

## Arbitration Clauses in Home Builder Contracts – What They Do and Why Eliminate Them

By James A. Zitesman

It is common for contracts from home builders to include arbitration clauses. These clauses have been the subject of many lawsuits. The principal question is generally whether they should be enforceable. My question is whether arbitration clauses truly serve the intended purpose.

I speculate that many builders and their lawyers publicly champion the idea of arbitration by stating that it is less expensive and less cumbersome than traditional litigation in the courts. I wonder if in private the reasons for desiring the arbitration process are so it can be private without public disclosure and without the conformity to case law and statutes. Arbitrators can decide however they please. They do not have to be lawyers; therefore, they are not expected or required to apply the law. But the question then becomes what do we have without the law?

The law is comprised of statutes enacted by the Ohio General Assembly and of court decisions where disputes have been decided. Law is public. Law is for the benefit of all. By having a public body of law in statutes and court decisions, people can reference how courts have decided similar situations and thereby provides a base of reference for how to proceed in any given situation. Unless there are significant compelling reasons not to, courts will follow the law as it exists. If a party receives a decision that they can prove is not in accordance with the existing law, they can appeal it. The possibility of appellate review is the “checks and balances” on the trial court system. It also provides the decisions which control and apply to future similar disputes.

Arbitration is arbitrary. Arbitrators do not have to apply law to their decisions and there is usually no oversight or appeal process, except for the most egregious cases where fraud is proven. Fraud is very difficult to prove. Most arbitration clauses found in home builder contracts require the decision to be binding.

So does a system that keeps disputes private and does not apply law benefit anyone? For the building industry, it sustains the perception of potentially being anti-consumer. For an industry dependent on the consumer, it is a mystery to this writer why they would ever want to be perceived as anti-consumer. Furthermore, does it benefit the truly good builders to create an environment where the bad ones can persist? If builders know that they can be taken to court where decisions are based on law and are public, will that affect how they treat customers? By being held to established law and consequences, builders could conduct themselves accordingly. Likewise, consumers would be able to rely upon established law to know when they do and do not have reasonable case.

Home builders are hurting. We all know that times are tough in the real estate market, but that is not an excuse. The home building industry as a whole has to come to the realization that it is dependent on consumers and that it needs to embrace customer service. Some builders have always placed a strong emphasis on customer satisfaction. They survive in these difficult times. The question for those builders is whether they want to elevate the standards of all builders. It is

not difficult to do, simply remove all arbitration provisions. Permit the legal system to work. It will make the unscrupulous builders, or those who simply deliver a poor product, to be held accountable. It is a public process. By being public, builders will know that they will not be able to hide within an arbitration proceeding.

In the end, both consumers and builders benefit by eliminating arbitration provisions and allowing builders to be subject to law and the legal system. If builders are concerned that the decisions rendered by the courts will be overly harsh or unfair, there are two options. One is the appeal process. The other is to treat customers like they would want to be treated; to respect customers, and thereby earn the customers' respect, and by having contracts that are fair, balanced, and clear. No one enters into a purchase contract hoping for a lawsuit or an arbitration proceeding. They just want to buy a home that is built to the plans and specifications associated with the contract and in a good and workmanlike manner. The builder should strive to provide the same.

By eliminating the arbitration provisions, builders who are consistently sued will leave the business. The builders who have consistently earned the respect and trust of their customers will prosper. It is just that simple. The arbitration process has allowed problem builders to remain unknown to the consumers. By allowing builders to be subject to the legal system and held accountable to the law, both the industry and the consumers will benefit.

Since contracts from home builders vary significantly from the standard Board of Realtors® approved contract, it is the real estate agent/broker's duty to alert the buyer that it may contain provisions unfamiliar to the agent/broker which may affect the buyer's rights. Therefore, the real estate agent/broker needs to refer the buyer to a knowledgeable real estate attorney to make sure the buyer understands the contract and to help protect the buyer's rights. Failure of a real estate agent/broker to refer a buyer to legal counsel in a home builder contract situation could be a breach of the statutory fiduciary duty owed to the buyer.