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HOUSE BILL 190

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

Ben Lujan

AN ACT

RELATING TO CONSTRUCTION; ENACTING THE RESIDENTIAL CONSTRUCTION
CONSUMER RECOVERY FUND ACT; PROVIDING FOR A FEE ON CONSTRUCTION
PERMITS; PROVIDING FOR COMPENSATION TO HOMEOWNERS FOR DAMAGES
RESULTING FROM HOME CONSTRUCTION BY LICENSED CONTRACTORS;
CREATING A FUND; ESTABLISHING PROCEDURES FOR PAYMENTS OF CLAIMS
AGAINST THE FUND; PROVIDING FOR CONTRACTORS TO REPAY THE FUND;
MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Residential Construction Consumer Recovery Fund Act".

Section 2. DEFINITIONS.--As used in the Residential
Construction Consumer Recovery Fund Act:

A. "commission" means the construction industries
commission;

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1 B. "damages" means actual damage incurred by a
2 homeowner as a result of the acts or omissions of a licensee in
3 the performance or breach of a retail transaction contract for
4 residential construction, including court costs and attorney
5 fees if included in a court order directing payment out of the
6 fund, but "damages" does not include special, exemplary,
7 punitive or consequential damages;

8 C. "department" means the regulation and licensing
9 department;

10 D. "division" means the construction industries
11 division of the department;

12 E. "fund" means the residential construction
13 consumer recovery fund;

14 F. "homeowner" means the owner of a residence that
15 is or is intended to be the primary place of residence of the
16 owner;

17 G. "judgment" means a judgment, or an arbitration
18 award that is reduced to a judgment, for damages awarded to a
19 homeowner against a licensee on which the appeal period has
20 been exhausted;

21 H. "licensee" means a person who is issued a
22 license or certificate pursuant to the Construction Industries
23 Licensing Act;

24 I. "local building program" means the segment of
25 any municipality or county government responsible for issuing

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1 building permits pursuant to a building code ordinance passed
2 by the municipality or county in compliance with Section 3-17-6
3 NMSA 1978;

4 J. "residence" means a single-family dwelling;

5 K. "residential construction" means construction,
6 repair, alteration, remodeling or home improvement of or on a
7 homeowner's primary residence; and

8 L. "retail transaction contract" means a contract
9 entered into by a homeowner and a licensed contractor for the
10 construction, repair, alteration, remodeling or home
11 improvement of or on the homeowner's primary residence.

12 Section 3. FUND CREATED--PURPOSE--ADMINISTRATION.--

13 A. The "residential construction consumer recovery
14 fund" is created in the state treasury. The fund consists of
15 appropriations, gifts, grants and donations to the fund and
16 assessments charged by the division and all local building
17 programs on each residential building permit issued by the
18 division or a local building program pursuant to Subsection C
19 of this section and credited to the fund. Money in the fund at
20 the end of a fiscal year shall not revert to any other fund.
21 The department of finance and administration shall administer
22 the fund, and money in the fund is appropriated to the
23 department of finance and administration to carry out the
24 provisions of the Residential Construction Consumer Recovery
25 Fund Act. The first one dollar (\$1.00) of the fee assessed by

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1 a local building program is appropriated to and shall be
2 retained by the local building program to defray the cost of
3 administrating the collection and reporting the fee.

4 Disbursements from the fund shall be made by warrant of the
5 secretary of finance and administration pursuant to vouchers
6 signed by the secretary of finance and administration or the
7 secretary's authorized representative.

8 B. The fund is created to compensate a homeowner
9 who enters into a retail transaction contract with a licensee
10 on or after July 1, 2010 for residential construction services
11 and who incurs damages in the course of the performance or
12 breach of that contract, as determined by a court of competent
13 jurisdiction. The homeowner may be compensated for all or a
14 portion of those damages, pursuant to a valid and binding
15 judgment and a court order directing payment out of the fund.

16 C. The division and a local building program shall
17 assess a fee on each residential building permit, including
18 permits for general, electrical, mechanical and plumbing
19 construction, issued by the division or the local building
20 program. The fee shall be submitted to the state treasury for
21 credit to the fund. The initial fee shall take effect on July
22 1, 2010. Any change in the amount of the fee shall take effect
23 only once a year on July 1. The amount of the fee assessed
24 shall be as follows:

25 (1) ten dollars (\$10.00) per permit until the

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1 balance of the fund reaches six hundred fifty thousand dollars
2 (\$650,000);

3 (2) after the balance of the fund reaches six
4 hundred fifty thousand dollars (\$650,000) and the balance
5 subsequently falls below six hundred fifty thousand dollars
6 (\$650,000), the fee shall increase to an amount determined by
7 the director of the division, but the fee shall not exceed
8 thirty dollars (\$30.00) until the balance of the fund exceeds
9 one million five hundred thousand dollars (\$1,500,000);

10 (3) in the event the balance of the fund
11 exceeds two million eight hundred thousand dollars
12 (\$2,800,000), the fee shall be suspended for the next fiscal
13 year by the director of the division, provided that the fee
14 shall be assessed when the balance subsequently falls to one
15 million five hundred thousand dollars (\$1,500,000); and

16 (4) each fiscal year, the director of the
17 division shall base the determination of the amount of the fee
18 on maintaining the balance of the fund at one million five
19 hundred thousand dollars (\$1,500,000), but the fee shall not be
20 less than five dollars (\$5.00) or exceed thirty dollars
21 (\$30.00).

22 Section 4. AUTHORIZED EXPENDITURES.--

23 A. No payment of claims against the fund shall be
24 made from the fund until the initial balance in the fund
25 reaches six hundred fifty thousand dollars (\$650,000).

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1 B. Money in the fund is appropriated to the
2 division for the administrative and operational costs of
3 implementing the fee on residential building permits and
4 administrating and processing claims against the fund.
5 Disbursements for this purpose shall be made to the division at
6 the beginning of each fiscal year and shall not exceed one
7 hundred fifty thousand dollars (\$150,000).

8 C. Money in the fund is appropriated to the
9 department of finance and administration to compensate
10 homeowners who have been awarded a judgment for damages based
11 on a retail transaction contract entered into on or after July
12 1, 2010.

13 Section 5. CLAIM PROCEDURES--ADMINISTRATION OF CLAIMS.--

14 A. The division shall administer and process claims
15 against the fund. The division shall adopt and promulgate
16 rules necessary to carry out the provisions of the Residential
17 Construction Consumer Recovery Fund Act subject to approval by
18 the commission. Claims of eligible homeowners shall be filed
19 pursuant to any rules adopted and promulgated by the division
20 pursuant to that act. No payment from the fund on a single
21 claim shall exceed twenty-five thousand dollars (\$25,000). The
22 total amount recoverable against any one licensee in a fiscal
23 year shall not exceed three hundred thousand dollars
24 (\$300,000). In the event insufficient money exists in the fund
25 to make a payment pursuant to an order directing payment, no

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1 payment shall be made until the balance of the fund reaches two
2 hundred fifty thousand dollars (\$250,000). Payments of claims
3 shall be paid in the order in which the claims are received.

4 B. When a civil complaint that may result in
5 liability for the fund is filed, the homeowner shall notify the
6 division in writing when the action is commenced and shall
7 provide the division with a copy of the complaint. Failure to
8 notify the division shall not be grounds to deny an otherwise
9 valid claim against the fund.

10 C. When notice of a civil action is received, the
11 division may enter a limited appearance, file pleadings and
12 appear at court hearings or take action it deems appropriate to
13 defend the fund.

14 D. When a homeowner obtains a valid judgment in a
15 court of competent jurisdiction against a licensee and that
16 judgment qualifies for payment from the fund, the homeowner to
17 whom the judgment was awarded may, within two years after the
18 judgment becomes final, file a verified claim in the court
19 where the judgment was issued. The verified claim shall be on
20 a form approved by the division and shall, at a minimum, verify
21 that each requirement for payment from the fund has been met.
22 The homeowner shall provide the division with a copy of the
23 verified claim within ten days of filing the claim with the
24 court. After thirty days from the filing of a verified claim,
25 the homeowner may request an order from the court directing the

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1 department of finance and administration to make payment from
2 the fund in the amount remaining unpaid on the judgment. A
3 copy of a signed order directing payment from the fund shall be
4 submitted to the division by the homeowner within thirty days
5 after the order is issued by the court.

6 E. If the homeowner fails to timely provide the
7 division with notice of a request for an order directing
8 payment, the court shall not issue an order of payment unless
9 it has received a valid and binding consent to payment,
10 executed on behalf of the division. If the division was given
11 timely notice of request for an order directing payment and
12 does not file written objections within fifteen days after
13 receipt of the notice or appear to object to the order, the
14 court may issue the order without a written consent to payment
15 by the division. If the division submits written objections,
16 the court shall give due consideration to the objections, and,
17 if the court issues an order of payment over such objections,
18 the order shall state the reasons for the court's decision.

19 F. Within thirty days after receipt by the division
20 of a certified copy of an order directing payment out of the
21 fund issued by a court of competent jurisdiction, the division
22 shall either authorize the payment or timely file an appeal of
23 the order. An appeal of any order directing payment out of the
24 fund shall toll the payment until the appeal is resolved.

25 Section 6. SUBROGATION.--If a court orders the department

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1 of finance and administration to pay any sum from the fund, the
2 division shall be subrogated to all the rights of the
3 homeowner, and, upon the issuance of such order, the homeowner
4 shall execute an assignment of rights, by which the division is
5 assigned all right title and interest of the homeowner in the
6 judgment or portion of the judgment sufficient to cover the
7 amount of the payment to the homeowner from the fund. Any
8 amounts recovered by the division pursuant to this section
9 shall be submitted to the state treasury for credit to the
10 fund.

11 Section 7. EFFECT OF FUND PAYMENT ON LICENSEE.--

12 A. Payments out of the fund shall be repaid by the
13 licensee against whom the judgment and order of payment were
14 issued within one hundred eighty days after the licensee
15 receives notice of a fund payment; provided, however, that the
16 division may authorize the licensee to repay the fund pursuant
17 to a written and binding payment plan allowing incremental
18 payments over a reasonable time period approved by the
19 commission.

20 B. Notwithstanding the provisions of the Uniform
21 Licensing Act, failure to repay the fund within one hundred
22 eighty days or failure to comply with all of the terms of a
23 payment plan authorized by the division together with interest
24 of eight and seventy-five hundredths percent per year on the
25 claim amount, accrued monthly, shall result in the

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1 cancellation, by operation of law, of the license and any
2 certificates of persons who are named in the judgment.

3 C. The division shall notify the licensee of the
4 effective date of the cancellation. If the commission receives
5 a timely, written request, the licensee shall have the
6 opportunity to appear and be heard by the commission solely on
7 the issue of repayment to the fund before the cancellation
8 becomes effective. The commission may postpone or suspend the
9 cancellation date for good cause shown.

10 D. The licensee shall not be eligible to renew or
11 reapply for licensure or certification until the full amount of
12 the fund has been repaid in the amount of the claim plus
13 interest, unless authorized to do so by the commission.

14 E. Work in progress at the time of cancellation of
15 a license pursuant to this section may be completed unless
16 otherwise directed by order of the commission, but new work
17 undertaken or bid, or application to permit new work after
18 cancellation, shall be deemed unlicensed contracting and shall
19 subject the licensee to prosecution pursuant to Section
20 60-13-52 NMSA 1978.

21 F. Nothing contained in the Residential
22 Construction Consumer Recovery Fund Act shall be construed to
23 limit the authority of the division to take administrative
24 action against a licensee or absolve a licensee who makes a
25 repayment to the fund from administrative action taken by the

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division against the licensee pursuant to the Construction
Industries Licensing Act.

Section 8. EFFECTIVE DATE.--The effective date of the
provisions of this act is July 1, 2010.