



# Bar Bulletin

Home > Publications > Bar Bulletin

## **A Perfect Hand: Arbitrating New Home Warranties**

**By Kenneth A. Vogel | September 15, 2016**

### **A Perfect Hand**

What is a perfect hand? The first contracts class taught in law school is the hairy hand case. *Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (N.H. 1929). The jury had to decide if a skin graft which gave the plaintiff a hairy hand was a breach of the doctor's 100 percent guarantee that Mr. Hawkins would have a perfect hand. In the matter of poor Dr. McGee, it was up to the jury to decide if a hairy hand is a perfect hand.

### **A Perfect Floor**

What is a perfect floor? Maryland law requires builders to warrant their new home workmanship against defects for one year. This gives the buyer time to discover items which are wrong or have gone bad, and compels the builder to fix them. By law, systems defects are warranted for two years.

Montgomery County imposes on builders a 10-year structural warranty on new home contracts, which exceeds State law. Many builders elsewhere in the State voluntarily offer an extended 10 year structural warranty. To comply, or if the marketplace demands it, the builder purchases a warranty issued by a third party security program, such as 2-10 HBW, Home Warranty of America or RWC. The third party stands behind the builder in case the builder goes out of business or does not honor its warranty to the homeowner. It also acts as the exclusive dispute resolution arbiter.

Just as automobile warranties provide less coverage over time, so do builder warranties. Your shiny new car might be covered for the first 12 months bumper to bumper. For year two, fewer items are covered. Perhaps just general mechanical problems? By year three, only the engine and transmission are covered.

Home warranties are similar. They take effect beginning in year two when the builder's full warranty expires. Year two covers the house's systems: mechanical, plumbing and electrical. Almost everything else falls away. Manufactured items, such as appliances, are only covered by the manufacturers' warranties. Years three to 10 only provide a major structural defect coverage.

Home warranties have mandatory arbitration clauses. If the buyer feels that his new house has a defect, and if the builder does not voluntarily fix it, the buyer can have an arbitrator decide if the claim is covered. Builders too can demand arbitration. If the builder contends that there is no defect, or that the defect has been repaired, and if the homeowner is not satisfied, then the builder may initiate arbitration so that a third-party, the arbitrator, will determine if a complaint is covered or not. Both parties are bound by the arbitrator's decision.

Arbitration is provided by an independent ADR company which specializes in construction disputes, such as Construction Dispute Resolution Services (CDRS). For homebuyer warranties, the parties are bound by the rules established in the warranty contract itself.

Arbitration is not free. Both the homeowner and the builder pay a fee when arbitration is initiated. This covers the cost of the arbitrator paying a site visit to the residence to meet the parties and discuss the alleged defects. The arbitrator inspects the property and hears testimony from the parties on site. Afterwards, he issues a written award. If there is a defect, the finding is either "yes" a covered defect or "no" not a covered defect. Only specific items identified in the request for arbitration may be considered. If additional items of defects are alleged, another arbitration request must be made, new fees paid and the process begins anew.

For Mr. Hawkins and his hairy hand, a jury had nothing but their experience and common sense to guide them on whether or not his hand was perfect. Fortunately for construction arbitrators, there are performance standards in the home warranty book which define industry standards. The National Association of Home Builders publishes Residential Construction Performance Guidelines. Noncompliance with these construction guidelines calls for corrective action by the builder. Where an item is not described, locally accepted trade practices of the construction industry will be used.

This brings us to our question "What is a perfect floor?" A floor might be concrete, flagstone, marble, slate or ceramic tile. Other flooring materials are found elsewhere in the home. These materials are generally resilient (vinyl); finished wood or carpeting. Every item has a performance standard.

Our homeowner might believe that his vinyl floor was installed incorrectly. But was it? The owner points to visible seams or gaps showing at the joints. Performance guidelines under the builder's 1 year workmanship coverage state "Gaps in excess of 1/32-inch in width in resilient floor

covering joints are deficiencies. Where dissimilar materials abut, a gap in excess of 1/8-inch is a deficiency.” After the first year, there is no coverage for this item at all. At an arbitration site visit, if defects in resilient flooring are claimed, the arbitrator is expected to measure the identified gaps. There is no discretion. Either the item is covered or it is not.

The Hawkins jury used subjective standards in defining a perfect hand. Construction arbitrators have the benefit of objective definitions to guide their decision making process.

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