

# **Issues in Manufactured Home Construction Litigation**

9<sup>th</sup> Annual Construction Law Institute  
State Bar of Montana  
October 18, 2013

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## I. Introduction

Disputes involving manufactured homes may present construction and real estate lawyers with novel and challenging issues. Manufactured home construction is regulated by the United States Department of Housing and Urban Development, as well as by state and local law. Moreover, manufactured homes can be deemed real or personal property depending on the manner of installation and elections made by the owner for property tax purposes. These factors must be taken into account when prosecuting or defending cases involving construction defects, warranties and liens.

### a. What is a Manufactured Home?

A “manufactured home” is . . . “a structure, transportable in one or more sections, which in the traveling mode is 8 body feet or more in width or 40 body feet or more in length or which when erected on-site is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained in the structure.”<sup>1</sup>

Manufactured homes are distinguished from other factory-built housing such as modular homes, panelized homes, and pre-cut homes, which must be built to the state and local building codes where the homes are sited. “Mobile homes” are manufactured homes built prior to 1976 when the HUD code went into effect.<sup>2</sup> Most factory-built housing since 1976 is categorized as manufactured housing, which is the focus of this presentation.

### b. The Manufactured Home Industry

- In 2012<sup>3</sup>:
  - In the U.S., manufactured home shipments made up 9% of new homes (535,000 new single family housing starts, 55,000 manufactured homes shipped).
  - 468 manufactured homes were shipped to Montana, approximately 1/3 of which were multi-section homes.

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<sup>1</sup> 42 U.S.C. 5402(6).

<sup>2</sup> The Montana tax code also distinguishes between manufactured homes, mobile homes and house trailers See Mont. Code Ann. §§ 15-1-101 and 15-24-201.

<sup>3</sup> Data compiled from U.S. Census Bureau/HUD.

- In Montana, the average purchase price of a manufactured home was \$64,300.
- In the U.S., the average cost per square foot of a manufactured home was \$42, versus \$86 for site-built homes (excluding land).
- In the U.S., 30% of new manufactured homes were placed in trailer park communities, while 70% were placed on private property.
- In the U.S., 77% of new shipments were titled as personal property, while 15% were titled as real estate
- The median income of manufactured homebuyers is approximately 50% of the median income of all homebuyers.
- Nearly all manufactured homes sold in MT are produced in factories out of state.
- The manufactured housing industry has been on a downward trend for last 10-15 years, which has resulted in consolidation among manufacturers.

## **II. Construction Defects**

In Montana, manufactured homes are typically purchased by the homeowner/consumer through an independent dealer. The purchase of a manufactured home involves several distinct yet integrally related phases of work:

1. Production of the home at the factory
2. Preparation of the building site
3. Transportation of the home from the factory to the building site
4. Setup and installation of the home on the building site
5. Completion of any additional on-site improvements and punch list items.

This work is typically performed by multiple contractors and may be governed by different building codes and standards. These and other factors must be considered in determining liability for defective construction and other damages.

#### a. Manufacturing versus Installation

Most manufactured homes sold in Montana are built on assembly lines in factories located out of state. These factories typically use rigorous quality controls, including third-party inspections and certification, which have significantly reduced the incidence of construction defects over the years. Although manufacturing defects still occur, they are usually minor or cosmetic in nature and are resolved through the punch list or warranty process.

Most defects in manufactured homes arise from the site preparation work, and installation and setup of the home on the building site. This work is typically performed by the dealer, or contractors who are hired by the dealer or the homeowner, and is subject to problems affecting traditional construction, such as poor weather, uncontrolled site conditions, and unskilled labor. Moreover, as manufactured homes have increased in size and amenities, mobility has decreased and more homes are installed on permanent foundations. Site preparation, installation and setup work has thus become more involved and important.

#### b. Applicable Standards

In 1974, Congress passed the Manufactured Home Construction and Safety Standards.<sup>4</sup> Under this authority, HUD has enacted regulations, commonly known as the “HUD Code,” regarding the construction, transportation and installation of manufactured homes. The HUD Code is the only federally regulated national building code.

The HUD Code is found in 24 CFR Chapter XX (parts 3280-3800). The material parts consist of:

- Construction and Safety Standards (Part 3280). This part contains mandatory performance standards for numerous aspects of home design and construction including structural design, floorplans, framing, fire safety, heating and cooling, plumbing, electrical, thermal protection, energy efficiency and transportation. These standards are comparable to the International Residential Code, yet in some cases more restrictive on issues such as structural loads, ventilation, fire safety, moisture barriers, and wiring. Compliance with these standards is enforced through a third-party inspection and certification process that occurs at the factory.

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<sup>4</sup> See 42 U.S.C. 5401 *et seq.*

- Model Installation Standards (Part 3285). These standards are designed to serve as the basis for developing the manufacturers' individual installation instructions. States which choose to operate their own installation inspection and certification programs must adopt installation standards which meet or exceed the HUD standards. In states that choose not to operate their own installation programs, the standards serve as the minimum standards for manufactured home installation.

Montana is among the minority of states that have not adopted their own installation standards and do not operate their own installation programs. Therefore, in Montana, the installation standards are provided and administered by HUD. HUD ensures that installers of manufactured homes in Montana are trained and licensed, and that installations are third-party inspected and certified.

Manufactured homes that are installed on permanent, site-built foundations may be deemed to be modular homes and exempted from the Construction and Safety Standards, and the Installation Standards, upon proper certification by the manufacturer.<sup>5</sup> Regardless of whether an exemption is obtained, site preparation and foundation work (whether temporary or permanent) may also be regulated by state and local building codes and subject to inspection. Moreover, it is important to note that the HUD Code does not apply to "add-on" site-built improvements that may be attached or accessory to the manufactured home, even if purchased simultaneously with the home itself.<sup>6</sup> Such improvements are generally governed by state and local building codes.

Therefore, when dealing with construction defects in manufactured homes, it is important to determine whether the defect arises from the manufacturing or installation process (or both), and whether the federal, state or local code applies.

### **III. Warranties and Remedies**

In most residential construction disputes, the terms of warranty and available remedies are prescribed by the written contract and/or the Montana Code and common law.<sup>7</sup> Express warranties are also usually provided in the sale of manufactured homes by the manufacturer, the dealer, or both. However, disputes involving manufactured

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<sup>5</sup> 24 CFR 3282.12.

<sup>6</sup> 24 CFR 3282.8(j).

<sup>7</sup> See e.g., MCA § 28-2-2201 et seq.; § 70-19-426 et seq.; MCA Title 30, Chapter 11, and the implied warranty of habitability.

homes can implicate additional or alternative remedies, such as the HUD regulations on consumer complaint handling and remedial actions, UCC provisions on sales of goods, and products liability law.

a. Consumer Complaints and Remedies Under the HUD Code

The HUD Code has provisions for consumer complaint handling and remedial action which require manufacturers to provide notification of, and correct at its expense, any imminent safety hazard or serious defect that can be related to an error in the design or assembly of a manufactured home by the manufacturer.<sup>8</sup> If it cannot be repaired, in certain circumstances, HUD may require the manufacturer to replace or repurchase the home from the purchaser.<sup>9</sup>

The HUD Code also provides for a dispute resolution program, which manufacturers, dealers, installers and homeowners may initiate as a means of resolving defect disputes that arise within 1 year of the sale.<sup>10</sup> In Montana, the program is administered by HUD. The program provides for mediation, followed by non-binding arbitration in which the arbitrator makes recommendations to HUD, which HUD may then use to assign responsibility and order corrective action if it finds that a defect exists.

b. Warranties and Remedies Under the UCC

The Montana Supreme Court has held that manufactured homes, by virtue of being identifiable and moveable, are “goods” under MCA § 30-2-105, and, thus, sales of manufactured homes are governed by UCC Article 2. See *Little v. Grizzly Manufacturing*, 195 Mont. 419, 636 P.2d 839 (1981). Therefore, the general statutory warranties of MCA § 30-11-201 et seq. are inapplicable to manufactured home sales by virtue of MCA § 30-11-224. *Id.*

While UCC Article 2 also provides for the creation (and disclaimer) of express and implied warranties, it contains more rigorous and clearly defined standards for the acceptance or rejection of goods; invoking warranties, remedies and the seller’s right to cure; and otherwise establishing a breach. See e.g., MCA § 30-2-601 et seq., and § 30-2-701 et seq. These higher standards can be a pitfall for both plaintiffs and defendants in manufactured home construction defect disputes. See *Little, supra* 195 Mont. 419, 636 P.2d 830; and *Montana Homes of Missoula, Inc. v. Anson*, 2004 Mont. Dist. LEXIS

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<sup>8</sup> See 24 CFR 3282, Part I.

<sup>9</sup> 24 CFR 3282.423.

<sup>10</sup> 24 CFR 3288.

2003 (Cause No. CDV-2001-734, First Judicial District Court of Montana, Lewis and Clark County).

It should be noted that in Montana, the implied warranty of habitability, which exists in the common law rather than the Montana Code, applies to sales of traditional and manufactured homes alike. The critical determination for a breach of habitability is whether the defects preclude the useful occupancy of the house. See *McJunkin v. Kaufman*, 229 Mont. 432, 748 P.2d 910 (1987) (denying claim for breach of warranty of habitability where defects in mobile home did not present a health or safety hazard and did not preclude its use as a residence).

### c. Strict Liability

Principles of products liability law, such as strict liability, can also come into play in construction disputes involving manufactured homes. The manufacturers of manufactured homes can be subject to strict liability for defects resulting from the manufacturing process. See *Thompson v. Nebraska Mobile Homes Corp.*, 198 Mont. 461, 647 P.2d 334 (1982) (extending doctrine of strict liability to include instances where the only damage is to the defective product itself); and *McJunkin, supra*, 229 Mont. 432, 748 P.2d 910 (holding that in order for strict liability to apply, manufacturing defect must be significant and that product must be unreasonably unsuitable for its intended or foreseeable purpose).

Strict liability is not governed by the UCC and cannot be disclaimed. *Thompson, supra*, 198 Mont. at 468, 647 P.2d 338. Since *Thompson* and *McJunkin* were decided, strict liability has been codified in MCA § 27-1-719.

## IV. Construction Liens

Because manufactured homes can be classified as either real or personal property, construction lien disputes involving manufactured homes can also present novel issues.<sup>11</sup>

According to MCA § 70-1-105 property is either real or immovable, or personal or moveable. According to MCA § 70-1-106, real or immovable property consists of land and that which is affixed to land, including a manufactured home declared by the owner to be an improvement to real property pursuant to MCA § 15-1-116. In order for a manufactured home to be declared as an improvement: (1) the running gear must be removed; (2) the home must be attached to a permanent foundation; and (3) it must be

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<sup>11</sup> A construction lien may arise only out of improvements to real property pursuant to a real estate improvement contract. See MCA § 71-3-521 *et seq.*

placed on land that is owned or being purchased by the owner of the home, or if placed on land owned by another person, with the landowner's permission. Once such a declaration is made, the certificate of origin or certificate of title is surrendered and the manufactured home is treated as any other improvement to real property.

When filing, enforcing or defending a construction lien on a manufactured home project, it should be determined at the outset, through researching the property tax records, whether the home is classified as real or personal property. If a manufactured home has been declared real property, an unpaid contractor would have a right to claim a construction lien for all work related to the home. If no such declaration has been made and the manufactured home is personal property, then there would likely be no right to claim a construction lien for work on the manufactured home itself. On the other hand, if the disputed work simply involves the construction of a foundation or some other improvement that is appurtenant to a manufactured home yet affixed to the real estate, a construction lien would be proper regardless of whether the home itself is real or personal property.

## **V. Miscellaneous Issues**

### **a. Landlord-Tenant**

Manufactured home construction disputes can also involve issues of landlord-tenant law and premises liability. The Montana Residential Mobile Home Lot Rental Act, MCA § 70-33-101 *et seq.*, may provide some substantive law and remedies in cases involving manufactured homes sited on rental lots, while the Montana Residential Landlord Tenant Act, MCA § 70-24-101 *et seq.*, may apply in cases in where the landlord owns both the lot and the manufactured home.

### **b. Lending and Foreclosure**

Manufactured home lending may be governed by UCC Article 9—Secured Transactions and the Montana Code provisions on perfecting security interests on titles to motor vehicles, if the home is considered personal property; or the Small Tract Financing Act or mortgage lending laws generally, if the home is declared to be real property. Additional federal laws are also likely to apply depending on the terms and character of the loan and whether the manufactured home is considered real or personal property. When representing lenders or borrowers in manufactured home lending transactions and disputes, it is important to determine at the outset which set of rules will govern the transaction, the perfection of security interests, and the default and foreclosure/repossession process.

## **Biography**

Frederick P. (“Rick”) Landers, Jr. is a partner in the Bozeman office of Axilon Law Group, PLLC. He graduated from Georgia Institute of Technology with a B.S. in Management in 1994, and received his J.D. from the University of Georgia School of Law in 1997. His practice generally consists of business litigation and transactions, with an emphasis on real estate, construction and development, and mortgage lending matters. He is an active member of the State Bars of Montana and Georgia and is admitted to practice in all state trial and appellate courts of Montana and Georgia, as well as the U.S. District Court and U.S. Bankruptcy Court for the District of Montana, and the U.S. Court of Appeals for the Ninth Circuit.