

Scribbles Squibs #29 (August 22, 2014):*

PROTECTING HOMEOWNERS WITH THEIR MASSACHUSETTS HOME IMPROVEMENT CONTRACTS

By Attorney Jonathan Sauer

I. INTRODUCTION:

One of the more difficult things we have to do as construction lawyers is to deal with homeowner claims as to Massachusetts Home Improvement Contracts (Contracts). The home improvement contractor will be referred to as the HIC. And, the various laws and regulations regulating HIC shall be referred to as HICL.

There are a number of factors leading to these difficulties. This might be the first time the homeowner has had to deal with a 'legal' thing (wills and divorces aside). The homeowner knows nothing about construction, whether with regard to the technical aspects or the contractual aspects. The homeowner might not have as many rights as he or she would have thought when proceeding with a poor contract or no contract at all. And, by the time the problems arrive at the lawyer's office, many of the things that haven't been done or which were not done properly can tie our hands as to what we might do (or want to do) to help the homeowner.

2. THE MODEL HOME IMPROVEMENT PROJECT USED IN THIS ARTICLE:

For the purposes of this article, we are assuming that the construction project is sophisticated, involving a general contractor and various subcontractors with a cost in excess of one hundred thousand dollars. Our model (Model) for this article will be adding a second floor to a one floor house. While this Model is based on an actual project I have been involved in, I'll change it a bit as I have a literary license!

Here is where I typically get involved with these disputes. I'll hear from a homeowner. The job is near the end. There is still a substantial list of items not done. There are claimed damages of 50k to 60k in terms of items the contractor has failed to complete or has otherwise damaged. In this case, the first 'contract' was drawn by the bank providing financing and only minimally even addresses contractual issues. It contains no reference to plans and specifications or the scope of work or even what the total price of the construction will be. It is not signed by the contractor. Essentially, this agreement is primarily a 'draw' agreement between the borrower and the bank and little else. The second 'contract' is labelled as an 'Estimate of Repairs', which is kind of a contractor's rather unusual proposal, which contains specific items of work to be performed in very general terms, this list of things to be done being individually monetized.

Neither 'contract' is a Contract or even anything remotely resembling a Contract. Neither document accurately describes what work will be done, the quality of the materials

which will be used, when the job would be commenced and completed and, possibly, even provide for firm pricing. No other contract documents are incorporated (plans, specifications). To add to the confusion, the homeowners purchased some of the materials covered by the 'contract' and even performed some of the items themselves. There were a variety of trade-offs during construction, many of which are insufficiently documented.

The contractor left a piece of heavy equipment for a period of time in the backyard and caused some site damage. In addition, another piece of equipment was run over a stone wall in the front yard and damaged a portion of a wall. A promised AC compressor for the second floor was never installed and the AC for the first floor has stopped working. There are numerous defects, some rather minor, some more substantive. There are two small children in the house and the condition of certain aspects of the incomplete construction may be dangerous for them (e.g. holes in walls, holes in floors, access panels with no doors on them).

The contractor, who shows up intermittently, sometimes as late as 11pm, is threatening a lien (he thinks he is owed money) and our sense is that some of the subs have not been paid, which makes them potential lienors. Since they aren't getting paid, no one is actually working at finishing up their work.. Moreover, there may be binding arbitration in the contract and long-standing readers know I loathe arbitration. And, of course, the bank financing insists that the construction be done by a certain date: otherwise, the remaining financing might be withdrawn. The job was already past that date by the time I first met the homeowners. The homeowners feel helpless and don't know what to do. The job looks like it will never get completed, although this family can live in the house even in its present condition. And, of course, the homeowner's finances are minimal at best, insufficient to correct and complete the project and probably insufficient to maintain any sustained litigation.

3. SOME RESIDENTIAL CONSTRUCTION SERVICES MAY NOT NEED SOME OR ALL OF THE STEPS THAT FOLLOW:

Now, moving away from the Model, certain home construction will not need any, many or all of the various steps set forth below to try to help homeowners not get into these situations. For example, hiring a 'window replacement' contractor will not require the various steps suggested here. Similarly, having your driveway repaved will not probably require all of the steps which follow. This writer recently fenced in his front yard so there would be another place for his dogs to run. I got two proposals from two companies and signed a simple contract which is typically just counter-signing the contractor's proposal. The various steps which follow were not followed and were not necessary.

4. NECESSARY INFORMATION AND STRATEGIES TO HELP HOMEOWNERS HAVE A MORE SUCCESSFUL RESULT:

I. Before you even begin soliciting bids for your Contract, educate yourself about the process and the substance of Massachusetts Home Improvement Contracts before you enter into a significant home improvement contract.

Initially, the word ‘significant’ is going to depend on what level of construction you are contemplating and the state of your finances.

On the high end, I was involved with a dispute where the contractor (not apparently an HIC) had worked on a relatively small amount of new construction and renovations to an existing house (as compared with the bills) where the homeowner has paid the HIC literally millions of dollars to date. And, more than four years after construction began, there is no end in sight in terms of when the job will be done and how much more it is going to cost. Periodically, the HIC hands the homeowner an ‘Estimate’ of the remaining items of work, identifying items with cost figures. But, work can’t be tracked from one Estimate to the next Estimate in terms of money because no percentage of completion is ever actually given.

On the lower end, I have been involved also with a dispute where the total amount of the homeowner’s claims are probably no more than twenty-five thousand dollars. But, they are so complex in terms of how many of them that there are and the construction inadequacies for each that litigating the issues would most likely exceed the amount in question. And, having been sued, the HIC would undoubtedly file a counterclaim against the homeowners were a suit to be filed.

These difficulties confront many kinds of people. A recent call concerning a home improvement project involved two homeowners, each of which is a lawyer, but not involved with construction law.

Let’s face it. For those of you who don’t work in construction, this is not what you do. Yet, you are about to embark on a process that is probably going to take longer than you think it should and cost more than you thought it would cost before you got started. The headaches are something encountered along the way. It may be poor solace but at least no one is charging you for them! And, if you don’t have the ability to move into a hotel during construction, you still have to keep your family functioning amidst all of the mess, confusion and lack of privacy.

So, what’s the first step? The first step is to educate yourself to the process, which won’t take long and which will largely involve your reviewing some free materials. For example, on a State website, there is a ‘model’ form of sample Contract, which the State encourages you to use. In all of my home improvement cases to date, I have yet to see this form used! This form gives you a lot of the key things you need to have understandings on with your contractor before you start construction. The form can be found at <http://www.mass.gov/ocabr/docs/sampcont.pdf>. For our readers’ convenience, we attach a copy of this sample Contract to the end of this article.

A first thing to know is that typically the HIC prepares the contract. So, if you are asked to sign a contract that doesn’t look a lot like the one attached to this article, this is not a favorable start.

These are some of the advantages that the model form gives you. The HIC has to describe what work he will be doing for the homeowner. That description is supposed to include the “type, brand, and grade of materials to be used”.

So, let’s take just one ‘material’ that might be used – windows – and see why a contract just stating that a ‘window’ will be installed in a certain place with no technical specifications is insufficient. Is the window made of vinyl or of some other material? Some windows are vinyl over wood. Is the window single pane or triple pane? Does the window have an ‘E’ rating? One ad playing often on the TV comments on how poorer quality windows use more vinyl around the actual glass to provide the strength necessary to support the glass, while better quality windows need less vinyl and provide more glass, providing more light for the homeowner. Does the window come with screens? How long is the window warrantied for? By whom? How long has that company been around?

Without some form of technical specifications or description, the window supplied might be of poor quality, not worth what you are paying for it. It might not work well and may not hold up over the long haul. Or, depending on the specifications, the window supplied might be a Cadillac model, offering weather protection that is going to save you a lot of money on heating the house in the winter, with plenty of light and with built in screens.

Here’s a very practical tip. The greatest cost in building construction is the labor involved to do it. So, let’s take a home roof, for example. The roofer can put up 20 year shingles. Or, he can put up 50 year shingles. The same amount of labor will be expended to do either. If you looked into it, you would see that the disparity in the materials cost between a 20 year shingle and a 50 year shingle is relatively insignificant when compared with the total cost of the job. But, using the better shingles will give you a better house. And, this will be an issue that you won’t have to deal with again for a very long time. And, they will add to the value of the house should you sell it at some point. So, when you are instructing your HIC bidders who will be giving you proposals, ask them to give you two different prices. One would be with using average materials. The second would be with using really good – better - materials. In a lot of cases, the cost difference isn’t that much, particularly when compared with the increased value of the product.

Also, the HIC should provide a date when the work will begin and a date when the work will be substantially complete (sufficiently complete that you can live in the house, although some final contract elements will need doing). The contract should provide a comprehensive payment schedule, indicating what monies you have to come up with and when. There are additional explanatory materials in the sample contract as to your rights to cancel the contract for up to three business days if the contract is signed at your house. The contract tendered should also have attached to it an actual cancellation form for you to simply sign and send in to the contractor. The purpose of this is to protect homeowners from fast-talking salesmen, who perhaps employ some heavy handed sales techniques. They, like car salesmen, always want you to sign the contract *today*. You’ll save a lot of money if you sign the contract *today*.

These few provisions may not sound like a lot. But, many of the ‘contracts’ I see don’t have all of this basic information. And, unfortunately, I find that more than a few of the

'contracts' I look at aren't real contracts at all in that there is no clear scope of work to be performed and no clear amount of money that will have to be paid. Such was the case with the high end homeowner's project described above. Sometimes, the 'contract' is really only a draw agreement from a bank, lacking the scope and cost elements as between the homeowner and the HIC. Keep in mind that the primary purpose of any bank-furnished documents is to establish their lien against your property to support the promissory note you have signed to get the money. The bank's relationship is with you: not with your contractor. The purpose of the bank-provided documents is to protect the bank and no one else.

Apart from the form of sample contract, we have an article on our website going through a 'sample Contract' and providing detailed comments as to the significance of several key provisions, explaining why they are there and what do they mean. This is article number six in our 'Construction Articles' section of our website, www.sauerconstructionlaw.com. And, since mechanics' liens could seriously damage your finances and your equity interest in your home, while you are at my website, you would be well-served to read an article entitled "Massachusetts' Mechanics' Lien Law As Of 2012." This is article 41 in the Construction Articles section of my website. More on the subject of mechanics' liens later.

The State also puts out 'A Massachusetts Consumer Guide to Home Improvement'. This can be found at <http://www.mass.gov/ocabr/consumer-rights-and-resources/home-improvement-contract/a-massachusetts-consumer-guide-to-home-improvement.html>. This is a fairly short summary of a number of things to keep in mind before becoming involved with an HIC.

Lastly, the State puts out a very short 'brochure' on how to hire a contractor. This can be found at <http://www.mass.gov/ocabr/docs/hic/hic-how-to-hire-brochure.pdf>. You can even check through the State to verify that the contractor you are thinking of using is, in fact, a licensed Mass Home Improvement Contractor. And, if he/she is not, why should he/she be working on your house doing a home improvement contract?

If these various resources don't answer your questions, I provide a one-time, free (up to fifteen minutes) telephone conversation to see if I can answer your questions. My contact information is at the end of this article. Please note that since home improvement contract law and real estate law is local, I can only answer questions pertaining to Massachusetts projects and issues. So, out-of-state homeowners, don't waste your nickel!

These resources are out there. Look, you are likely to be spending a *lot* of money on your home improvement project. Your home is your refuge against the world. It's your castle. *It's where you keep your dogs!* One has to fight being impulsive, accepting a proposal from the first contractor you speak with who has an extremely convincing, velvet-tongued salesman. After you have read this article and some of the referenced information sources, you should know the right questions to ask and the right things to look for in an HIC and have a better idea of how to go about getting your home improvement.

The statutory scheme regulating HIC is very complex. Not all projects are covered or completely covered. For example, there typically is no coverage if you buy a completely new

home. And, even for some Contracts where this statutory scheme *somewhat* applies, it will not apply to all trades (subcontractors). The statutes don't typically require licensed trades to enroll in the HIC program, the idea being that the consumer is offered some level of protection because these individuals (such as electricians) can demonstrate a certain minimum level of competency because they have to take specific training and then pass a comprehensive test. Otherwise, many (most) subcontractors are also required to be enrolled in the HIC program themselves. And finding out whether or not your general contractor is enrolled in the HIC program, getting this information might be as simple as looking up your contractor at <http://www.mass.gov/ocabr/licensee/license-types/housing-and-home-improvement.html> to see if he is a registered HIC.

II. Determine whether or not you can *really* afford the construction once the proposals begin coming in.

Early on in the process – before a contract is signed and work commences – the homeowner will typically receive written proposals from potential general contractors.

At this point, the homeowner has to determine whether or not he or she can *really* afford the construction project now that he or she is seeing how much this is going to cost. It is a rare project which doesn't have 'change orders'. (A 'change order' is a modification to a contract which adds both new work and more cost to the contract.) For most commercial and public contracts, an owner will typically have a contingency fund of some amount of money – often ten percent or more – to cover just that: contingencies.

It may be that when the construction starts, the contractor discovers issues with your house that are not immediately evident such as, for example, mold issues in your walls. There may be 'differing site conditions' meaning that the physical site itself is not what it appears to be when the contract was signed. In excavating a foundation, a contractor may discover ledge (rock), which is very expensive to remove. Also, in excavating a foundation, a contractor may discover a higher water table than was assumed when the project was estimated and bid. In many ways, renovation projects – such as a home improvement project – are more complex than new construction because the new construction in the renovation has to somehow seamlessly fit into older, existing construction.

There are any number of changed conditions and differing site conditions which will legitimately add cost and additional time to your project. For our model, you have to assume that there will be change orders. So, to be prudent, you should financially provide for contingencies, whether this is something you advise the contractor of (don't – he'll want to be sure he gets all of it) or not. So, if your HIC will be for one hundred twenty thousand dollars, you should have available, *at a minimum*, one hundred thirty-two thousand dollars (a ten percent contingency) for the construction costs of your home improvement project.

Maybe you won't use any of this contingency. But, frequently, this amount won't be enough to cover the contingencies. You have to expect that there *will* be change orders and provide accordingly.

If your financial resources barely allow you to cover your financial obligations under the proposed base contract, you might be well-advised to wait for the additional construction until you can truly and better afford it. If you run out of money at the end of the job, the general contractor and the subcontractors will probably stop working. And, if they are owed money, they might file mechanics' liens against your house, any one of which could turn into a lawsuit, which can be very expensive.

For our model, other costs may be necessary to best protect your interests with a HIC. Whether or not you hire an architect to design your project, for more complicated projects, an architect should be consulted to at least *review* the contractor's proposal for sufficiency. For our model, engineers may have to be consulted to see if your house's foundation is strong enough to carry the additional weight of another floor.

Having your experienced construction attorney look over the proposal and the proposed contract for adequacy of content and form might save you tremendous expenses and heartache down the road. Paying a small amount for legal attention in the beginning may prevent your having to pay a great deal more for legal attention later in the project.

Some or all of these consultants may have to be consulted with up-front to best protect your interests under your Contract.

At about this point, the homeowner may be feeling simply overwhelmed. But, for our model, some or all of these consultants may be necessary to protect your interests and to ensure that when the construction is done, it works, there are no mechanics' liens or lawsuits and what you got is what you expected to get when you signed the contract. Figuring something into your construction budget for the possible use of these consultants is prudent, particularly for the more difficult home improvement projects. One or more of them are as real a cost for the home improvement project as what you pay the contractor. They'll help keep you out of trouble.

III. **Check your contractor's past project references before you sign the contract.**

In the song 'I Heard It Through The Grapevine' are the following words: "People say believe half of what you see, And none of what you hear". Unfortunately, in many areas of our lives – both personally and with business issues - we encounter deception. Con artists are very good at convincing people to do things.

Before you sign a contract, ask your proposed contractor to provide you with specific references as to specific similar jobs he or she has previously recently done. For our model, we would want some references to other owners who added a second floor to their house. And, contact them and see if they are happy with the job that was done. Ask some questions: Was the contractor responsive? Did he finish when he said he would? Are you happy with the quality of the construction, including the quality of the materials used? Did you have a lot of change orders? You might even want to at least drive by one or more of these projects and see what they look like. If the contractor won't give you references, find somebody else.

We all know in today's day and age that a lot of information is available on the internet. Type in your contractor's name and see what comes up. Also, there are services such as 'Angie's List', which rates local contractors. You may have to become a member to get these services but it is inexpensive to join. (I am a member.) My own experience has been that I am not impressed with 'Better Business Bureau' ratings as something used to evaluate a company. My sense is that I have seen on more than one occasion that an 'A' rating given by the BBB to a contractor didn't match the homeowner's actual experience.

IV. **Other steps to take before you sign a contract and/or allow construction to begin.**

It's always a good idea to get more than one bid. For public building projects, historically, an owner could go out for a new round of filed subbids (certain kinds of subcontractors) if there were fewer than three bidders, the idea being that there isn't adequate competition unless there are at least three bidders.

I just recently added a fence at the front of the house. You see, the dogs had informed us that they needed *two* fenced-in areas, one in front of the house and one in back. Are you willing and able to argue with several pit bulls and a Rotweiler? No? I thought not.

I got *two* bids. One of them, the second guy, was almost fifty percent higher than the first bid. I used the low guy – not always a good idea – because I liked the way the contractor came across. The owner of the company came to my house and told me what he was going to do and what materials he was going to use. He arrived in a pick-up truck with the company name on the side and was dressed in workmens' clothes and looked like he could, himself, start doing the work *right then*. A big burly middle-aged guy. Salt of the earth. He struck me as more competent than the guy who came to the house who was fifty percent higher. The other guy showed up in a car with no company identification on it, wearing a sweater. Since when do construction guys in the Northeast during summer wear *sweaters*? Hello? Let's just say that he didn't look the part.

The job got done when the first guy said it would and there were no added costs. The foreman of the crew did a small piece of additional work that I wasn't even charged for. (It was extra work and I fully expected to pay for it.) Before he did the work, he said he talked with the owner of the company, who reportedly told him: 'No charge. He's paid enough for this job.' (So far) I am happy with the work. I saved the family money. One very *definitely* in my



column!

By contrast, I only got *one* window replacement bid. The salesman had a very lengthy and compelling presentation. But, in thinking about it, he essentially recited a very lengthy spiel

that obviously came out of a very thick notebook sitting open right in front of him. It was clear that he essentially had it memorized. He performed one or two visual demonstrations, such as exposing his window material to extreme heat at the same time doing the same thing to a piece of material from another window manufacturer. You can guess whose material melted and whose material didn't melt. He let me hold a small cross-section of the window to show me how heavy it was. (It was heavy. But, then again, I *am* getting along in years.) But, in thinking back about it, he had no extraneous chatter: 'hey, what *about* those Red Sox?' And, thinking about it *some more*, he didn't maintain any eye contact. At all. He quoted me an astronomical number and then almost immediately started making phone calls to 'his office'. There was a brief pause in the presentation while I was receiving medical attention. (I had hit my head on the table when I fainted.) He told me that he could greatly reduce that enormous number to a number that was only merely excessively and truly large. This presentation seemed like it had been going on for hours. So, I bit. Big deposit. And, while the windows seem to be of high quality, I found out later that I probably overpaid. Maybe by a lot.



Just goes to show you that 'dumb' comes in many different flavors. And, in many different age groups. Favors neither women nor men. Not showing any particular absence in any particular job or profession. Fully appearing at so-called higher levels of academic achievement. *Even among teachers and writers who teach and write about this stuff and are supposed to know better.* Uh, moving right along

If your contractor is not a corporation or a limited liability company (LLC), this is more than some evidence of poor thinking and planning on his part. When one works as a corporation or LLC, typically, the owners and officers and shareholders and members are not liable for their corporation's or LLC's debts. A contractor who is *not* a corporation or LLC - a d/b/a - is risking his own personal assets for every job he does because he doesn't have that extra level of protection that he could have if he worked as a corporation or an LLC. That doesn't make any sense to me. Construction contracting is, by nature, a dangerous activity where many people get injured and even worse.

Checking published fees for the purposes of writing this article, it costs \$275 as a fee to the State to form a corporation in Massachusetts and \$125 to file the required annual report. If four hundred dollars is an insurmountable amount for a contractor *to avoid losing his house*, you would be well advised to consider looking elsewhere. Frankly, this may be evidence of bad judgment. In fairness, it might be some evidence that the owner is a character, of the old school. But, if this individual can't properly look after his own interests, isn't that some evidence of the

fact that he might not take good care of *your* interests? And, this from someone who has already demonstrated that he is fully capable of being *dumb*.

How long has your contractor been in business under his current name? You can also easily find out what prior corporations or LLC's the principal individual at your contractor has had. If he has had several prior corporations or LLC's doing construction work, you might want to consider looking elsewhere for a contractor. People don't usually form new corporations or LLC's to do the same work unless there was some serious trouble with the prior corporation or LLC. This information is readily available at <http://www.sec.state.ma.us>.

You should inquire as to what kind of insurance your potential contractor has. At minimum, he should have some form of general liability insurance, auto insurance and workmens' compensation insurance. Your own insurance agent should be a resource as to advising you of what kinds of insurance you should ask for and in what amounts. No general contractor should work at your house before you have in hand a written certificate of insurance naming you as an additional named insured *not* as a certificate holder. You should inquire as to whether or not the subcontractors who will be used can also produce evidence of being insured and tell him you will require insurance certificates from them, as well. At first read, that sounds like being a bit pushy. But, it's not. He tells a sub to produce a certificate of insurance – which he should want in any event for his own protection – and then to simply add your name onto it. The insurance agent does this; part of his or her job. No big deal at all.

Now, specialty contractors - window replacement, fence installers, roofers, plumbers, painters, electricians - may be in business for thirty or forty years just doing that limited kind of work. For them, that's what they do. But, for general contractors, one has to keep something in mind. Many larger general contractors performing million dollar projects today started off as HIC. As they got good at contracting, they grew and entered the commercial and public markets, which usually offer the promise of higher profits. So, some residential general contractors are relatively new to the construction field, as this is often the first step in a general contractor's business life. This might be something to keep in mind. For our model, we don't want this to be the first second floor this guy has ever done.

Everything that is related to the scope of the work and money should be in writing *before the work starts*. Typically, a contractor will meet with you, look at your house and give you a proposal. This should say what exactly is going to be done, what the total price is, when the work will start and when it will conclude with some discussion of what kind of materials will be used. Receiving a proposal does not mean that you are contractually bound at that point. You only become contractually bound if you sign the proposal as accepted or sign a contract that follows the proposal. Typically, the contract will contain more information than the proposal and has legal significance and is generally binding on both parties. Since this is so, having your experienced construction attorney take a look at the contract before you sign could be very well in your best interests. Things that shouldn't be there might be taken out. Things that should be there might be added in.

A HIC cannot generally ask for more than one-third of the amount of the contract as an up-front deposit. One thing that con men do is promise a cheaper price if they can get a larger

cash deposit up-front. They may tell you that having a larger amount of cash up-front allows them to buy materials more cheaply because they can pay in cash. This should almost always be avoided.

Speaking of materials, for your job, it might make more sense for you to buy directly some of the more expensive materials that may be required for the job. I'm not talking lumber or drywall. But, if you have expensive bath fixtures or custom fixtures that are either expensive and/or are long lead items (not off of the shelf), your buying these directly may benefit you. There are several advantages to doing this. For one thing, a contractor bidding a job generally marks up actual material costs with overhead and profit. So, if the cost of a certain kind of material is one hundred dollars, the contractor may charge you one hundred fifteen dollars. The mark-up provides no added value for the homeowner.

By buying some of the materials up front, especially more expensive materials, fixtures and equipment and for long lead items (you have to wait for the materials, fixtures and equipment to be constructed because they are not off the shelf items), you'll have the advantage of having the materials available for when the construction requires them. Also, for a fixed price contract, if you buy key materials yourself, you might get higher quality fixtures than you would have gotten had the contractor bought the materials. You might even take the 15% you saved (the contractor's mark-up) and use that to buy better materials. Also, by your buying and paying for the materials directly, there might be some cash discount that you could take advantage of. And, at least for these materials, you won't have a mechanic's lien against your property by the supplier of these materials if bought through a subcontractor or the general contractor.

Speaking of mechanics' liens, you should know what they are. (Several articles and *Squibs* on our website discuss these – www.sauerconstructionlaw.com.) This is a kind of good news/bad news situation. The good news is that a homeowner generally has no direct liability to any material supplier to a subcontractor or to a general contractor or, generally, to subcontractors to pay them. From a *contractual* standpoint, the only party with an obligation to pay for a materialman's bill or a subcontractor's bill is the contractor who ordered the materials or signed a subcontract.

However, the bad news is that material suppliers, subcontractors and general contractors have a *statutory* right to file a mechanic's lien against your house for the fair and reasonable value of the materials, equipment and labor they used to perform your home improvement project. Meaning, when someone liens, they are trying to go after your equity (ownership) interest in the property, which can be a serious matter. For one thing, with a proper mechanic's lien, sooner rather than later, the lienor has to sue the homeowner (it's a statutory requirement) to perfect the mechanic's lien. A lot of expense may be involved with that. And, typical mortgage and financing agreements may provide that a homeowner's allowing a mechanics' lien to remain on the title for a period of thirty days or more is a breach of mortgage, allowing the lender to accelerate your note, meaning that the entire amount of the note might become due *now*.

Parties signing contracts in Massachusetts forbidding the filing of mechanics' liens *contractually* do not prevent liens, as such a clause is generally viewed as unenforceable because material men, subcontractors and general contractors have a *statutory* right to file mechanics'

liens. The best way to protect yourself in this regard is to require the general contractor to supply notarized lien waivers with each requisition from itself and from all major subcontractors (say, those subcontractors having more than a five thousand dollar contract value). There is an article on our website addressing some of these issues: “Making Sense of Lien Waivers and Releases”.

Make sure that there are clear warranty provisions in your contract. One year is a typical length of time for a warranty for construction work. During this time, you are typically entitled to the contractor’s coming out and making adjustments and making repairs to items of the construction which aren’t quite right. There are usually more lengthy warranties on various aspects of the construction. Roof shingles are typically warranted through the factory for a period of time of between twenty years and fifty years. Before you release the final payment to the contractor, make sure you have all of the written warranties which go with the new work. If he is supplying a piece of significant equipment – an AC compressor or emergency generator, as examples – make sure you get all of the owner manuals and maintenance manuals which come with that equipment.

V. **Don’t sign an HIC which is not in substantially similar form to the attached.**

If you are offered a different form of contract, probably some bells, alarms and whistles should go off. The requirements in the sample form of contract track statutory requirements. If the contractor you are considering using either is not licensed, doesn’t know what the statutory requirements are or doesn’t *care* to use them, a real question should arise as to why you should use/want to use this person. The sample contract provides for a clear scope of work, the kind of materials that will be supplied, a schedule for completion and all cost elements, which are essential for any construction contract and, in this context, for your own personal financial planning.

VI. **Don’t let the home improvement contractor design the building.**

There is a *tremendous* tendency for homeowners to allow the contractor to ‘design’ the contract work. This occurs for any number of reasons. (Before the trouble hits), the contractor is personable, available and interested in the homeowner’s project. He (or she) seems so knowledgeable, so competent, so friendly and helpful! Also, many homeowners have little or no information or experience concerning construction, the construction process and potential construction issues. Since the contractor seems so much more competent and knowledgeable, it makes sense to let this individual do the design and attend to all of those things the homeowner has little or no idea about.

In addition, with many projects, the homeowner has just barely enough money to do the project. There may be little or no money for an architect or to talk with a lawyer before agreeing to contract terms. And, frankly, it’s simply easier for the homeowner to let the contractor do it all. There’s a bit of lazy in many of us!

Now, before I go any further, I need to let you know that there are certain types of construction contracts where the contractor is also the designer. These are called ‘design-build’

contracts. But, their application is generally on much larger commercial and public projects – often for more than a million dollars - where the general contractors, generally speaking, are much larger than the typical HIC, more experienced, have better technical expertise, more capital, better project management, errors and omissions (malpractice) insurance – and the list goes on and on. This type of contract – the design-build – generally will have **no** application to home improvement contracts.

While a typical HIC may be for less than one hundred thousand dollars, the technical aspects of the work are a microcosm of the complex, construction issues involved with projects costing millions of dollars. Typically, for a larger construction project, it is ‘designed’ by an architect. But, the more technical aspects of a project are designed by an engineer. For example, if one is adding a floor to one’s house, can the existing foundation support the additional weight? This typically would be an engineering question. I recognize that these are extra costs that a homeowner doesn’t want to incur. And, for a project where a contractor is simply replacing existing windows, for example, provided that the company is reputable, neither an architect nor an engineer or a lawyer, for that matter, need be consulted with. But, adding a floor to your one story house is probably a situation where at least an architect should be consulted with.

Now, to *some* extent, the homeowner is given some protection by the fact that the HIC has to get a building permit before beginning work and in some situations that may only be granted by the submission of stamped construction drawings signed by a professional engineer. And, of course, at some point, before the homeowner can legally occupy the new construction, an occupancy permit might have to be obtained from local building inspectors, which can include a general building inspector and specialty building inspectors for trades such as electrical, plumbing and fire protection. But, at *that* time, mistakes in the design or construction may be very expensive to fix, if they can be fixed at all. Mistakes in design concept and execution usually are more obvious during the last phase of the construction process. And, the last ten percent of *any* construction project is the hardest part to get concluded. If the second floor was not put on properly, the homeowner may have gone through a difficult and expensive experience for nothing, unless he/she can get final building occupancy permits.

Your car repair guy may be excellent at what he does. But, you wouldn’t let him take out your appendix. A dermatologist would not generally perform brain surgery. As a construction law attorney, I don’t do wills, divorces or real estate closings. We live in an era of specialization. Being a good contractor does not mean that one has the skills or the training or the licenses of an architect or engineer. A builder builds. An architect designs. An engineer answers the difficult technical questions associated with the design and in supporting the design. For a commercial job, a builder typically works off of plans and specifications that some design professional prepared.

And, one doesn’t ever voluntarily want to let the wolf guard the hen house. Letting the contractor design and build the project is putting too many eggs in a very weak basket. But, in some measure, that is what a homeowner does when he or she cedes building design to the contractor alone.

VII. Get an experienced construction attorney involved earlier rather than later when significant problems appear.

At various times during the construction process, homeowners might need some legal help. For one thing, it might be useful for an attorney to evaluate the tendered contract, typically prepared by the contractor, to measure compliance of the contract with the various HICL. Other aspects of the contract might require tweaking, such as dealing with factors unique to your own house and your own desired home improvement.

The next time during your project you should get a lawyer involved is when it is obvious that there are construction issues and/or issues in the relationship between a homeowner and the contractor. Getting your experienced construction lawyer involved *earlier* may offer some opportunities that may not exist – or, exist as well – when the job is nearly over. For example, the preparation and sending of a C93A letter claiming unfair and deceptive trade practices – under which statute the winning claimant is awarded double or triple damages along with attorneys’ fees – might work in some circumstances. Sometimes sending a general ‘lawyer’s letter’ or a lawyer’s letter threatening termination might achieve some positive response.

One possible remedy that may be available at mid-job when things are not going well is to terminate the contractor and hire another contractor to finish. This is more feasible mid-job because, presumably, the homeowner still has some serious money left on the loan with which he or she would be able to pay the succeeding contractor.

At the tail end of a troubled job, however, by then the homeowner most likely has used up the majority of his/her money. Terminating the contractor at that point is more a litigation strategy at best because if you have no remaining monies, you are not going to be able to pay another contractor to finish or correct the work. At *that* point, the only strategy available to the homeowner might be to pursue the contractor with litigation, which can be very expensive because the process has numerous steps with two years to trial on smaller cases and five to seven years to trial on larger cases and all kinds of required and expensive steps in between for both.

5. CONCLUSION:

This is a difficult, often emotional, subject. Our homes reflect our lives and our memories and are our bastions to protect ourselves and our loved ones against an increasingly unfriendly and chaotic world. But, for various reasons, at times it makes sense to make repairs to our homes and to make improvements to our homes. Quite often, this is a great deal cheaper than simply moving.

Home improvement contracts which will better serve homeowners have numerous issues to be considered and resolved before execution (signing). Following some of the above steps should help to make the process more understandable, hopefully leading to a more effective and less dramatic construction experience for the homeowner.

(Copyright claimed 2014)

* A 'squib' is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a 'squib' as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

Jonathan P. Sauer
Sally E. Sauer
Sauer & Sauer
15 Adrienne Rd.
E. Walpole, MA 02032
Phone: 508-668-6020
Fax: 508-668-6021
jonsauer@verizon.net
sallysauer@verizon.net
www.sauerconstructionlaw.com

This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational and discussion purposes only. Questions of your legal rights and obligations under your contracts and under the law are best addressed to legal professionals examining your specific written documents and factual and legal situations. Sauer & Sauer, concentrating its legal practice on only construction and surety law issues, sees as part of its mission the provision of information and education (both free) to the material suppliers, subcontractors, general contractors, owners and sureties it daily serves, which will hopefully assist them in the more successful conduct of their business. Articles and forms are available on a wide number of construction and surety subjects at www.sauerconstructionlaw.com. We periodically send out 'Squibs' - short articles, such as this one - on various construction and surety law subjects. If you are not currently on the emailing list, please contact us and we'll put you on it.

"Knowledge is Money in Your Pocket!" (It really is!)
(Advertisement)