

OREGON ASSOCIATION OF REALTORS® HOMEBUYER PROTECTION ACT GUIDANCE FOR REALTOR® MEMBERS

House Bill 3539, known as the Homebuyer Protection Act of 2003, became effective January 1, 2004. The Act was intended to deal with the problem of real estate purchasers getting stuck with unrecorded construction liens. The problem has been around for years, mostly in the new home construction industry.

To understand the operation of the Act, it is necessary (or at least helpful) to understand something about construction liens. In Oregon, a person who provides labor, materials or equipment used in the improvement of real property is entitled to place a lien on that property if not paid. The right to lien, used extensively by subcontractors and material suppliers in the new housing industry, attaches to the property when the labor, materials or equipment are supplied. If the sub or supplier doesn't get paid, even if the owner paid the developer or general contractor, they can file a lien on the property. If the property owner doesn't pay off the lien, the lien holder can force foreclosure of the property.

The power to lien real property is extremely advantageous to builders and material suppliers. Like any power, it can be misused and abused. To limit misuse and abuse, the law sets strict notice and filing requirements on those with lien power. In the case of construction liens, the law requires the lien holder to record their lien within 75 days of completing their work on the property or within 75 days of completion of construction, whichever comes first. This provision of lien law creates a 75 day window during which potential liens may not be recorded and, therefore, do not show up on a title report. The Homebuyer Protection Act is designed to protect purchasers during this 75 day window.

The Homebuyer Protection Act applies to all new residential construction. It also applies to a residential property where \$50,000 in remodeling or renovation have been done within 90 days of a sale. If the property falls into one of these two categories, the Act applies. If the Act doesn't apply to the property, the seller need take no action whatever. If the Act does apply to the property, the seller must decide whether Section 2 of the Act applies to a particular sale. If Section 2 of the Act applies to the sale, the seller must choose one of six statutorily allowed means of protecting the buyer from unrecorded liens and give the buyer notice of that choice. The notice is given on a form developed by the Construction Contractors Board (CCB) for that purpose.

The process just described can be confusing if not addressed one step at a time. The first question, asked at the time of listing, is: does the Act apply to the property. That is, is this property new residential construction or has it had \$50,000 or more worth of improvements within the last 90 days? If the answer is yes, the Act applies to the property and the seller will need to get the CCB "Notice of Compliance with the Homebuyer Protection Act" form. They can get the form by visiting: http://www.ccb.state.or.us/New_Web/Statutes/HBPA.htm A copy of the **form** is also reproduced here for your convenience.

If you look at the Notice of Compliance form, you will see that it is in three parts (I, II, III). In

the first part (I) is the address or description of the property and the “date of purchase.” The date of purchase is the date the buyer becomes bound on a contract for sale. In the second part (II) the seller is asked to check either “A” or “B.” “A” says that Section 2(2) of the Act does not apply to the property. “B” says Section 2 of the Act does apply and gives the buyer notice of how the seller complied with Section (2). If you’re confused at this point, don’t despair. It’s easier than it seems.

Section 2 of the Act requires a seller who sells (enters into a binding agreement with a purchaser) property subject to the Act within 75 days of completion of construction to provide the buyer with one of five listed methods of protection or get the buyer to waive their rights under the Act. It is the 75 day requirement that explains why there is an “A” and “B” on the form. The Act itself applies to residential property as described above - either new construction or at least \$50,000 in renovations within the past 90 days. But Section 2 of the Act applies only if the property is sold (entered into binding agreement) within 75 days of completion of construction. If the Act applies to the property but the agreement to purchase comes more than 75 days after completion of construction, the seller can check “A.”

Still confused? Here are some examples that may help. Suppose you list a house with a new \$85,000 addition just completed. At the time of listing, the Act potentially applies to the property because it has been remodeled for more than \$50,000 within the last 90 days. If your seller accepts an offer within the 90 days after the completion of the addition, the Act will apply to the property. If that acceptance comes more than 75 days after completion, the seller can check “A.” If not, they have to check “B” and decide how to provide lien protection or get the buyer’s waiver. If no offer is accepted within 90 days of completion of the addition, the Act will no longer apply to the property and no form at all is required.

New construction is a little easier to follow than renovations and remodels. The Homebuyer Protection Act applies to *all* new construction regardless of construction cost or date of completion. If you are selling new residential construction, your seller is going to need the Notice of Compliance form. Whether they then check “A” or “B” on the form depends on how long after completion of construction an offer is accepted.

If you list a spec home that has been on the market for a year, your seller is going to be able to check “A” because any sale will be more than 75 days after construction. If you are selling a custom built home, the seller is going to have to check “B” because the “sale” (when the purchaser agrees to purchase) will precede construction completion. If that deal falls apart at closing and a new buyer is quickly found, that new buyer will get the Notice of Completion if the new “sale” is within 75 days of completion. Once past the 75 days, the seller can check “A.” The thing to remember on *new* construction is that the form is *always* used but whether the seller checks “A” instead of “B” depends upon how many days after completion of construction the property is sold.

Still confused? The [Homebuyer Protection Act Flow Chart](#) offers additional understanding.

The protection provisions of Section 2 of the Act are not something a real estate licensee wants to get too involved with. Which of the allowed protections might best suit the seller’s

circumstances is a business question for the seller. To the extent that answering that business question requires legal knowledge, it is beyond the expertise of a real estate licensee. Do not let your client involve you in the unauthorized practice of law. That said, let's look at the choices the seller will face if they must provide lien protection to a buyer under the Act.

There are six check boxes under "B" on the form. The first says the seller is going to provide title insurance as defined in the Act. That means the seller will provide the buyer with an early issue of title insurance at the seller's expense. Often in new construction, the lender will make the buyer pay for such a policy for the lender. Sellers can often piggy-back on such policies by paying for the same kind of policy to cover the buyer. If you are a buyer's agent, watch for efforts by builders to shift this expense to your buyers.

The second check box under "B" says that the seller will retain not less than 25% of the purchase price in escrow until after the 75 day lien filing deadline has run. Do not hold your breath for builders to adopt this strategy. The third box allows the seller to have a letter of credit that will cover any potential loss to the buyer from unrecorded liens. This option requires rule making by the CCB. As of March 1, 2004, those rules have not been developed and so this option may not be available. The fourth check box can be used by the seller only if the seller gets all of the subs, material and equipment suppliers to sign waivers that say they will not place a lien on the property. As a rule, material and equipment suppliers are reluctant to sign such waivers.

The fifth option available to sellers under Section 2 of the Act is a little more complicated. It says that the sale is "completed" more than 75 days after the completion of construction. This provision is for those cases where the "sale" is within 75 days of completion of construction, thus triggering the need for the Notice of Compliance, but the closing is beyond 75 days from completion of construction. Remember, a buyer can be stuck with an unrecorded lien only for the 75 days following completion of construction. If the closing date is after the lien notice deadline, there will be no unrecorded liens and, therefore, the buyer is protected.

The final check box provision under "B" is a waiver from the buyer. Basically, the buyer just gives up their right to be protected from liens under the Act. The Notice of Compliance is not a waiver. The waiver must be on a separate form. Because it basically allows builders to ignore the new law, some builders are developing procedures to get buyers to sign waivers. One way this is done is for the seller to give the buyer a "personal guarantee" that there are no liens. If you are a buyer's agent and the seller is asking your buyer to waive their rights under the Act, you should consider warning your buyer of potential consequences. This can be done by giving them, and getting them to acknowledge the receipt of, a written warning about waivers. A sample of such a **document** is included here for your convenience.

Further information about the Homebuyer Protection Act, and a copy of the Act itself, is available from the CCB at: http://www.ccb.state.or.us/New_Web/Statutes/HBPA.htm