

ALERTS AND UPDATES

Arbitration Is Exclusive Remedy for Displeased New-Home Warranty Claimants, per N.J. Appellate Division

May 24, 2011

In *Frumer v. National Home Insurance Company*,¹ the New Jersey Superior Court, Appellate Division, held that arbitration was the exclusive remedy available to plaintiffs, pursuant to the terms of the plaintiffs' new-home buyer's warranty. The warranty at issue—which was a private warranty plan approved pursuant to the New Home Warranty and Builders' Registration Act² (the "Act")—permitted the homeowners to elect at the outset whether to pursue a remedy for "workmanship/systems defect" claims under the warranty, or whether to pursue such claims through litigation. If a warranty claim is elected, the warranty plan states that disputes arising from a warranty claim are to be submitted to binding arbitration. The warranty further provides that arbitration is the exclusive remedy for a dispute over a "major structural defect" claim.

Although statutory new-home warranties issued pursuant to the Act permit homeowners to elect between either the warranty claim process or other legal remedies potentially available through litigation, approved private warranty plans—such as the one at issue in *Frumer*—need not provide an election of remedies and may limit the available remedy to arbitration.

Case Background

In *Frumer*, plaintiffs Alon Frumer and Michelle Berliner Frumer discovered numerous significant defects shortly after moving into their new home. They submitted a claim under the warranty plan, and the defendant warranty company National Home Insurance Company (NHIC) classified some of the defects as workmanship/systems defects, and others as major structural defects.

Under the warranty plan, NHIC had the option to repair, replace or pay the plaintiffs the reasonable costs of repairing or replacing defects. NHIC initially chose to repair the defects. After spending nine months and \$350,000 on repair work, NHIC ceased work and instead offered the plaintiffs the additional sum of \$208,059 to settle the claims. After the plaintiffs rejected the offer and the parties engaged in an unsuccessful mediation, the plaintiffs commenced litigation, ignoring the warranty plan's requirement that the dispute be submitted to arbitration.

The trial court denied the defendants' motion to compel arbitration, upon the stated grounds that the arbitration provision was ambiguous, because it did not state with sufficient clarity that arbitration was the exclusive remedy for disputes arising from warranty claims. The trial court deemed this dearth of clarity to be an ambiguity that should be construed against the drafter, NHIC.

Appellate Division Decision

Citing the strong federal and New Jersey presumption in favor of arbitration and the requirement that arbitration agreements have to be read liberally in service of that presumption, the Appellate Division reversed and ordered the matter to be submitted to binding arbitration. The Appellate Division found no ambiguity in the warranty plan's arbitration provisions, holding that, at least with respect to the workmanship/systems defects, the plan provides an election of remedies by which the plaintiffs could submit a warranty claim or elect other remedies, but not both. Because the plaintiffs had filed a claim

under the warranty, their attempt to litigate their claims against NHIC was precluded by the warranty's requirement that arbitration is the exclusive remedy for disputes arising from a warranty claim.

Analysis

The *Frumer* decision appears to emphasize not only that private warranty plans approved under the Act need not provide an election of remedies and may limit the available remedy to arbitration, but also that arbitration provisions contained in such private plans are likely to be liberally construed in favor of arbitration.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact [Robert A. Prentice](#), [Michael W. O'Hara](#), any [member](#) of the [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.

Notes

1. *Frumer v. National Home Insurance Company*, 2011 N.J. Super. LEXIS 92 (App. Div. May 16, 2011) (approved for publication).
2. New Home Warranty and Builders' Registration Act, N.J.S.A. 46:3B-1, *et seq.*

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