

WHAT GLITTERS ISN'T ALWAYS GOLD

By Karen M. Goodman¹

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Like a new car, a new home is magical—everything is shiny and polished. Nothing like your grandmother's house, which is old, outdated and smells funny. However, frequently, the builder insists that the consumer sign a one-sided contract which is fundamentally unfair.

The builder-produced contract deviates from a neutral contract (such as the CAR form contract NCPA), in several significant instances, including the following:

- **Close of escrow is whenever the builder finally finishes the home instead of a specific closing date.**
- **The builder's "agent" is typically the only "agent" involved in the transaction, but purports to only represent the builder, even if acting as an undisclosed dual agent.**
- **The builder frequently passes off most, if not all, the closing costs on to the buyer, including escrow fees, transfer taxes and document preparation costs.**
- **The builder will attempt to steer, through financial incentives, the buyer to an affiliated-lender.**
- **The builder will invariably insist on a specific title company, even where the buyer is paying all of the closing costs and the title insurance.**
- **The builder will not provide any of the statutory required disclosures.**
- **The builder will not recommend that the buyer have a home inspection by an independent contractor conducted.**

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- The builder will attempt to limit its warranty for the condition of the home to “fit and finish” warranties.
- The builder will not provide the buyer with a due diligence period and will limit the buyer’s ability to cancel escrow.
- The builder will not provide written notice to buyer of a “notice to perform” before declaring the contract is cancelled.
- The builder will not have a provision for attorneys fees to the prevailing party.
- The builder will not have a liquidated damages provision in the contract, limiting the buyer’s liability to the deposit.
- The builder will require arbitration and will select the arbitration provider through the contract.

Most buyers sign these one-sided contracts trusting that the builder is protecting their rights. In spite of the friendly nature of the “negotiation”, the builder is “adverse” and is interested in limiting its responsibility to the buyer. The buyer signs the contract, not realizing that he has bargained away significant legal rights and dramatically limited his remedies. Once a problem is discovered, then the buyer is at the mercy of the builder to remedy the problem. The builder, with superior economic resources, can rely on the costly and lengthy “binding arbitration proceedings,” knowing that litigation, even where there are substantial contractual or professional breaches are not cost effective for the buyer to pursue.

These one-sided builder form contracts are unconscionable.

“[U]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821). The builder insists on its own form contract instead of a neutral form and then refuses to allow the buyer to modify the contract. California courts will reject a builder’s contract as unconscionable and unenforceable when the buyer’s substantive rights are given up. Courts have determined what is unconscionable on a “sliding scale”: The more substantively oppressive, the less evidence of procedural unconscionability is required. (*Morris v. Redwood Empire Bancorp* (2005) 128

Cal.App.4th 1305, 1317).

If a builder insists on its form contract, don't purchase the home. Insist that your agent prepare your offer on a neutral form, such as the CAR NCPA. If the builder refuses to sell the home under a neutral contract, purchase another home from a builder that will agree to a neutral contract or buy resale. Have a lawyer review the builder provided contract and explain the purported limitation of buyer's rights and remedies.

The principal legal reason for purchasing a new home is the implied warranty associated with a new home purchase. It is well-established that builders and sellers of new construction should be held strictly liable where they breach the implied warranty "that [a] completed structure was designed and constructed in a reasonably workmanlike manner." (*Pollard vs Saxe & Yolles Development Company* (1974) 12 Cal.3d 374, 380) This is because "[b]uyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale." (*Kriegler vs Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 228-229) Moreover, the builder/seller has actual or presumed knowledge about the structure that the buyer does not have, the buyer relies on the builder/seller's knowledge, skill and judgment in deciding to purchase a new home from the builder/seller, the buyer reasonably expects that the builder/seller used its knowledge, skill and judgment to complete the structure in a workman-like manner, the builder/seller knows that the buyer has such reliance, and the buyer cannot fully examine the completed structure to determine the existence of latent defects. (*Pollard vs Saxe & Yolles Development Company* (1974) 12 Cal.3d 374, 379-380) This broad warranty is what the builder frequently seeks to limit.

Where a party with superior bargaining strength drafts a contract and imposes its contract terms on a party with weaker bargaining strength, demanding that the weaker party adhere to the contract or reject it in its entirety, and the contract terms do not fall within the reasonable expectations of the weaker party, then that contract is adhesionsary and its terms will not be enforced against the weaker party. (*Neal vs State Farm Ins Companies* (1961) 188 Cal.App.2d 690, 694; *Thompson vs Toll Dublin, LLC.* (2008) 165 Cal.App.4th 1360, 1371-1372 citing *Armendariz vs Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113) An adhesionsary "contract or provision which does not fall within the reasonable expectations of the weaker or 'adhering' party will not be enforced against him." (*Thompson vs Toll Dublin, LLC* (2008) 165 Cal.App.4th

**1360, 1372 citing *Armendariz vs Foundation Health Psychcare Services, Inc.*
(2000) 24 Cal.4th 83, 113)**

Since builders often actively discourage the involvement of buyers' agents, the one-sided nature of the transaction are not discovered until after close of escrow, when it is too late. Then, the new home is neither "shiny" nor "gold."