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ILLINOIS STATE BAR ASSOCIATION

REAL PROPERTY

The newsletter of the Illinois State Bar Association's Section on Real Estate Law

The Home Repair And Remodeling Act—Can we fix it?

By Adam B. Whiteman

The Home Repair and Remodeling Act ("Home Repair Act), 815 ILCS 513/1 et seq. (West 2006) has been the subject of nine separate appellate decisions, and it has already made its way to the Illinois Supreme Court since its passage in 2000. As discussed below, it is believed that the wording of the Act has created confusion as to the proper remedy for courts to apply. It is hoped that a bill currently pending in the state legislature will clarify that, unless otherwise stated within the Act, a private citizen's remedy for a violation of the Act is to be found in the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et. Seq.) ("Consumer Fraud Act").

The key provisions of the Home Repair Act are Sections 20, 30 and 35. Section 20 provides that "for any contract over $1,000, any person engaging in the business of home repair and remodeling shall provide to its customers a copy of the "Home Repair: Know Your Consumer Rights" pamphlet prior to the execution of any home repair and remodeling contract." (815 ILCS 513/20). Section 30 provides that "[i]t is unlawful for any person engaged in the business of home repairs and remodeling to remodel or make repairs or charge for remodeling or repair work before obtaining a signed contract or work order over $1,000." (815 ILCS 513/30). Section 35 (815 ILCS 513/35) is titled "Enforcement" and it empowers the Attorney General to "restrain and prevent any pattern or practice violation of this Act" and rem-

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A modest proposal

By Myles L. Jacobs; Brumund, Jacobs, Hammel, Davidson & Andreano, LLC

This article concerns one of those things we do because we have always done so. As we all know, lawyers do many things because "that's the way we have always done it."

The continued solvency of residential home builders is no longer a given. In 2007 a major builder went out of business, leaving half-finished construction to be completed by others, if at all. Last year another major builder also failed. While this phenomenon is hardly new, and the troubled market place has brought the issue of continued financial stability of lenders and builders into sharp focus, builders expect buyers to continue to do business as it has always been done, with deposits (other than for newly constructed condominium properties) being given directly to builders to be spent, saved or squandered by the builder, but not to be held in escrow.

Why should buyers of residential new construction take such risks? Simply because they have always done so? To "keep costs down"?

Builders have argued for years that buyers should absorb some of the costs of construction to reduce ultimate costs. The deposits help defray construction loan expenses that would otherwise be incurred. In the current market they would urge buyers to deposit an even

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edies under the Consumer Fraud Act are referenced in the way of carrying out this purpose. Section 35 makes no mention of any remedies available to private citizens.

Case Review

In *Central Illinois Electrical Services, LLC. v. Slepian*, 358 Ill.App.3d 545, 831 N.E.2d 1169 (3rd Dist. 2005), a contractor performed work exceeding $1,000 in value without a written contract or estimate. The home owner asserted the Home Repair Act as an affirmative defense to the contractor's complaint which, among other forms of relief sought to foreclose a mechanic's lien claim. The contractor argued that the Home Repair Act was not applicable because the home owner initiated the remodeling work and because the home owners were 'constantly changing the scope' of the work therefore preventing the contractor from providing a written estimate. The court disagreed noting that there is no exception under the Home Repair Act for projects billed on a time and material basis, and that the terms of the Home Repair Act would apply. The case was remanded for further consideration.

In *MD Electrical Contractors, Inc. v. Abrams*, 228 Ill.2d 281, 888 N.E.2d 54 (2008), the Illinois Supreme Court simply held that the Home Repair Act does not apply to subcontractors.

In *Smith v. Bogard,* 377 Il.App.3d 842, 879 N.E.2d 543 (4th Dist. 2007), the homeowner defendants raised the Home Repair Act as a defense to a contractor that sued to recover the unpaid balance on work it had performed. In this case the contractor did not provide a written contract, nor did it provide a consumer rights brochure required under Section 20. The court determined that because the contractor failed to comply with the Home Repair Act, it would be 'precluded from recovering any amounts he claims due for work performed.' In so ruling, the court barred the contractor from recovering any money for breach of contract or under equitable theories of unjust enrichment or *quantum meruit*. The court cited the language in Section 30 of the Home Repair Act declaring it 'unlawful' to perform work without a written contract, and the court further cited cases indicating that the contact was 'void' and that the contractor had 'unclean hands'.

In *Kunkel v. P.K. Dependable Construction, LLC,* 387 Ill.App.3d 1153, 902 N.E.2d 769 (5th Dist. 2009), the plaintiff homeowners filed a claim against their roofing contractor alleging, among other things, a violation Section 2z of the Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2z) which provides, "Any person who *knowingly* violates the *** Home Repair and Remodeling Act *** commits an unlawful practice within the meaning of [the Consumer Fraud and Deceptive Business Practices] Act." (Emphasis added) The provision of the Home Repair Act that was violated was that the contractor failed to provide a consumer rights brochure. The homeowners sought to prove a violation of the Consumer Fraud Act in order to justify an award of attorney fees and court costs. The court explained that an award of attorney fees under the Consumer Fraud Act was only appropriate if the homeowner could prove they were damaged as a result of the subject violation and if the homeowner could prove that the contractor's violation was "knowingly" committed. Specifically, the court held, "..the plaintiffs provided no evidence on the defendants' state of mind in not proving the brochure, and there is no evidence in the record to support a knowing violation of the Home Repair and Remodeling Act. Accordingly, there was no violation of Section 2Z of the Act." The court further held, "Here, the plaintiffs introduced no evidence that the defendants' failure to provide the brochure proximately caused their damages. Accordingly, the plaintiffs did not acquire a private right of action under the Act for the defendants' failure to provide them the "Home Repair: Know Your Consumer rights" brochure."

In *K. Miller Construction Co., v. McGinnis*, 394 Ill.App.3d 248, 913 N.E.2d 1147 (1st Dist. 2009), a contractor filed a three counter complaint for breach of an oral contract, enforcement of a mechanics lien and *quantum meruit* relief in connection with a major home remodeling project for which it was claimed $177,580.33 was still due and owing. The homeowner filed a 2-615 motion to dismiss arguing that the three counts were legally insufficient because the contractor

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failed to obtain a written contract in violation of the Home Repair Act. The question addressed by the First District was, "whether the legislature's declaration that oral contracts falling under the Home Repair Act are "unlawful" means that the equitable remedy of *quantum meruit* is foreclosed in an action between a well-established contractor and a sophisticated consumer (a lawyer), where no allegation is made that the contractor engaged in anything other than a fair and honest practice, and where, based on the allegations of the complaint, the contractor took out a construction loan to complete the project, which, after a "walk-through" was approved by the consumer." The manner in which the court framed the question illustrates the core problem with the Home Repair Act which is that a technical violation might be used to unfairly preclude a contractor from receiving reasonable compensation for services rendered. As for the oral contract and mechanic's lien claims, the court held, "Because section 30 of the Act bars the enforcement of an oral contract as "unlawful," we affirm Judge Bartkowicz's dismissal of counts I and II in Millers second amended complaint." However, the court permitted the contractor to pursue its *quantum meruit* claim. Here the court expressly split with the Fourth District on this issue and concluded that, "the use of "unlawful" is a term too ambiguous and doubtful to convey legislative intent to *repeal* the equitable remedy of *quantum meruit*." This case has been granted *certiori* by the Illinois Supreme Court.

In *Artisan Design Build, Inc. v. Bilstrom*, No. 2-08-0855 slop op. (2nd Dist. 2009), a contractor sued to enforce a written contract, to assert a mechanic's lien and for unjust enrichment. The homeowner filed a 2-619 motion to dismiss based on the contractor's failure to provide the Consumer Rights Brochure required under the Home Repair Act. The court first noted that "Section 15.1(c) of the Home Repair Act provides a specific sanction for failure to advise the consumer of the presence of the binding arbitration and jury waiver clauses, which is to render those clauses null and void. Therefore, with respect to those sections, the legislature spelled out the consequences to the contractor of failing to comply." The court compared this specific remedy provision with the language of Section 20, which sets forth the requirement of the consumer rights brochure and noted that Section 20, "does not provide that a failure to furnish it constitutes an unlawful act or that such failure has any negative consequences with respect to the enforceability of a plaintiff's contract for remodeling or repairs." The court then made the following determination, "We interpret the plain language of the Act to mean that a contractor's failure to provide the consumer with the brochure does not vitiate the contractor's right to recover either in equity or in law, but if certain requirements are met, the failure to furnish the brochure may give the consumer a cause of action under the Consumer Fraud and Deceptive Business Practices Act." The court explained that, "as was held in *Kunkel*, if a private right of action exists for violation of section 20, the plaintiff has to prove that his damages were proximately caused by the failure to provide the brochure."

In *John Behl, d/b/a Behl Construction v. Gingerich*, No. 4-08-0974 (4th Dist. 2009), a contractor filed suit alleging breach of contract

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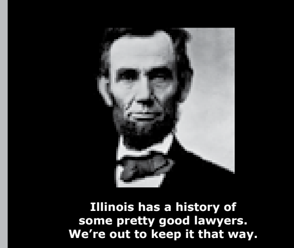

and foreclosure of a mechanic's lien for labor and materials provided to the defendant's home. The homeowner moved to dismiss the complaint on the grounds that there was no signed, written agreement authorizing the work, and no delivery of a consumer rights brochure in violation of the Home Repair Act. The fourth district appeared to do some back peddling from its application of the Act in *Bogard*. Here the court stated, "the question before us is whether substantial, rather than strict, compliance with a mandatory statutory requirement in this case is permissible and, if so, whether plaintiff demonstrated such compliance. To answer this question, we conduct a twofold analysis. First, we look to the purpose of the Act to determine whether the purpose was achieved without strict compliance. Next we decide whether the defendant suffered any prejudice form plaintiff's failure to strictly comply with the Act." The court then found that, "plaintiff substantially complied with the Home Repair Act" by supplying a 'written but unsigned work order". The court then denied the homeowner's motion to dismiss and found that the "defendant cannot demonstrate that plaintiff's failure to secure his signature on the work order or plaintiff's failure to provide him with the consumer-rights brochure proximately caused him damages."

In *Roberts d/b/a Roberts Cleaning, Maintenance and More v. Adkins*, No. 3-09-0187 (3rd Dist. 2010), a contractor sued to enforce a mechanic's lien and the homeowner asserted, as an affirmative defense, that the contractor violated the Home Repair Act by failing to provide a consumer rights brochure or a written agreement. The court determined that the failure to obtain a written contract was a violation of the Home Repair Act and further determined that, "[W]hen a contract does not comply with the Act, it is invalid and cannot form the basis of a breach of contract action or an action to foreclose a mechanic's lien."

In *Fandel Construction v. Tiffany Allen*, No 3-08-0237 (3rd Dist.), a contractor was hired by a homeowner to perfom roof repairs. After the work was complete, the homeowner issued a check as payment, but then cancelled that check. The contractor sued to enforce a mechanic's lien and the homeowner moved for summary judgment relying on the contractor's failure to provide a consumer rights brochure and the contractor's failure to obtain a signature on the itemized work order it presented to the homeowner before starting work. In an inexplicable, but welcome, split from its own decision in *Roberts v. Adkins*, the 3rd Disctrict completely reversed itself and found that the failure to comply with these sections "does not act to automatically invalidate the agreement between the parties." The court explained concluded that, "Because the HRRA is void of any language which serves to invalidate the parties' agreement, defendant cannot now use the HRRA to bar plaintiff from asserting this lien. However, if defendant has suffered any actual damages as a result of plaintiff's unlawful violations, the statu has created a cause of action for her under section 10(a) of the [Consumer Fraud Act]."

To summarize the case law,

- *Slepian* (3rd Dist.)—Failure to obtain a written contract is an affirmative defense to all contractor's claims.
- *MD Electrical* (Sup.Ct.)—The Act does not apply to subcontractors.
- *Bogard* (4th Dist.)—Failure to obtain written contract and to provide consumer rights brochure bars all legal and equitable remedies, including mechanic's liens.
- *Kunkel* (5th Dist.)—The failure to provide a consumer rights brochure is only a violation if homeowner can prove damages under the Consumer Fraud Act.
- *K.Miller Construction* (1st Dist.)—Failure to obtain a written contract bars enforcement of an oral contract and mechanic's lien, but does not bar recovery under *quantum meruit*.
- *Artisan Design Build* (2nd Dist.)—Proper remedy for failure to provide consumer rights brochure is to be found in the Consumer Fraud Act.
- *Behl Construction* (4th Dist.)—Failure to secure a signature on the work order and the failure to provide consumer rights brochure is not a bar to recovery if the contractor can show that he "substantially complied with the Home Repair Act" and if the homeowner was not damaged by the violation.
- *Roberts* (3rd Dist.)—Failure to obtain a written contract invalidates contract and precludes mechanic's lien.
- *Fandel* (3rd Dist.)—Failure to obtain signed contract and failure to provide consumer rights brochure does not bar mechanic's lien, but instead, gives rise to cause of action under the Consumer Fraud Act.

Analysis

In the opinion of this author, Kunkel, Artisan Design and Fandel reflect a correct reading and application of the Home Repair Act as far as their facts allow. The Home Repair Act was not intended to automatically invalidate contracts and mechanic's liens in the face of any technical violation. Such a result would have the effect of ignoring over 100 years of interpretation and application of the Mechanic's Lien Act (770 ILCS 60/.01 *et seq.*). The Mechanic's Lien act permits a lien based on an oral contract. As it is presently interpreted, the Home Repair Act forbids oral contracts in connection with home repair and remodeling projects.

Courts are beginning to realize the problems with the Home Repair Act and are doing all they can in terms of interpreting it so as to approximate a fair result. The length of the decisions over this statute, and the fact that they are turning to cases involving statutory construction and substantial compliance is testimony to the fact that the Home Repair Act, as currently written, does not clearly set forth the proper remedy to be applied for its violation.

The confusion among (and within) the districts regarding the application and interpretation of the Home Repair Act results principally from the fact that the Home Repair Act characterizes the failure to provide a written contract as "unlawful". Characterizing a violation of the Act as "unlawful" had the unintended effect of leading courts to believe that any violation, no matter how small, would automatically bar a contractor from seeking any compensation or asserting any mechanic's lien for his work.

Recognizing this problem, members of the Illinois State Bar Association met with the Illinois Attorney General's Office in order to discuss the remedy provision of the Act. After this consultation, and upon further meetings, it was determined that a private citizen's proper remedy for a violation of the Home Repair Act is to be found in the Consumer Fraud Act. Indeed, the Consumer Fraud Act already makes reference to this fact (815 ILCS 505/2z). Section 35 of the Home Repair Act titled "Enforcement" makes reference to the Consumer Fraud Act, but that provision seems to be addressed exclusively to the en-

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A modest proposal

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higher percentage of the sales price on the theory that skittish lenders have reduced the "Loan-to-Value" ratios on such construction, making less money available to complete the project. But should buyers jump in where lenders fear to tread?

A modest proposal for buyers of new residential construction would be to take the same position that they would take if they had decided to purchase a newly constructed condominium unit or an existing structure not being offered by a builder. The earnest money should remain in escrow until closing, to insure that the buyer does not lose the deposit to a secured creditor of an insolvent builder in the event of bankruptcy or foreclosure.

The Illinois Condominium Property Act requires that deposits on newly constructed condominium units be kept in escrow. Custom and usage in the purchase of an existing residence calls for earnest money deposits to be placed in escrow until closing. Why should non-condominium new construction be any different?

Builders routinely want buyers to "have some skin in the game." The risk to the buyer whose deposit is exposed lessens the buyer's negotiating power. There is a psychological advantage to the builder more accustomed to dealing in such "numbers"; buyers whose money is "locked" into such a deal are likely to be more compliant when delays result or issues arise concerning workmanship and materials. And builders without access to buyers' deposits need to put additional cash into each house, or borrow even more than before. But in such a scenario, should buyers take on the role of secondary lender?

One way to provide for compensation to the builder who does not have access to a buyer's deposit is to calculate the additional construction loan interest a builder would incur on account of the unavailability of the buyers' deposits and to add that amount (or an amount negotiated by the parties) to the purchase price. The author submits that some buyers, faced with the issue of lack of security of such deposits, may be willing to add additional cash on the "back end" to protect their deposits on the "front end." ■

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forcement powers granted to the State's Attorney General. No mention is made in said provision to private remedies.

SB 2540 has been drafted and, with the approval of the Illinois Attorney General's Office, introduced by Senator Wilheimi. The proposed amendment will entirely replace Section 30 of the Act to clarify and more accurately identify the remedies available to private parties under the Act. The proposed amendment reads as follows:

Sec. 30. Violation of Act. The remedy under this Act for any person who suffers actual damage as a result of a violation of this Act is that such person may bring an action pursuant to 815 ILCS 505/10a of the Consumer Fraud and Deceptive Business Practices Act. (815 ILCS 513/30)

The Home Repair Act has the laudable goal of making sure that a contractor utilizes a written contract and provides a Consumer Rights Brochure to home owners who engage them to undertake home remodeling work valued in excess of $1,000. As a consumer protection oriented statute, the intended remedy for a violation of the Act was to be found under the Consumer Fraud and Deceptive Business Practices Act. However, the Act does not sufficiently spell out this remedy, and the courts have come to impose wholly unintended penalties for even the most benign violations. It is hoped that this bill will be passed and will clarify the unfortunate confusion that now exists among the courts. ■

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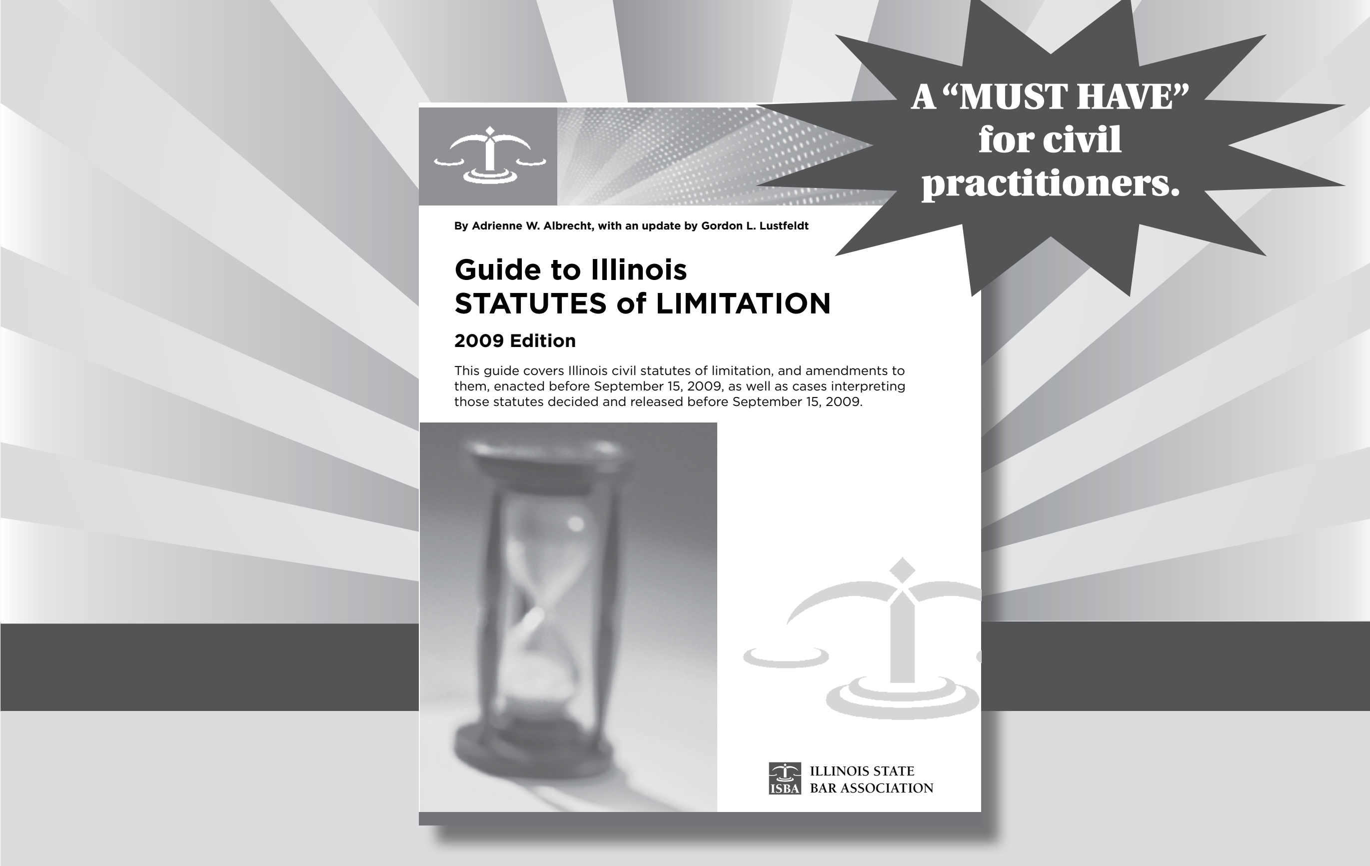

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