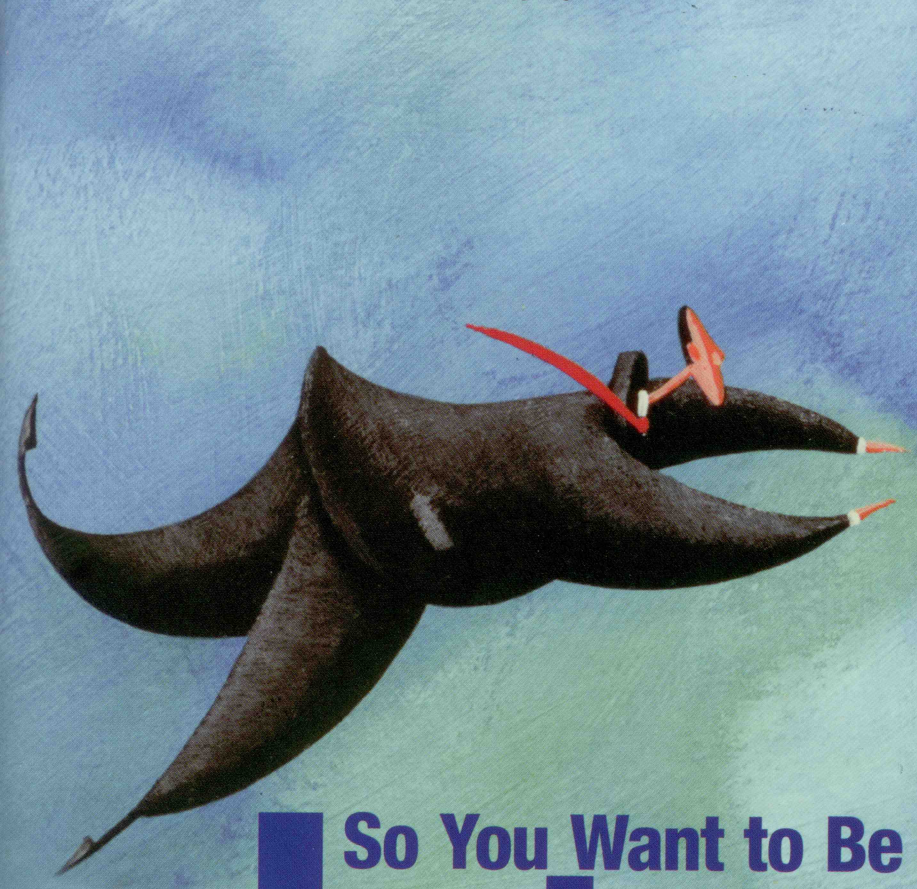
ILLINOIS BAR
JOURNAL
September 2010
Vol. 98, No. 9 ■ www.isba.org/ibj
The Magazine of Illinois Lawyers



So You Want to Be a Judge?

Page 456

THE NEW, IMPROVED HOME REPAIR AND REMODELING ACT

By Adam B. Whiteman

ISBA-inspired changes to the Home Repair and Remodeling Act clear up confusion caused by conflicting cases – and make the law fairer to contractors – by specifying that a homeowner's remedy for an HRRA violation is to sue under the Consumer Fraud and Deceptive Business Practices Act.

The Home Repair and Remodeling Act ("HRRA") was enacted 10 years ago to protect consumers from unscrupulous contractors. Unfortunately, ambiguities in the Act produced a bewildering array of conflicting appellate decisions that left contractors, homeowners, and their lawyers without clear guidance.

The problem: the HRRA as originally drafted failed to specify a clear remedy for its violation. It also characterized a contractor's failure to comply as "unlawful." That had the unintended effect of leading some courts to rule that any violation, no matter how minor, barred a contractor from seeking compensation or asserting any mechanic's lien for his work.

In an effort to untangle the confusion and make the act fairer to contractors, members of the ISBA Real Estate Law Section met with the Illinois Attorney General's Office to discuss the remedy provision of the Act. Ultimately, the consensus was that a private citizen's remedy for a violation of the HRRA should be found in the Consumer Fraud and Deceptive Business Practices Act. The result was an amendment to the HRRA implementing that change, which was enacted last July.

This article briefly discusses the original HRRA, takes a quick look at the

Adam B. Whiteman, of Whiteman Law Offices, Inc, <AdamWhitemanLaw@aol.com> maintains a practice in Chicago, where he concentrates on real estate law and civil litigation.

confusing cases it generated, and describes the amendment that, drafters hope, will fix the problem. It also includes some HRRA tips for lawyers who represent contractors.

HRRA fundamentals

The Home Repair and Remodeling Act[1] ("HRRA") is a consumer-protection statute passed because "[t]he General Assembly recognizes that improved communications and accurate representations between persons engaged in the business of making home repairs or remodeling and their consumers will increase consumer confidence, reduce the likelihood of disputes, and promote fair and honest practices in that business in this State."[2] It applies to a broad range of contractors performing work on single-family homes or multiple-family dwellings containing six or fewer units.[3]

The HRRA requires contractors to meet a number of requirements and make various disclosures to home repair and remodeling consumers. For example, before initiating home repair or remodeling work for over $1,000, the contractor must give the customer a written contract or work order.[4] Also, the contractor must get consumers' written acceptance or rejection of any contract provisions that require them to submit disputes to binding arbitration or waive a jury – otherwise those provisions are void.[5]

Further, if the contract requires payment over $1,000, the contractor must give customers a copy of the "Home Repair: Know Your Consumer Rights" pamphlet and sign an acknowledgement that he has done so, as must the consumer.[6] The contractor must also meet certain insurance requirements.[7]

Prior to the recent amendment, the HRRA declared it "*unlawful* for any person engaged in the business of home repairs and remodeling to remodel or make repairs…before obtaining a signed contract or work order over $1,000, and before notifying and securing the signed acceptance or rejection, by the consumer, of the binding arbitration clause and the jury trial waiver clause…"[8]

An enforcement provision in the HRRA empowers the attorney general to enforce it through penalties provided for in the Consumer Fraud and Deceptive Business Practices Act.[9] While no private remedy was specifically mentioned in the original HRRA, section 505/2Z of the Consumer Fraud and Deceptive Business Practices Act ("CFDBPA") provides that "[a]ny person who knowingly violates…the Home Repair and Remodeling Act…commits an unlawful practice within the meaning of this Act."[10]

Section 10a of the CFDBPA further provides that "[a]ny person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper."[11]

The split in the district courts

Starting in 2007, Illinois appellate court districts began issuing diverging decisions about how the HRRA should be applied.[12] The scope of these decisions is reflected in the following discussion.

No payment for noncomplying contractors. In *Smith v Bogard*, the fourth district determined that a contractor who fails to provide a written contract and consumer pamphlet as required under the HRRA is "precluded from recovering any amounts he claims due for work performed," whether for breach of contract, unjust enrichment, or quantum meruit.[13]

Likewise, in *Roberts v Adkins*, the court determined that "when 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."[14] In this line of cases, the courts look to the term "unlawful," which, as is discussed above, appears in section 30 of the HRRA to describe conduct by a contractor that violates the HRRA. These courts reason that a contractor should not recover money for unlawful conduct.

The opposing, no-strict-liability view. The strict liability imposed by *Smith* has not been applied by some other courts. In *K. Miller Const Co, Inc v McGinnis*,[15] the first district barred a contractor (who failed to provide a written contract and a consumer pamphlet) from recovering under its mechanic's lien. However, the court allowed the contractor the right to recover under a theory of quantum meruit. A petition for leave to appeal in this case has been granted by the Illinois Supreme Court.

In *Behl v Gingerich*, the fourth district backpedaled from *Smith* and held that "substantial, rather than strict, compliance" with the HRRA was sufficient to permit a contractor to recover for services rendered.[16]

Finally, some courts opined that the proper remedy for a violation of the HRRA is in the CFDBPA, under which consumers can recover only if they prove damages and that the contractor knowingly violated the HRRA. For example, in *Kunkel v P. K. Dependable Const, LLC*,[17] the court ruled that because the plaintiffs did not introduce evidence that they were damaged by the contractor's failure to provide the consumer pamphlet, they had no cause of action.

The amendment removes language that labels a violation of the HRRA "unlawful" and establishes that a homeowner's remedy for an HRRA violation is to sue under the CFDBPA.

The legislative fix

After the *Smith* decision was issued, some feared that its strict-liability approach could effectively bar a contractor from receiving just compensation. If

1. 815 ILCS 513/1 et seq, eff Jan 1, 2000.
2. 815 ILCS 513/5.
3. 815 ILCS 513/10.
4. 815 ILCS 513/15.
5. 815 ILCS 513/15.1.
6. 815 ILCS 513/20.
7. 815 ILCS 513/25.
8. 815 ILCS 513/30 (PA 96-1023 rewrote the quoted material) (emphasis added).
9. 815 ILCS 513/35.
10. 815 ILCS 505/2Z.
11. 815 ILCS 505/10a.
12. These cases are more fully reviewed in Adam B. Whiteman, *The Home Repair and Remodeling Act – Can We Fix It?*, ISBA Real Property Newsletter (Feb 2010), Vol 55, No 4.
13. 377 Ill App 3d 842, 848, 879 NE2d 543, 548 (4th D 2007).
14. 397 Ill App 3d 858, 864, 921 NE2d 802, 808 (3d D 2010).
15. 394 Ill App 3d 248, 913 NE2d 1147 (1st D 2009). See also a brand-new case from the first district, *Universal Structures, Ltd v Buchman*, 2010 WL 2675216 (1st D 2010), which is discussed on page 452 of this issue.
16. 396 Ill App 3d 1078, 1086, 920 NE2d 665, 671 (4th D 2009).
17. *Kunkle*, 387 Ill App 3d 1153, 902 NE2d 769 (5th D 2009).

a homeowner is satisfied with the contractor's work, why should he or she escape paying just because the contractor neglected to provide a consumer pamphlet? Moreover, the *Smith* court's interpretation of the HRRA would effectively reverse long-settled interpretation of the Illinois Mechanic's Lien Act, which does permit liens based on oral contracts.[18]

In response, a subcommittee of the ISBA Real Property Section met with the Illinois Attorney General's office to explain its concerns about the way courts were interpreting the HRRA. As the court wrote in *Artisan Design Build, Inc v Bilstrom*, "[t]o hold that a failure to provide a consumer with the brochure allows the consumer to defeat all legal and equitable claims by the contractor would lead to mischief and a result the legislature could not have intended."[19]

An amendment was drafted and presented by Senator Wilhemi to the state legislature as Senate Bill 2540. It deleted what was then section 30 of the HRRA and replaced it with the following language: "Any person who suffers actual damage as a result of a violation of this Act may bring an action pursuant to Section 10a of the Consumer Fraud and Deceptive Business Practices Act."

The amendment thus removes the language that labels a violation of the HRRA "unlawful" conduct and establishes that a homeowner's remedy for an HRRA violation is to sue under the CFDBPA. It was signed into law on July 12, 2010, as Public Act 96-1023 and took effect immediately.

The CFDBPA – knowing violation, actual damage required

Under the CFDBPA, a knowing violation could expose the contractor to liability for actual damages suffered by a consumer. In *Kunkle*, the court denied the homeowners relief because they "provided no evidence on the defendants' state of mind in not providing the brochure, and there is no evidence in the record to support a knowing violation of the Home Repair and Remodeling Act."[20]

While proving a contractor's state of mind and damages might be difficult for a plaintiff, this requirement will help to assure that HRRA applies to wrongdoers who are actually trying to defraud a homeowner. This result is more in line with the consumer-protection nature of the HRRA. But homeowners who overcome this hurdle can recover fees under the CFDBPA.

Quantum meruit and mechanic's liens – still available to contractors

Even assuming a plaintiff has proven a knowing violation and damages, the courts will not necessarily deny a contractor fair and just compensation for work the consumer approved and accepted. As is illustrated in the *McGinnis* case cited above, a court may permit a contractor to recover under a theory of quantum meruit even when there is a violation of the HRRA.

In addition, the HRRA is not intended to overturn settled Mechanic's Lien Act law allowing a contractor to assert a mechanic's lien based on an oral contract. The statutes must be construed together, and there is no language in either the HRRA or the CFDBPA requiring automatic invalidation of a mechanic's lien or an oral contract.

That some conduct is unlawful does not necessarily invalidate the contract under which the conduct took place. For example, a builder might violate electrical building codes when erecting a home, but the homeowner can't necessarily use this violation as a basis to refuse payment. Perhaps the electrical problems are easy to fix and insubstantial in comparison to the overall value of the work.

Courts should balance any economic loss against the benefits and improvements the consumer received. They should not reflexively invalidate a mechanic's lien or oral contract in its entirety, but should consider reducing the lien or contract as necessary to achieve a just result.

Even if a homeowner proves his case under the consumer fraud act, courts will not necessarily deny the contractor fair compensation for work the consumer approved and accepted.

Advising contractors in the wake of the amendment

Create a compliance packet. The biggest problem with the HRRA is that few contractors and attorneys know about it. Because a violation can expose a contractor to liability under the CFDBPA, lawyers must teach clients how to comply.

One approach would be to prepare a "Home Repair and Remodeling Act Compliance Packet" for contractor clients. It would include a copy of the HRRA and bullet-point reminders to contractors to, for example, get signed contracts and signatures on any arbitration clauses or jury waiver provisions.

It should also include a sample consumer rights pamphlet in the packet, along with instructions about how to use it. Additional copies of the pamphlet, and copies of the HRRA, are available on the Illinois Attorney General's website at http://www.illinoisattorneygeneral.gov/consumers/consumer_publications.html.

Written contracts, please. Strongly advise your contractor clients to use written contracts even for projects involving work for less than $1,000. In *Roberts*, the contractor sought to escape the HRRA by arguing that the project wasn't supposed to exceed $1,000 but later grew beyond that.

The court ruled that when the contractor became aware that the costs would probably exceed $1,000 he should have gotten a written contract. Also, note that contractors cannot escape the reach of the HRRA by claiming that the work was done on a "time and materials" basis.[21]

Conclusion

Practitioners should keep their contractor clients informed about the HRRA and make sure they use written contracts, distribute the consumer-rights pamphlet,

(Continued on page 489)

18. See Adam B. Whiteman, *Residential contractors (and subcontractors) BEWARE! The Home Repair and Remodeling Act prevents mechanic's liens on a residence when there is an oral contract for work that exceeds $1,000*, ISBA Real Property Newsletter (March 2008), Vol 53, No 9.

19. 397 Ill App 3d 317, 330, 922 NE2d 361, 371 (2d D 2009).

20. *Kunkle* at 1160, 902 NE2d at 776.

21. See *Central Illinois Elec Services, LLC v Slepian*, 358 Ill App 3d 545, 831 NE2d 1169 (3d D 2005).

uct; this is a pretty nice tool to have. Searching in a couple of my areas of expertise, I mostly found the cases I expected to see.

Due to the inherent limitations of a mobile phone, even one as versatile as an iPhone, this is still something that'll be most effective when a specific case is needed when standing outside (or inside) the courtroom. It can't, and won't, replace full-blown research.

But other law-based apps currently available tend to be limited to the Federal Rules and the U.S. Constitution, so this app changes the game at least with regard to what is freely available in a mobile environment. Attorneys will probably find it more useful, however, once they can, for instance, download a case or statute and e-mail it to a client directly from their phone. ■

HOME REPAIR | *Continued from page 464*

and obtain all the appropriate signatures. They should remember that the proper remedy for a violation of the HRRA is in the CFDBPA, which requires a knowing violation and proof of actual damages.

Assuming a violation, the final step is determining the appropriate remedy, a task for which the court is granted broad latitude under the CFDBPA. That remedy should reimburse the consumer for his damages – and possibly his attorney fees – while providing fair and just compensation to the contractor for the value of improvements received by the consumer. ■

MAINTENANCE OBLIGATION | *Continued from page 469*

the amount a payor spouse is required to carry every year.[44]

A payor spouse may not change the beneficiary of the policy after the divorce "since the receiving spouse has a vested equitable interest therein."[45] Such a change or a payor spouse's failure to designate the ex-spouse as the beneficiary could result in a contempt finding.[46]

However, courts can modify such orders based on "unforeseen circumstances" such as a payor spouse's future uninsurability or a substantial increase in the cost of maintaining coverage.[47] Moreover, the life-insurance requirement may terminate upon such changed circumstances as "'the remarriage or continued cohabitation of the supported spouse.'"[48]

Conclusion

As a California court wrote, "Life insurance, like an annuity, assures that the supported spouse will not be left without means for support. It is a substitute for support following the death of the obligor spouse."[49]

The fourth district has found trial judges have the discretion to order a maintenance-paying spouse to secure the obligation with life insurance. If Illinois courts are going to have discretion to grant such an order, the question centers on what factors judges must consider when confronted with the situation in a dissolution proceeding. Future consideration by the supreme court or the general assembly will help clarify this area of the law and decide whether every judge in each of the five appellate districts will have the discretion to grant such an order as well as formulate a procedure to determine how that discretion will be administered. ■

44. *Mouw*, 561 NW2d at 102.
45. 27B CJS Divorce § 774 (2008).
46. *In re Marriage of Elies*, 248 Ill App 3d 1052, 1058, 618 NE2d 934, 939 (1st D 1993).
47. *In re Marriage of Morrow*, 53 Wash App 579, 589-90, 770 P2d 197, 202 (1989); see also 750 ILCS 5/510(a-5) ("An order for maintenance may be modified or terminated only upon a showing of a substantial change in circumstances.").
48. *Wooten*, 364 SC at 553, FN5, 615 SE2d at 109, FN5, quoting SC Code Ann § 20-3-130(B)(1).
49. *Tintocalis v Tintocalis*, 20 Cal App 4th 1590, 1594, 25 Cal Rptr 2d 655, 657 (1993).