

TAPS IN ROACH CITY

By: J. Robert Eckley

It's like cockroaches! Stamp on one and fifty more scurry about from crevices and crannies. So here's the Construction Cocoon, the homebuilders' lobby which has been busy in smoke-filled back rooms at both the Legislature and Registrar of Contractor's office cooking the books and passing black bags to make it harder and harder for thousands of bilked consumers to complain about their collapsing homes. And there are the Courts of this state--probably the only bastion left standing against this scandal--regularly, emphatically (and thankfully) squashing each conspiracy as it pokes its twitching little antennas out of the dark. That's right: No homebuilders have won a single major residential defective construction case in this state, yet! And even larger class actions against them are coming down the pike, soon.

Yet, right behind each fatal "WHOOOSH" of "jurisprudential 'Raid'" and with some truly massive debugging litigation virtually on the horizon, incredibly, more of these malconstruction roaches bent on the same mischief skitter right out of the dank to continue the attack on the entire Arizona community: They hurt the owner that paid a silk purse price for a sow's ear; they hurt the real estate licensee who is sued for innocently selling their defective homes; they hurt the entire public which foots the bill for this load on the Court system while at the same time suffering personal loss as their homes are stigmatized by this billion-dollar bad-home epidemic that is even now becoming of increasing national notice and disrepute.

The long and short of it is that we all profit when these creepy-crawlies are located and litigatively toasted so they cannot harm again. This is especially the case when the Registrar--the chief exterminator--is becoming virtually indistinguishable from the pests he controls. Okay, so here's the latest infestation I've located.

Under the insect theory "when spray is away, the bugs will play," there is a novel new document currently being circulated as part of the sale package by new home builders to purchasers and their home inspectors, which purports to limit or prohibit pre-completion and even post-completion inspections of new homes! Say again? You heard me right. They want the community to sign a "home free" ticket for contractor larvae. The document has various permutations: One form prohibits the owner and Inspector from inspecting the home at all; another requires the buyer's home inspector, at the same time he is employed by the buyer, to enter into a second inspection contract with the builder that limits his rights to inspect or report in confidentiality to his own customer; another has the home inspector insuring the builder in the event there are defects of the builder's own creation; another prohibits the inspector from doing any inspection unless he has insurance payable to the builder which is virtually 400 times in excess of those even legally required of the builder, himself! Wow! The hell-bent capability for societal malevolence when an insect mind is unleashed in the dark truly is an awesome thing to behold! Well, that's the nest. Ugly! Now here's the well-earned toasting.

First, home inspectors are recognized in this state as a legitimate, registered profession. SB 1132, now ARS 32.101 B. 16., et. seq.. They are regulated ONLY under the Board of Technical Registration (the "BOTR"). Not the Registrar of Contractors (thank God!) and not by the homebuilders (double thank God!). In fact, those with just homebuilders' license are NOT

authorized by law to do home inspections without an Inspector's registration with the BOTR and would be in violation of the law if they did. ARS 32-1101 A.7.; ARS 32-1154 A. 17. and ARS 32.128 B.3., a class 2 misdemeanor under ARS 32-145, et. seq.. The BOTR is the same dignified professional Board as for engineers and architects and it has the final word on what the Inspector does or does not have to do.

Nothing in the Inspector's regulation provides that the Inspector kow-tows in the least to the builder. It goes precisely the other way. The regulation specifically provides that the Inspector's SOLE loyalty is to his customer. He is NOT to be controlled by the very builder whose work he is inspecting. The builder that asks him to do that or even tries to place the Inspector under his control violates the law. Not just BOTR law, id., ARS 32.101, above and R4-30-301 4, 5 7-9 and 12., but the builder's own licensure (see ARS 32-1159, wt. seq., below). This goes for trying to get insurance or co-insurance from the Inspector that is not called for by BOTR statute, this goes for attempts to limit the scope of the Inspectors mandated inspection, this goes for even conspiring to interdict the law and to interfere with the Inspector's legal relationship to his customer. Id. R4-30-301 et. seq..

The crux is: The builder may or may not turnout to be an actual roach. That will be seen as the construction progresses. But the Inspector is definitely a private exterminator with a sworn duty when hired by the buyer to refuse contractual relations with the builder and to mercilessly spray bug like builders dead on sight. It's a good system to protect innocent buyers. Too damn good, according to the bugs.

Second, any all such anti-consumer "bugs-are-beautiful" clauses are not only unlawful, but absolutely void on their face under contractor licensure, the BOTR and common law. See for Contractors, ARS 32-1159, R4-9-108, R4-9-131 (2), (6), 7, 8, 11, ARS 32-1154 3., 13., 17. A.R.S. § 32-1154, R4-9-108 Registrar of Contractor's Rules and Regulations and *Brannigan v. Raybuck*, 667 P.2d 213, 136 Ariz. 513 (1983); For the BOTR: id. ARS 32-101, et. seq. above, and id. *Brannigan*; for common law, see id. *Brannigan* and *Salt River Project Agricultural Improvement and Power District*, 143 Ariz. 368, 694 P.2d 198 (1984); *Morganteen v. Cowboy Adventures, Inc.*, 949 P.2d 552 (App., 1998). *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*, 140 Ariz. 383, 682 P.2d 388 (1984); *Wagonseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 383, 710 P.2d 1025 (1985). The law expressly calls clauses that attempt to skirt law and escape statutory responsibilities a violation of the public policy, right from the get-go. The regulators can also sanction the contractor or Inspector who is so foolish as to insist upon or sign one of these.

Smell that smoke? It's the last fumes from the last remnants of some very justly-torched bugs being whisked up the flue.

Disclaimers against building a sound home won't work, trying to make every Inspector in the state deaf, dumb and blind by contract won't work. Paying off political hacks won't work. The verdict is in and those minions following the Dark Side in the Construction Cocoon just don't get it. But Judge Allen Reed did while whacking the builder in *Mollan v. One Tall Builder*, ROC Case No. P02-0096, Docket Number 02F-P0096-ROC when he said:

"..(t)here is nothing in the law, which provides that a contractor has any inherent right to construct something in a manner, which tolerates initial failure. Construction may not be a perfect science but it should not be a sloppy science. If a (home component) fails (to perform its function).. under normal conditions, there is a workmanship problem. Simply because a contractor (offers to) correct the work in order to avoid (litigation) does not mean that poor workmanship in the first instance is..excused..." (parentheses mine)

"LIGHTS ON! SCATTER! WHOOOSH! TAPS!"*Right on, Al!*

J. Robert Eckley is a real estate, construction and home inspection attorney with offices in Phoenix. His co-author, Audra Rose, is a respected Legal Assistant and construction specialist advising throughout Arizona. He or she may be reached at (602) 952-1177. See the firm website at eckleylaw.com and log on that site mid-September, 2002, for the "where and when" of a new seminar coming up in November comprehensively covering the "rogues gallery" of most-often-seen construction issues and construction design, engineering, execution and materials and "red flags" which you, whether builder, engineer or real estate licensee, ought to know, as developed from over 500 actual cases. Don't miss this one!