An industrialized unit as described in section 3781.06 of the Revised Code;
- (2) A manufactured home as described in section 3781.06 of the Revised Code;

(3) A mobile home as described in section 4501.01 of the Revised Code.

(G) "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.

Added by 129th General Assembly File No. 107, HB 383, § 1, eff. 8/31/2012.

## **4722.02 Service contract.**

(A) Except as provided in division (C) of this section, no home construction service supplier shall perform any home construction service the cost of which equals or exceeds twenty-five thousand dollars unless the supplier enters into a written home construction services contract with the owner. The contract shall include all agreements and conditions related to the home construction service, including all of the following:

- (1) The supplier's name, physical business address, business telephone number, and taxpayer identification number;
- (2) The owner's name, address, and telephone number;
- (3) The address or location of the property where the home construction service is to be performed;
- (4) A general description of the home construction service, including the goods and services to be furnished as part of the service;
- (5) The anticipated date or time period the home construction service is to begin and the anticipated date or time period it is to be completed;
- (6) The total estimated cost of the home construction service;
- (7) Any cost of installation, delivery, or other cost that the total estimated cost does not cover;
- (8) A copy of the supplier's certificate of insurance showing general liability coverage in an amount of not less than two hundred fifty thousand dollars;
- (9) The dated signatures of the owner and the supplier.

(B)(1) If the total amount of reasonably unforeseen, but necessary, excess costs of a home construction service at any time exceeds five thousand dollars over the course of

the entire home construction contract, prior to performing the work related to the excess costs, the home construction service supplier shall provide an owner with a notice that contains a written or oral estimate, depending on which type the owner has designated in the contract.

(2) To determine the type of notice an owner requires when the costs of a home construction service exceed the estimate provided in the contract, the contract shall include a statement in substantially the following language:

"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"

(3) If the contract stipulates that the specified cost of the home construction service is a firm price and the home construction service supplier will not charge the owner with any excess costs, the home construction service supplier need not comply with the notice requirements of this division.

(C) A home construction service supplier who enters into a cost-plus contract with an owner for a home construction service need not comply with the requirements in divisions (A) and (B) of this section.

Added by 129th General Assembly File No. 107, HB 383, § 1, eff. 8/31/2012.

### **4722.03 Prohibited acts.**

(A) No home construction service supplier shall do any of the following:

(1) Prior to commencing work related to the home construction service, fail to enter into a written contract that complies with this chapter;

(2) After entering into a contract with an owner and prior to commencing any work that is related to an excess cost, fail to provide an estimate of the excess costs as this

chapter requires;

(3) After entering into a contract with an owner, do any of the following:

(a) Fail to disclose, prior to the owner's acceptance of any goods or work related to an excess cost, that in failing to approve an excess cost, completion of the work may not be possible and a charge may be imposed for any disassembly, reassembly, or partially completed work, which shall be directly related to the actual labor or parts involved;

(b) Charge for any excess cost that the owner has not approved;

(c) Represent that repairs or work have been performed when such is not the fact;

(d) Fail to perform the home construction service in a workmanlike manner;

(e) Fail to tender to the owner, within a reasonable time and upon the owner's request, any replaced parts, unless the parts are to be rebuilt or sold by the home construction service supplier, or returned to the manufacturer in connection with a warranted repair or service, and the intended reuse or return is made known to the owner prior to commencing any repair or services;

(f) Fail to provide a full refund within a reasonable time period for any goods or services that the home construction service supplier has failed to deliver in accordance with the terms and conditions of the contract required by section 4722.02 of the Revised Code and for which the supplier has received payment;

(g) Fail to provide to the owner, within a reasonable time and upon the owner's request, a written, itemized receipt for any item of goods that is left with, or turned over to, the home construction service supplier for repair or services. The receipt shall include all of the following:

(i) The identity of the person who will perform the repair or services;

(ii) The name and dated signature of the person or representative who actually accepts the goods;

(iii) A description, including make and model number or other features that will reasonably identify the goods that are turned over, and the repair or services that are to be performed.

(4) Make the performance of any home construction service contingent upon an owner's waiver of any rights this chapter provides;



- (5) Represent that repairs, services, or work is necessary to comply with the residential building code when such is not the fact;
  - (6) Represent that an item of goods or any part thereof that is being inspected or diagnosed for a home construction service is in a dangerous condition, or that its continued use may be harmful, when such is not the fact;
  - (7) Intentionally understate or intentionally misstate the estimated cost of the home construction service;
  - (8) Intentionally misrepresent any aspect of the transaction or the nature or the quality of the work or materials;
  - (9) Fail at the time any owner signs or initials any document to provide the owner with a copy of the document within a reasonable time period;
  - (10) Fail to disclose to the owner prior to the commencement of any repair or service that any part of the repair or service will be performed by a person other than the home construction service supplier or employee of the supplier if the contract disclaims any warranty of the repair or service that the other person performs;
  - (11) Represent that repairs or services must be performed away from the property on which the home construction service is being performed when that is not the fact.
- (B) A home construction service supplier who enters into a cost-plus contract with an owner for a home construction service need not comply with the requirements regarding excess costs provided in this section.

Added by 129th General Assembly File No. 107, HB 383, § 1, eff. 8/31/2012.

#### **4722.04 Down payments.**

A home construction service supplier may take as a down payment not more than ten per cent of the contract price before the supplier's performance that is required by the contract begins, except a supplier may take as a down payment not more than seventy-five per cent of the total cost of any special order item that is otherwise not returnable or usable before the supplier's performance that is required by the contract begins. This section does not apply to a home construction service supplier who enters into a cost-plus contract. A supplier may accept payments from a construction loan in connection with a home construction service contract.

Added by 129th General Assembly File No. 107, HB 383, § 1, eff. 8/31/2012.

### **4722.06 Investigation by attorney general.**

(A) If, by the attorney general's own inquiries or as a result of complaints, the attorney general has reasonable cause to believe that a person has engaged or is engaging in an act or practice that violates this chapter, the attorney general may investigate.

(B) For this purpose, the attorney general may administer oaths, subpoena witnesses, adduce evidence, and require the production of relevant matter.

If matter that the attorney general requires to be produced is located outside the state, the attorney general may designate representatives, including officials of the state in which the matter is located, to inspect the matter on the attorney general's behalf, and the attorney general may respond to similar requests from officials of other states. The person subpoenaed may make the matter available to the attorney general at a convenient location within the state or pay the reasonable and necessary expenses for the attorney general or the attorney general's representative to examine the matter at the place where it is located, provided that expenses shall not be charged to a party not subsequently found to have engaged in an act or practice violative of this chapter.

(C) Within twenty days after a subpoena has been served, a motion to extend the return day, or to modify or quash the subpoena, stating good cause, may be filed in the court of common pleas of Franklin county or the county in which the person served resides or has the person's principal place of business.

(D) A person subpoenaed under this section shall comply with the terms of the subpoena, unless the parties agree to modify the terms of the subpoena or unless the court has modified or quashed the subpoena, extended the return day of the subpoena, or issued any other order with respect to the subpoena prior to its return day.

If a person fails without lawful excuse to obey a subpoena or to produce relevant matter, the attorney general may apply to the court of common pleas of the county in which the person subpoenaed resides or has the person's principal place of business for an order compelling compliance.

(E) The attorney general may request that an individual who refuses to testify or to produce relevant matter on the ground that the testimony or matter may incriminate the individual be ordered by the court to provide the testimony or matter. With the exception of a prosecution for perjury and an action for damages under this chapter, an individual who complies with a court order to provide testimony or matter, after asserting a privilege against self-incrimination to which the individual is entitled by law, shall not be subjected to a criminal proceeding or to a civil penalty or forfeiture on the

basis of the testimony or matter required to be disclosed or testimony or matter discovered through that testimony or matter.

(F) The attorney general may:

(1) During an investigation under this section, afford, in a manner considered appropriate to the attorney general, a supplier an opportunity to cease and desist from any suspected violation. The attorney general may suspend the investigation during the time period that the attorney general permits the supplier to cease and desist; however, the suspension of the investigation or the affording of an opportunity to cease and desist shall not prejudice or prohibit any further investigation by the attorney general under this section.

(2) Terminate an investigation under this section upon acceptance of a written assurance of voluntary compliance from a supplier who is suspected of a violation of this chapter.

Acceptance of an assurance may be conditioned upon an undertaking to reimburse or to take other appropriate action with respect to identifiable owners damaged by an alleged violation of this chapter. An assurance of compliance given by a supplier is not evidence of violation of this chapter. The attorney general may, at any time, reopen an investigation terminated by the acceptance of an assurance of voluntary compliance, if the attorney general believes that further proceedings are in the public interest. Evidence of a violation of an assurance of voluntary compliance is prima-facie evidence of an act or practice in violation of this chapter, if presented after the violation in an action brought under this chapter. An assurance of voluntary compliance may be filed with the court and if approved by the court, entered as a consent judgment.

(G) The procedures available to the attorney general under this section are cumulative and concurrent, and the exercise of one procedure by the attorney general does not preclude or require the exercise of any other procedure.

Added by 129th General Assembly File No. 107, HB 383, § 1, eff. 8/31/2012.

### **4722.07 Civil actions and penalties.**

(A) If the attorney general, by the attorney general's own inquiries or as a result of complaints, has reasonable cause to believe that a supplier has engaged or is engaging in an act or practice that violates this chapter, and that the action would be in the public interest, the attorney general may bring any of the following:

(1) An action to obtain a declaratory judgment that the act or practice violates this

chapter;

(2)(a) An action, with notice as required by Civil Rule 65, to obtain a temporary restraining order, preliminary injunction, or permanent injunction to restrain the act or practice. If the attorney general shows by a preponderance of the evidence that the supplier has violated or is violating this chapter, the court may issue a temporary restraining order, preliminary injunction, or permanent injunction to restrain and prevent the act or practice.

(b) On motion of the attorney general, or on its own motion, the court may impose a civil penalty of not more than five thousand dollars for each day of violation of a temporary restraining order, preliminary injunction, or permanent injunction issued under this section, if the supplier received notice of the action. The civil penalties shall be paid as provided in division (G) of this section.

(c) Upon the commencement of an action under division (A)(2) of this section against a supplier who operates under a license, permit, certificate, commission, or other authorization issued by the supreme court or by a board, commission, department, division, or other agency of this state, the attorney general shall immediately notify the supreme court or agency that such an action has been commenced against the supplier.

(3) A class action under Civil Rule 23, as amended, on behalf of owners who have engaged in home construction service contracts in this state for damage caused by an act or practice described in this chapter.

(B) On motion of the attorney general and without bond, in the attorney general's action under this section, the court may make appropriate orders, including appointment of a referee or a receiver, for sequestration of assets, to reimburse owners found to have been damaged, to carry out a home construction service contract in accordance with an owner's reasonable expectations, to strike or limit the application of unconscionable clauses of contracts so as to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a referee or receiver against the supplier.

(C) Any moneys or property recovered by the attorney general in an action under this section that cannot with due diligence within five years be restored by a referee to owners shall be unclaimed funds reportable under Chapter 169. of the Revised Code.

(D) In addition to the other remedies provided in this section, the attorney general may request and the court may impose a civil penalty of not more than twenty-five thousand dollars against the supplier for each violation of an act or practice described in this chapter. The civil penalties shall be paid as provided in division (G) of this section.

(E) No action may be brought by the attorney general under this section to recover for a home construction service contract more than two years after the occurrence of a violation.

(F) If a court determines that provision has been made for reimbursement or other appropriate corrective action, insofar as practicable, with respect to all consumers damaged by a violation, or in any other appropriate case, the attorney general, with court approval, may terminate enforcement proceedings brought by the attorney general upon acceptance of an assurance from the supplier of voluntary compliance with this chapter, with respect to the alleged violation. The assurance shall be filed with the court and entered as a consent judgment. A consent judgment is not evidence of prior violation of such chapter. Disregard of the terms of a consent judgment entered upon an assurance shall be treated as a violation of an injunction issued under this section.

(G) Civil penalties ordered pursuant to divisions (A) or (D) of this section shall be paid as follows: one-fourth of the amount to the treasurer of the county in which the action is brought and three-fourths to the consumer protection enforcement fund created by section 1345.51 of the Revised Code.

(H) The remedies available to the attorney general under this section are cumulative and concurrent, and the exercise of one remedy by the attorney general does not preclude or require the exercise of any other remedy.

(I) In carrying out the attorney general's official duties, the attorney general shall not disclose publicly the identity of any supplier who is or was the subject of an investigation under this chapter or any facts developed during such an investigation unless those matters have become a matter of public record in enforcement proceedings, or the supplier who is the subject of the investigation gives written consent to public disclosure of those matters.

(J) The attorney general shall cooperate with state and local officials, officials of other states, and officials of the federal government in the administration of statutes comparable to this chapter.

Added by 129th General Assembly File No. 107, HB 383, § 1, eff. 8/31/2012.

### **4722.08 Owners' causes of action.**

For a violation of Chapter 4722. of the Revised Code, an owner has a cause of action and is entitled to relief as follows:

(A) Where the violation was an act prohibited by section 4722.02, 4722.03, or 4722.04

of the Revised Code, the owner may, in an individual action, rescind the transaction or recover the owner's actual economic damages plus an amount not exceeding five thousand dollars in noneconomic damages.

(B) In any action for rescission, revocation of the transaction must occur within a reasonable time after the owner discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the transaction.

(C) Any owner may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter.

(D) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:

(1) The owner complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the owner filed or maintained the action in bad faith;

(2) The home construction service supplier has knowingly committed an act or practice that violates this chapter.

(E) As used in this section, "actual economic damages" means damages for direct, incidental, or consequential pecuniary losses resulting from a violation of Chapter 4722. of the Revised Code and does not include damages for noneconomic loss as defined in section 2315.18 of the Revised Code.

(F) Nothing in this section shall preclude an owner from also proceeding with a cause of action under any other theory of law.

Added by 129th General Assembly File No. 107, HB 383, § 1, eff. 8/31/2012.