

Date of Hearing: April 25, 2017

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS

Evan Low, Chair

AB 1357 (Chu) – As Introduced February 17, 2017

SUBJECT: Home inspectors: roofing contractors: roof inspections.

SUMMARY: Exempts from the provisions relating to unfair business practices for a home inspector a licensed roofing contractor that performs repairs pursuant to the licensee's inspection of a roof and prohibits a home inspector from performing a roof, inspection on the same home upon which the home inspector performed an inspection.

EXISTING LAW:

- 1) Prohibits, under the Unfair Practices Act, various unfair, dishonest, and discriminatory practices. (Business and Professions Code (BPC) §§ 17000-17002)
- 2) Defines, for purposes of the Unfair Practices Act, the following:
 - a) “Article or product” includes any article, product, commodity, thing of value, service or output of a service trade, except as specified. (BPC § 17024)
 - b) “Vendor” includes any person who performs work upon, renovates, alters or improves any personal property belonging to another person. (BPC § 17025)
 - c) “Loss leader” means any article or product sold at less than cost and meets the following: (BPC § 17030)
 - i) Where the purpose is to induce, promote or encourage the purchase of other merchandise.
 - ii) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers.
 - iii) Where the effect is to divert trade from or otherwise injure competitors.
- 3) It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition. (BPC § 17043)
- 4) It is unlawful for any person engaged in business within this State to sell or use any article or product as a “loss leader,” as defined. (BPC § 17044)
- 5) Establishes the duties, standard of care, and prohibitions for home inspectors. (BPC §§ 7195-7199)
- 6) Defines, for purposes of home inspections, the following:
 - a) “Home inspection” is a noninvasive, physical examination, performed for a fee in connection with a transfer of real property, of the mechanical, electrical, or plumbing

systems or the structural and essential components of a residential dwelling of one to four units designed to identify material defects in those systems, structures and components. “Home inspection” includes any consultation regarding the property that is represented to be a home inspection or any confusingly similar term. (BPC § 7195(a)(1))

- b) A “home inspection report” is a written report prepared for a fee and issued after a home inspection. The report clearly describes and identifies the inspected systems, structures, or components of the dwelling, any material defects identified, and any recommendations regarding the conditions observed or recommendations for evaluation by appropriate persons. (BPC § 7195(c))
 - c) A “home inspector” is any individual who performs a home inspection. (BPC § 7195(d))
 - d) “Transfer” is a transfer by sale, exchange, installment land sales contract, as defined, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units. (BPC § 7195(e))
- 7) Makes it an unfair business practice for a 1) home inspector, 2) a company that employs the inspector, or 3) a company that is controlled by a company that also has a financial interest in a company employing a home inspector, to do any of the following: (BPC § 7197(a))
- a) To perform or offer to perform, for an additional fee, any repairs to a structure on which the inspector, or the inspector’s company, has prepared a home inspection report in the past 12 months.
 - b) Inspect for a fee any property in which the inspector, or the inspector’s company, has any financial interest or any interest in the transfer of the property.
 - c) To offer or deliver any compensation, inducement, or reward to the owner of the inspected property, the broker, or agent, for the referral of any business to the inspector or the inspection company.
 - d) Accept an engagement to inspect or to prepare a report in which the employment itself or the fee payable for the inspection is contingent upon the conclusions in the report, preestablished findings, or the close of escrow.
- 8) Excludes from the unfair business practice provisions:
- a) A home protection company that is affiliated with or that retains the home inspector does not violate this section if it performs repairs pursuant to claims made under the home protection contract. (BPC § 7197(a)(5))
 - b) This section shall not affect the ability of a structural pest control operator to perform repairs, as defined under the laws relating to licensure of structural pest control operators, as a result of a structural pest control inspection. (BPC § 7197(b))
- 9) Establishes the Structural Pest Control Board within the Department of Consumer Affairs (DCA) to administer and enforce the laws relating to the licensure and regulation of structural pest control. (BPC §§ 8500-8536)

- 10) Establishes the Contractors' State License Board (CSLB) with the DCA and vests the CSLB with all functions and duties relating to the administration of the Contractors' State License Law, including licensing and regulation of contractors. (BPC §§ 7000-7191)
- 11) Defines, for purposes of the Contractors' State License Law, "a specialty contractor" as, among other things, a contractor whose operations involve the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts. (BPC § 7058(a))
- 12) Defines a "Class C-39 - Roofing Contractor" as a contractor who installs products and repairs surfaces that seal, waterproof and weatherproof structures. This work is performed to prevent water or its derivatives, compounds or solids from penetrating such protection and gaining access to material or space beyond. In the course of this work, the contractor examines and/or prepares surfaces and uses the following material: asphaltum, pitch, tar, felt, glass fabric, urethane foam, metal roofing systems, flax, shakes, shingles, roof tile, slate or any other roofing, waterproofing, weatherproofing or membrane material(s) or a combination thereof. (Title 16, California Code of Regulations § 832.39)

THIS BILL:

- 1) Makes it an unfair business practice for a home inspector, a company that employs the inspector, or a company that is controlled by a company that also has a financial interest in the company employing the home inspector, to perform a roof inspection on the same home upon which the home inspector performed an inspection.
- 2) Excludes from the unfair business practice provisions relating to home inspections a roofing contractor who holds a C-39 license, as defined under the CSLB's regulations, to perform repairs pursuant to the licensee's inspection of a roof.

FISCAL EFFECT: Unknown. This bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is sponsored by **HomeGuard Incorporated**. According to the author, "[this bill] seeks to add clarifying language to the law, similar to what has been in law for over a decade for pest inspectors, providing licensed roof inspectors the ability to make roof repair to homes they have inspected, even if the same company has also performed a home inspection on the same property. [This bill] provides consumers with the option to hire the same licensed roofing contractor who has identified the needed roof repairs. Currently, if a consumer has had a home inspection and a roof inspection performed by the same company, they would need to search for another roofing contractor to make repairs identified in the roof inspection. [This bill] enhances consumer choice while maintaining the same consumer protections provided by the [CSLB] for licensed roofing contractors."

Background. Existing law makes it an unfair business practice for a home inspector or the home inspector's business associates to perform repairs on a structure within 12 months of the home inspector's inspection in connection with the sale or transfer of a home. This bill exempts a licensed contractor who performs repairs based on the contractor's roof inspection. The intent is to allow a roofing contractor who employs a home inspector (or is employed by the home

inspector's employer) to perform repairs based on the contractor's roof inspection even if the employed home inspector has performed a home inspection.

Home Inspectors. While home inspectors are not licensed, existing law establishes a standard of care for home inspectors, defines terms related to paid home inspections, and prohibits home inspections in which the inspector has a financial interest, among other things. The intent of the law, which was established under SB 258 (O'Connell), Chapter 338, Statutes of 1995, was "to assure that consumers of home inspection services can rely upon the competence of home inspectors." The sponsors of SB 285, the California Association of Realtors, wrote at the time, "Increasingly, families buying homes rely upon a home inspection before they make their investment decision. However, most of the inspectors performing this service are not licensed professionals in any construction-related field, nor are they regulated by any private or public entity."

While there is no requirement that home inspectors be licensed or certified, as with many professions, there are private, voluntary certifications consumers can look to. Because private certifications regularly contain educational, ethical, and examination requirements, they are often relied upon when establishing industry standards (and therefore often overlap with state licensing laws). However, because the home inspector law established a standard of care rather than competency standards, the legislative intent stated, "in ascertaining the degree of care that would be exercised by a reasonably prudent home inspector..., the court may consider the standards of practice and code of ethics of the California Real Estate Inspection Association, the American Society of Home Inspectors, or other nationally recognized professional home inspection associations."

Scope of a Home Inspection. When purchasing a home, consumers often rely on several types of inspections and real estate licensees are required to perform one (CIV § 2079, 2079.3, requiring a visual inspection of reasonably accessible areas). In some instances, real estate licensees are authorized to rely on licensees or "other experts" for purposes of that inspection (CIV § 1102.4). Two common inspections are the structural pest inspection (CIV § 1099) and a roof inspection. These are distinct from a home inspection as contemplated under the home inspector law.

According to the Standards of Practice established by the American Society of Home Inspectors (ASHI), an inspector must "inspect readily accessible, visually observable, installed systems and components listed in [the standards]" (Section 2.2.A). Per the standards, a home inspection report contains, among other things, an inspection of the structure's interior and roof system.

The standards specify that the inspection of the interior involves an inspection of: 1) walls, ceilings, and floors; 2) steps, stairways, and railings; 3) countertops and a representative number of installed cabinets; 4) a representative number of doors and windows; 5) garage vehicle doors and garage vehicle door operators; and 6) various installed appliances (Section 10.1). The standards exclude, among other things: 1) paint, wallpaper, and other finish treatments and 2) floor coverings (Section 10.2).

For roof inspections, the standards include an inspection of: 1) roofing materials; 2) roof drainage systems; 3) flashing; and 4) skylights, chimneys, and roof penetrations (Section 5.1.A). The inspector must describe: 1) roofing materials and 2) methods used to inspect the roofing (Section 5.1.B). The inspector is not required to inspect inaccessible areas and installed accessories (Section 5.2).

Unfair Business Practices. Existing law defines various acts as unfair business practices and makes the commission of the acts a misdemeanor, enforceable by the licensing entities under the DCA, the Office of the Attorney General and other law enforcement agencies. Generally, the prohibition against unfair business practices is meant to promote competition through prevention of unfair, dishonest, destructive, and discriminatory practices (BPC § 17002).

The sponsors of SB 285 wrote at the time that the “unfair business practices” listed under the home inspector law were meant to assure prospective buyers that “the inspection will be untainted by an inspector's interest in kickbacks from agents, financial interests in the property, or repair work generated by the inspection.”

Current Related Legislation. AB 717 (Dababneh) of the current Legislative Session will require a home inspector to be a licensee of the CSLB pursuant to the Contractors’ State License Law. *STATUS: This bill is currently pending in the Assembly Committee on Business and Professions.*

Prior Related Legislation. SB 258 (O’Connell), Chapter 338, Statutes of 1995, established a standard of care for home inspectors, defined terms related to paid home inspections, and prohibited home inspections in which the inspector has a financial interest, as specified.

ARGUMENTS IN SUPPORT:

HomeGuard Incorporated (sponsor) writes in support, “The clarification sought in [this bill] provides consumers with the option to hire the same licensed roofing contractor who has identified the needed roof repairs. Currently, if a consumer has had a home inspection and a roof inspection performed by the same company, they need to search for another roofing contractor to make repairs identified in the roof inspection. Looking for another roofing contractor requires additional time and expense and can delay a property transaction from closing. In addition, if the consumer were to find other roofing contractors to perform repairs, they still may prefer the price, trustworthiness, or competence of the contractor that performed the roof inspection. However, under current law, the consumer is prohibited from hiring that licensed roofing contractor because another employee from their company performed a home inspection on the same property.”

ARGUMENTS IN OPPOSITION:

California Association of Realtors writes in opposition that this bill “allows conflicts of interest in home inspections.

[This bill] erodes consumer protection. Existing law goes to great lengths to ensure that home inspectors are objective third parties and are not tempted by any conflicts of interest to change their reports. This bill erodes that consumer protection by allowing a home inspector to call out repairs in his or her report, and then perform the very work called for in the report. The invitation for consumer abuse is obvious.

Roofers are given special advantages over other contractors. We respectfully suggest that it is ill-advised to create a special class of exemption from consumer protections just to codify the business model of particular contractor. Even a recognized expert inspector like a general contractor (please see Civil Code Section 1102.4(c)), is prohibited from calling out their own work order in an inspection report.”

POLICY ISSUES FOR CONSIDERATION:

- 1) This bill exempts roofing contractors who make repairs pursuant to their own inspection of a roof from the list of unfair business practices for home inspectors. According to the sponsor, “in any other circumstance, the consumer already has the option of allowing a licensed roofing contractor to make repairs identified in their inspection. Only when the same company has also performed a home inspection on that property, is the licensed roof inspector prohibited from making repairs identified in their roof inspection. The fact that a home inspection has been completed on a home by another employee of the same company does not create any new conflicts for the consumer.”

It is not clear that this does not create any new conflicts for the consumer. While there may be a question of the number of potential bad actors, the evidence is not available because this practice is currently prohibited. In concept, a roofing contractor and home inspector who do not have the same employer will be more likely to differ in opinion because the inspection outcome of one does not affect the financial interest of the other. A roofing contractor and a home inspector who have the same employer are more likely to do what is in the best interest of the employer.

- 2) The sponsor argues that the purpose of the home inspector law was to protect consumers against unlicensed home inspectors. Therefore, the sponsor argues, consumers will still be protected because the exemption will not “impact the expertise, obligations, or abilities of a licensed roofing contractor from fulfilling the duties allowed under their state license.” While that may be true about the quality of the repair of the roof, the quality of the repair is not at issue. License requirements are primarily designed to ensure competent practice. While fraud and dishonest behavior are factors licensing entities may look into, the entities are not ordinarily equipped to investigate anticompetitive or unfair practices like collusion or self-dealing.
- 3) The sponsor points out that licensed structural pest control operators are currently exempted and that this exemption is no different. However, a home inspector’s inspection of a roof is closer to the certification a roofing contractor performs than what a structural pest control operator would do for a pest inspection. A home inspector’s inspection of a roof under the ASHI standards would include observation of the roof and roofing materials, which could preliminarily determine a potential leak from rotten shingles, improperly installed accessories, or physical damage. A home inspector’s visual inspection of the interior is not as likely to reveal a pest infestation requiring repairs that the consumer or real estate licensee could not also notice.
- 4) As noted by the opposition, this bill exempts roofing contractors but not other types of contractors. While roof leak certifications and repairs may be more common in real estate transactions than other types of inspections performed by contractors, the potential for conflict of interest is the same. Therefore, if there is no conflict of interest created under this bill, the exemption should be expanded for all licensed contractors.

AMENDMENTS:

To narrow the potential for self-dealing and collusion, the author should amend the bill as follows:

1) On page 2, strike lines 22-23:

~~(5) To perform a roof inspection on the same home upon which the home inspector performed an inspection.~~

2) On page 2, amend subdivision (d):

(d) ~~(1) This section does~~ *Paragraph (1) of subdivision (a) shall* not affect the ability of a roofing contractor who holds a C-39 license, as defined in Section 832.39 of Title 16 of the California Code of Regulations, to perform repairs pursuant to ~~his or her~~ *the contractor's* inspection of a ~~roof.~~ *roof for the specific purpose of providing a roof certification if the following are met:*

(1) Different employees perform each inspection.

(2) The offer to repair the roof is accepted prior to the commencement of the home inspection.

(3) The consumer is provided a consumer disclosure prior to authorization of the home inspection. The disclosure shall include all of the following:

(A) The same company performing the roof inspection and roof repairs will perform the home inspection on the same property.

(B) Any repairs being authorized by the consumer are for the repairs identified in the roofing contractor's roof inspection report and no repairs identified in the home inspection report are authorized or allowed.

(C) The consumer has the right to seek a second opinion.

(4) For purposes of this subdivision, a roof certification shall mean a written statement by a licensed C-39 Roofing Contractor who has performed a roof inspection, made any necessary repairs, and warrants that the roof is free of visible defects at the time that the certification is issued and should perform as designed for the specified term of the certification.

REGISTERED SUPPORT:

HomeGuard Incorporated (sponsor)

REGISTERED OPPOSITION:

California Association of Realtors

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