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IT'S A NUMBERS GAME:

The Florida Building Code Cycle Shift

Top Nine Kitchen Trends for **2016**

NAHB Housing Forecast



TORT

is a four letter word

BY James Leach *CEO, FHB Insurance*

If you believe litigation is your friend, then I have some land to sell you South of the Everglades. Here are some concepts you should be familiar with as a Residential General Contractor, from a legal and risk management perspective. Solid contracts can shield you from tort claims.

Being a homebuilder is a great profession; building what is many people's most valuable and treasured asset. It's an entrepreneurial business. It can be very lucrative.

However, when something goes wrong, homeowners can become very emotional, even angry. They may call the builder. They may call their lawyer. And things do go wrong.

The court system is filled with construction defect liability cases.

Decks collapse, residents and guests get injured. Soil movement leads to 80 percent of construction defect claims and these claims usually happen many years later (80 percent of these claims are more than 3 years after completion of construction).

Decades ago, the law for homebuilders was Caveat Emptor, buyer beware. In their infinite wisdom, courts around the country decided this was unfair to the innocent consumer. The homebuilder is the expert and should be held to a higher standard.

The playing field was not level.

Courts inherently do not like such an imbalance. So, state by

state, courts responded with implied warranty laws: court cases demonstrating that homebuilders must impliedly warrant that a home built for a homeowner is free from defects, typically from the substantial completion of construction, until the expiration of the Statute of Repose. The law has now become Caveat Venditor - builder beware!

In Florida, which has a 10-year Statute of Repose, key court cases, such as Conklin v. Hurley, 428 So.2d 654 (Fla.1983), rejected Caveat Emptor in favor of the doctrine of ►



implied warranty. A Homebuilder impliedly warrants that his newly constructed home is habitable and built in a workmanlike manner. The purchaser is not in an equal bargaining position. The builder has special skills and knowledge, and the consumer has the right to expect that a home will be free from substantive structural defects. (This is a generalization, mostly referring to single family dwellings. The laws can get more complicated for Condominiums).

Implied warranty laws, by definition, lead to tort claims. Tort - negligence leading to damages or a loss - means court, lawyers, time, and expense.

Here is the good news. You can avoid and prevent/deflect tort claims with solid contracts.

A homebuilder can replace the implied warranty laws with a written warranty contract, and a home builder's thought process should start here. Unfortunately, some builders will try to create a warranty themselves. I have seen many of these that will not be effective: one-page, one-year warranties. There is a very good chance that a court would view a one-sided document as ineffective and thus, would throw this out in favor of the law of implied warranties. In fact, you can probably count on that.

A written warranty is important and the structural defect exposure can be transferred to that document; the risk assumed by the warranty provider's insurer. Just be careful this is done right.

But wait – there is another contract with the homeowner; the Purchase/Sales agreement. Be sure that the dispute resolution for both documents is the same (binding

arbitration). If there is inconsistency between the sales agreement and the warranty, conflict could open the door to litigation.

Then, there are the subcontractor agreements. Many are very professional; done by fine lawyers; and protect the general contractor. However, many are inadequate contracts in several key areas: indemnification; insurance; waiver of subrogation; dispute resolution; etc. And, it still amazes me that some areas generally do not use subcontractor agreements. "I've been using cousin Bruce as my roofer for 20 years; never had a problem. I'm not going to change that now and make him sign a contract. He'd just quit on me and go bird hunting." When something goes wrong you need contract protection, not a handshake. You need to be sure the liability is picked up by the right party and, often, that is the work of the subcontractor. The appropriate party's insurance should respond.

Finally, the fourth contract to protect you is a General Liability Insurance Policy. It is very important that all four of these contracts work closely together. This will provide the best protection from the implied warranty laws. For example, which contract is primary: your warranty or the General Liability? Use care too, to avoid contract loopholes such as 'faulty workmanship' exclusion, which is a controversial area in the courts where half of states require faulty workmanship to trigger coverage under a General Liability policy. I note here, it's not just the General Liability Contract that needs close attention from a professional. Many warranty companies will exclude claims from Soil Movement. Really? That's where over 80 percent of the claims will come from.

In summary:

1. Courts are in the business of compensating victims. There is a good chance they're on the side of the consumer.
2. Most states have implied warranty laws; court cases putting a bull's-eye on the back of the professional - the builder.
3. Contracts can avoid tort claims.
4. Binding arbitration is preferable to tort litigation. Unless you love paying lawyers. Mediation is fine, but it is usually not binding.
5. There are FOUR key contracts that should be the focus for every builder: Warranty, Purchase/Sales Agreement, Subcontractor Contracts, and General Liability Insurance Policy.
6. Statute of Repose is 10 years in Florida.
7. Beware of exclusions in your GL and Warranty contracts. Some companies care more about guarding their assets and less about protecting yours.
8. Deal with professionals who know your business. Insurance agent with expertise in construction; warranty risk management specialist; and your lawyer.

Homebuilding is a great profession. You can build assets and net worth. Be sure to protect them.

James Leach, CEO of FHB Insurance, has given numerous seminars in the area of contracts and tort. He is a licensed insurance agent, attorney, Airline Transport Pilot, Flight Instructor and graduate of Duke University. He received his MBA long before his JD; so he's on your side.