



CONSTRUCTION PRACTICE & LITIGATION DEPARTMENT

ALERT

PENNSYLVANIA'S HOME IMPROVEMENT CONSUMER PROTECTION ACT

By Adam Silverstein and Julie Goldstein

Pennsylvania recently enacted the Home Improvement Consumer Protection Act (HICPA), which requires contractors to register with the Bureau of Consumer Protection of the Pennsylvania Attorney General (the Bureau) and mandates the form and content of contracts.

HICPA provides a consumer protections above and beyond those set forth in Pennsylvania's Unfair Trade Practices and Consumer Protection law. While HICPA was created to protect consumers from unscrupulous contractors and scam artists, it also places significant burdens, costs and restrictions on every contractor. HICPA will go into effect on July 1, 2009, and all contractors must be prepared to bring their contracts into compliance and to register with the Bureau. Proper legal advice can be critical to ensure contractor compliance.

Who Does HICPA Apply To?

HICPA applies to contractors doing over \$5,000 of home improvement business annually. "Home improvement" is defined broadly to include all of the following:

- A contractor who is engaged in work such as repair, replacement, remodeling, demolition, removal, renovation, installation, alteration, conversion, modernization, improvement, rehabilitation or sandblasting
- Contractors who are involved with the construction, replacement, installation or improvement of:
 - driveways, swimming pools, solar energy systems, pool houses, garages, roofs, siding, insulation,

security systems, flooring, patios, fences, gazebos, sheds, cabanas, painting, doors, windows, waterproofing, installation of central heating or air conditioning, and installation of storm windows or awnings

Generally, HICPA does not apply to landscaping services, unless the landscaper is involved in the construction, replacement, installation or improvement of any of the above. Specifically, landscapers will fall within the purview of HICPA if they are involved with lighting systems, non-decorative fences, concrete walkways, windows, doors and the installation of retaining walls, fountains or drainage systems. It is likely that HICPA will apply to landscapers, as many landscaping businesses perform a variety of the above services for their customers.

Who Must Register With The Bureau?

Contractors who do more than \$500 worth of work for a consumer in their home or on the land surrounding their home must register with the Bureau.

The definition of those who must register with the Bureau is quite broad. If a contractor performs any of the work described above, it is required to register individually and as a business.

Who Does Not Need To Register With The Bureau?

Despite the expansive definition of "contractors" who must register with the Bureau, there are some exemptions. For example, any individual that sells his services for commercial or business use is exempted from the

registration requirement, as is new home construction. In addition, someone who sells appliances, such as stoves, refrigerators, freezers or room air conditioners, is not required to register. Finally, a home improvement retailer that has a net worth of more than \$50,000,000, such as Home Depot and Lowe's, does not need to register with the Bureau.

Registration Requirements

An individual, general partnership, corporation, limited liability company and limited partnership all have relatively the same registration requirements. An applicant must provide: names, home addresses, telephone numbers, driver's licenses numbers, social security numbers, and all prior business names and addresses of the home improvement businesses operated by the individual or each partner, officer, manager, etc. HICPA provides that the personal information of the contractor shall not be disclosed to the public, and a home address and telephone number will only be released to the public if the contractor uses home contact information for the business.

HICPA also requires each applicant, whether it be an individual or a company, to provide a complete description of the nature of the business and provide a statement which lists whether he or the company has ever been convicted of a criminal offense relating to a home improvement transaction, fraud, theft, deception or fraudulent business practices. Furthermore, each applicant must disclose any final civil judgments entered against it relating to a home improvement transaction in the last 10 years, or whether it has ever filed for bankruptcy.

A concern for any contractor is the potential for having to report even the smallest judgment, regardless of the reason entered. Obviously, in evaluating the costs of litigation or settling claims, a contractor must now weigh the risk of being legally required to report a judgment, which will remain on file with the Bureau.

HICPA also requires an applicant to disclose whether a certificate or similar license issued by another state or township was revoked or suspended by a court. This provision of HICPA extends to any other business in which the applicant has ever had an interest, and is not limited to a home improvement business. In addition, an applicant must inform the Bureau whether they are registered in another state, and if any disciplinary action has occurred in that state.

HICPA also mandates that all contractors obtain and provide proof of liability insurance covering personal injury

and insurance for property damage in a minimum amount of \$50,000.

After complying with each of the registration requirements, an applicant must renew its registration every two years.

Once a contractor has complied with all of the registration requirements, paid the \$50 fee and obtained its registration certificate, its work is still not done. Based on the requirements of HICPA, a contractor will in all likelihood be forced to rewrite all of its contracts prior to July 2009.

Contracts Must Comply With HICPA

By July 1, 2009, all contracts that do not contain the specific requirements of HICPA will be VOID. Therefore, if the form of contract a business has been using does not contain required information, it must be revised.

HICPA requires that every contract:

- Contain the approximate starting date and completion date of the work. This provision is very important and places an added burden on the contractor to be both reasonable and accurate in providing start and completion dates.
- Include a description of the work to be performed, the materials to be used and a set of specifications. Most importantly, these specifications cannot be changed without a written change order signed by the owner and the contractor. This creates an added burden on the contractor to ensure a written change order is executed for any change from the original contract.
- Include the names, addresses and telephone numbers of all subcontractors on the project. However, HICPA only requires information of subcontractors that are known as of the date of signing of the contract.
- State that the contractor agrees to maintain insurance and identifies the current amount of insurance maintained at the time of signing the contract.

In addition, the contract must also contain these basic requirements:

- Be legible, in writing, and include the registration number of the contractor
- Be signed by the owner of the home, agent or other permitted person and the contractor or a salesperson of the contractor

- Constitute the entire agreement
- Contain the date of the transaction
- List contact information of the contractor
- Include the total sales price due
- Include the amount of any down payment plus, listed separately, any amount advanced for special-order materials.

A copy of the contract shall be provided to the consumer at the time it is signed.

While most contracts in use likely contain some of the required provisions, a contract must now include the toll-free telephone number for the Bureau and a notice of the Right of Rescission providing that a consumer can rescind the contract within three business days of signing the contract.

HICPA provides further requirements that will require contractors to reprint all of their agreements. If a contractor includes an arbitration clause in a contract, the clause must be in capital letters, 12 point, bold face type, and on a separate piece of paper. Further, it must state whether the arbitration is binding or can be appealed, and whether the arbitration will be deemed confidential. It must also contain a separate line for each of the parties to sign and date. All of the items required by HICPA must be present or the arbitration clause can be voided by a consumer.

Voidable Clauses

HICPA also provides a list of provisions, which if included in the contract, will give a consumer the ability to void a contract. The most important provision of this section of HICPA prohibits a contractor from including in a contract a provision allowing for an award of attorney fees and costs. HICPA has legislated away a contractor's right to privately contract with its customers for the ability to obtain attorney fees and costs if a lawsuit is commenced. However, while the contractor has lost a significant piece of leverage in pursuing claims, the consumer still has the ability to receive an award of attorney fees and costs, as well as treble damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Therefore, it is recommended that a contractor obtain legal advice to determine other ways to protect its interests.

Big Box Retailers

While a "Big Box" Retailer, a home improvement retailer having a net worth of more than \$50,000,000,

does not need to register with the Bureau, its contracts are required to contain many of the same provisions as required of all other contractors. More than likely, Big Box Retailers will be required to change their contracts to comply with the HICPA.

A Big Box Retailer's contract must contain:

- Name, address, and telephone number of the retailer
- Name of the person signing on behalf of the retailer and the position within the retailer or their authority to sign the contract
- Signature of the owner
- Entire agreement
- Date of transaction
- Approximate starting date and completion date
- Description of the work to be performed, materials used and specifications, which cannot be changed without a written change order
- Total sales price due
- Down payment plus any amount for special materials
- Right of Rescission
- Arbitration Clause requirements

The Big Box Retailer also may not include a provision that it can obtain an award of attorney fees or costs.

The legislature left a silver lining for contractors after taking away their right to recover attorney fees. Contractors may still recover on an unjust enrichment or *quantum meruit* claim. This is small recompense to contractors in light of consumers retaining leverage to threaten a claim for attorney fees under the Unfair Trade Practices and Consumer Protection Law.

If the various restrictions created by HICPA do not make a contractor squeamish enough, HICPA has also created both civil and criminal offenses for home improvement fraud.

Civil And Criminal Violations

The definition of what is home improvement fraud is what typically would be expected: misrepresenting the true name of the salesperson, contractor or business; damaging a person's property with the intent to induce the consumer into purchasing home improvement services; misrepresenting the cost of materials; altering an agreement, mortgage, etc.; or publishing a false advertisement. However, receiving an advance payment

for home improvement work and failing to complete the work when specified in the contract and not returning the payment, is now defined as home improvement fraud. As with any new piece of legislation, there is uncertainty as to the interpretation of certain provisions. However, a contractor should prepare itself with the proper advice to prevent even inadvertent violations of HICPA.

Criminal Violations

Committing home improvement fraud can be prosecuted as a misdemeanor or a third-degree felony. If the victim is 60 years old or older, the grading of the offense will increase. HICPA also gives a court the ability to revoke or suspend a contractor's certificate. If revoked, a contractor can only petition the court for reinstatement after five years have elapsed. Needless to say, the punishment created by HICPA is intended to be severe so that contractors strictly follow the letter of the law.

Civil Penalties

In addition to the registration and contractual requirements imposed, HICPA expands the Unfair Trade Practices and Consumer Protection Law to provide for additional prohibited acts that will give rise to a civil action by consumers.

A contractor is required to fully refund any amount paid by a customer within 10 days after it receives a written request for refund if 45 days have passed since the work was to begin, and no substantial portion of the work has been performed. A contractor is also in violation of the Unfair Trade Practices and Consumer Protection Law if it materially deviates from plans or specifications without a written change order that contains the price change for the deviation. This is very important. It is common practice for many smaller contractors to verbally change certain specifications on a small project. However, if any change in the plan, specification, etc. of the project is made, a written change order must be executed. This may turn out to be a common way for a contractor to unknowingly violate HICPA.

Another important expansion of the Unfair Trade Practices and Consumer Protection Law holds that for a contract of more than \$1,000, the contractor cannot accept a deposit in excess of 1/3 of the contract price, or 1/3 of the contract price plus the cost of special order materials.

The Lesson = Be Prepared

HICPA attempts to protect consumers from unscrupulous contractors. However, in doing so it places a heavy burden on contractors, large and small. First, it is very important that all contractors register with the Bureau. The Bureau will have forms available both electronically or in hard copy. Due to the broad scope of the registration requirements, and the need to provide a statement containing information about your business and past dealings, it will be helpful to have an attorney review your registration filings.

Equally important as the registration filings, will be the need for every contractor to revise their contracts. There are many technical requirements that must be satisfied to ensure a contract will be valid and binding. It would be advisable to have counsel review all contracts to ensure compliance with HICPA, and avoid the contract being deemed VOID by a dissatisfied consumer.

Furthermore, keep in mind that attorney fees and costs may no longer be recovered by a contractor in an action against a consumer that fails to pay. This issue needs to be taken into consideration when discussing HICPA with your counsel.

Due to the harsh penalties imposed by HICPA, contractors may want to have their contracts reviewed by an experienced attorney. Fox Rothschild LLP is a full-service law firm capable of assisting contractors to ensure compliance with HICPA.

If you have any questions on HICPA, contact Adam Silverstein at 215.918.3611 or asilverstein@foxrothschild.com, or Julie Goldstein at 215.918.3558 or jgoldstein@foxrothschild.com.



Fox Rothschild LLP
ATTORNEYS AT LAW

© 2008 Fox Rothschild LLP. All rights reserved. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.