HOME CONSTRUCTION DEFECTS AND THE ELECTION OF REMEDIES

In the context of construction defect claims for new home construction, the question of whether a homebuyer can pursue legal claims in the courts as well as through a warranty program is a complicated one, and a veritable minefield for the uninformed who could easily find herself boxed in and forced to arbitrate all claims. Two recent decisions of the New Jersey Appellate Division, one published and the other unpublished, provide some new guidance on the election of remedy problems in new home construction defect litigation.

In Frumer v. National Home Insurance Co., 2011 N.J. Super. LEXIS 92 (App. Div. May 16, 2011), the Appellate Division provided a thorough discussion of the remedies available to homeowners under the New Home Warranty and Builders' Registration Act, N.J.S.A. § 46:3B-1 to 20 ("the Act"), as well as the builders' ability to foreclose the pursuit of claims in court. A builder must either comply with the warranty provisions in the Act or set up "an approved alternate home warranty security program" (ie., a private warranty plan). N.J.S.A. § 46:3B-5.

Importantly, if a builder sets up a private warranty plan, it need not provide the homeowner with the option of electing remedies and may limit the homeowner's recourse to arbitration, with limited review of the arbitrator's decision by the courts. N.J.A.C. 5:25-4.2.

In Frumer, the builder had a private warranty program which distinguished between claims for workmanship/systems defects, and structural defects. The warranty in question permitted a homeowner to elect between suit in court or the private warranty for workmanship/systems defects, but provided no such election of remedies for structural defects, which were required to be arbitrated. The Court enforced the warranty as against a homeowner who had filed a claim under the warranty for workmanship/systems defects, and then tried to sue later for such claims as well as structural claims. The Court directed all claims to arbitration except the breach of warranty and bad faith claims, which were to be held in abeyance pending arbitration. Apparently, even the builder did not try to argue that the arbitration clause encompassed such claims.

Wilson v. Woodfields at Princeton Highlands, Docket No. A-6277-08T1 (N.J. Super. Ct. App. Div. June 3, 2011), provides a recent example of how the courts are reluctant to enforce strict election of remedy language in a contract unless the election is clear and unambiguous. The homeowner in Wilson had a new home built on a lot in 2001. In July 2007, she sued the developer-builder as well as individual agents of the builder, the homeowners' association and property managers, and others, claiming breach of contract, negligence, fraud and violations of the Consumer Fraud Act ("CFA").

The homeowner in Wilson had tried during contract negotiations, albeit unsuccessfully, to remove the mandatory arbitration provision in her contract. She first pursued a claim under the warranty for certain defects, but later filed suit, claiming that

the arbitration process was rigged in favor of the developer-builder. The developer-builder succeeded in getting the trial court to compel arbitration of all claims, including the statutory claims. The Appellate Division reversed, finding that the waiver provisions in the contract were not clear enough:

> In this context, an agreement to arbitrate statutory claims is enforceable when the contract provisions "(1) contain language reflecting a general understanding of the type of claims included in the waiver; or (2) provide that, by signing, the consumer agrees to arbitrate 'all statutory claims arising out of the relationship,' or any claim or dispute based on a federal or state statute." (Id. at 8).

These two decisions provide some recent guidance on the insistence by the Court in a post-Garfinkel[1] world that contracts with residential homeowners "clearly and unmistakably" explain that the homeowner is waiving statutory claims. Homeowners with potential claims must carefully evaluate the options, including the ramifications of first proceeding under a warranty. For their part, builders/developers must carefully word their contracts in order to deal with this developing law.

[1] Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124 (2001).