

ORC Chapter 4722 and Home Construction Services Contracts: Attempting To Level The Playing Field

by Bryan L. Jeffries



Ohio Revised Code Chapter 4722 (“ORC Chapter 4722”) no longer subjects home construction services contractors to stiff penalties when dealing with a consumer, such as triple damages and attorneys’ fees, which were available under the Ohio Consumer Sales Practices Act (“CSPA”). However, not all home construction services contracts are exempt from the CSPA. As shown below, in order for ORC 4722 to apply to take the transaction out of the operation of the CSPA, the contract must exceed \$25,000 and be performed by a “construction service supplier” carrying at least \$250,000 in liability insurance. For these reasons, residential contractors need to understand the requirements and prohibitions of ORC Chapter 4722.

The CSPA Before the Enactment of ORC Chapter 4722

In convincing the legislature to take certain home construction services contracts out of the operation of the CSPA, advocates of the new ORC Chapter 4722 successfully argued the CSPA was not designed for home construction or remodeling. The CSPA was originally designed to protect a consumer from predatory and unscrupulous practices of sellers of consumer products, auto mechanics, furnace repairmen, and the like.

For example, the CSPA requires almost immediate estimates, which was designed for getting an estimate for car repair, furnace repair or something that could reasonably be estimated over the counter. This is not practical in residential construction where designs need to be drawn, materials need to be priced and prices need to be obtained from subcontractors. Therefore, contractors argued that construction did not always fit the elements of the CSPA.

Courts, however, have viewed the CSPA and residential construction differently. Since the Green County Appellate Court’s decision in 1993 in *Keiber v. Spicer Constr. Co.*, many courts have applied the CSPA to residential construction. To contractors, ORC Chapter 4722 is a welcome respite from the potential liability contained in the CSPA.

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ORC Chapter 4722

ORC Chapter 4722, effective August 31, 2012, imposes new requirements and prohibitions upon residential contractors, some of which are similar to those found in the CSPA. ORC Chapter 4722, like the CSPA, provides certain definitions to determine its applicability, and applies to what are defined as “home construction service contracts.”

ORC Section 4722.01(D) defines a “home construction services contract” as: “...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.” The contractor or remodeler is referred in this new statute as the “supplier” or “home construction service supplier,” which is defined as “...a person who provides 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.” If the contract exceeds \$25,000, then ORC 4722 requires the contractor to carry \$250,000 in insurance coverage. This is a new requirement not found in the CSPA.

Residential contractors should read through ORC Chapter 4722 very carefully, and ensure the contracts they use comply with these statutes. For example, each contract must contain specific language pertaining to excess costs (unless the contract is a cost plus contract):

“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”

A construction service supplier also may not condition any service on a consumer waiving any rights under ORC Chapter 4722. So any waiver provision under the contract must be revised.

Like the CSPA, ORC Chapter 4722 is full of references to prohibit deceptive conduct, which range from misrepresentation of what is safe, what building codes require and to disclose and proactively obtain approval on cost increases. Most importantly, these provisions requires that all work be done in a “workmanlike manner.” And under ORC Chapter 4722, the Ohio Home Builders Association is to promulgate minimum quantifiable standards to define what workmanlike manner means. This standard is different than that found under cases decided in Ohio, which fairly consistently define workmanlike manner by standards of similar professionals in the community, toward a statewide standard.

Residential contractors must also be aware of the protections for consumers provided by ORC Chapter 4722 that are very similar to the CSPA. For example, ORC Chapter 4722 allows investigations and remedies by the Attorney General. In addition, ORC Chapter 4722 permits consumers to elect between an action for rescission of the transaction within a reasonable period of time, plus economic damages not to exceed five thousand dollars (\$5,000), or an action to recover all economic damages.

ORC Chapter 4722 also allows a consumer to pursue an injunction to prevent violations of these statutes. Any such actions will not prohibit the consumer from pursuing any cause of action under any other theory of law. Attorney fees could be awarded to the consumer if the home construction service supplier knowingly has committed an act or practice that violates ORC Chapter 4722, but also could be awarded to the supplier if the owner maintains a groundless action under ORC Chapter 4722 or in bad faith.

In order to avoid liability, residential contractors must comply with the requirements and prohibitions found in ORC Chapter 4722. To do so, they must be familiar with each of its provisions.

For questions on ORC Chapter 4722, or advice on other construction law issues, please feel free to contact [Bryan L. Jeffries](mailto:bljeffries@eastmansmith.com), chair, Construction Law Practice Group, at 614.564.1449, or bljeffries@eastmansmith.com.

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