

Report From Agency

DATCP Docket No. 12-R-08
Rules Clearinghouse No. 13-066

Proposed Final Draft
October 30, 2013

PROPOSED ORDER
OF THE WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION
ADOPTING RULES

2 The Wisconsin department of agriculture, trade and consumer protection proposes the following
3 rule *to repeal* ATCP 110.02 (3) (d), 110.02 (6) (L) and (m), 110.02 (7) (c), Ch. ATCP 111 Title
4 and preamble notes, ATCP 111.02 (5), and 111.06; *to renumber* ATCP 111.01, 111.02 (title)
5 and (1) to (4), (6), and (7), 111.03 (2) to (6), and (8) to (10), 111.04, and 111.05; *to renumber*
6 *and amend* ATCP 111.03 (intro) (1) and (7); *to amend* ATCP 110.01 (2), 110.02 (6) (L) to (n),
7 110.03 (1), 110.04 (1) and 110.05 (4) and (7); *to create*, 110.01 (2m), 110.023, 110.025,
8 110.027, 110.03 (3) and (4), 110.06 (1) (Note), and 110.09 (title); *relating to* Home
9 improvement practices and basement waterproofing practices, and affecting small businesses.

Analysis Prepared by the Department
of Agriculture, Trade and Consumer Protection

This rule revises and updates current rule relating to home improvement practices.

Statutes Interpreted

Statutes Interpreted: s. 100.20, Stats.

Statutory Authority

Statutory Authority: ss. 93.07(1) and 100.20 (2) (a), Stats.

Explanation of Statutory Authority

DATCP has broad general authority, under s. 93.07(1), Stats., to interpret laws under its jurisdiction.

DATCP has authority under s. 100.20 (2) (a) to promulgate rules forbidding methods of competition in business or trade practices in business that are determined to be unfair. DATCP also has authority to promulgate rules prescribing methods of competition or trade practices that DATCP determines to be fair.

Related Statutes and Rules

Some of the home improvement contractors regulated by ATCP 110 may also be regulated by Ch. 101 – Subchapter II, One and Two Family Dwelling Code, Wis. Stats., associated Department of Safety and Professional Services (DSPS) administrative rules, and building codes administered by local units of government. Under statutes and rules administered by DSPS, persons who apply for building permits for one or two unit dwellings (and who are not an owner and resident), are required to have a Dwelling Unit Contractor Certification from DSPS. These statutes and rules do not distinguish between building permits for new construction and building permits for home repairs or improvement. Therefore, those certified dwelling unit contractors who specialize in new home construction are not regulated by ATCP 110. And those home improvement contractors who perform jobs that do not require building permits are not regulated by the dwelling unit contractor certification program.

Section 100.65, Wis. Stats., Residential Contractors, was recently created by 2013 Wisconsin Act 24. Generally, this act regulates contracts for replacement or repair of roof systems and other exterior repair, replacement, construction, or reconstruction projects in cases where property insurance claims are involved. This statute contains some specific notice requirements, rights for consumer to cancel a contract if insurance claim is denied, and certain restrictions on contractors' actions relating to insurance claims.

Plain Language Analysis

Rule Content

ATCP 110 currently regulates home improvement practices. Pursuant to the definition of “home improvement,” new residential construction is outside of the scope of the current rule and DATCP does not regulate trade practices in the construction of new homes.

Under this proposed rule, the rights and duties contained in ATCP 110 would not apply to very large home improvement projects, defined as those where the value of the project is more than the assessed value of the existing structure. A typical example of this might be a contract to build a new structure on a preexisting foundation.

Under the current rule, home improvement contractors must obtain all required state or local building permits before work can begin under the contract. Under this proposed rule, if a home improvement contract consists of multiple subprojects, contractors may start work on the overall project before obtaining all building permits. However, they may not begin work on a subproject

that requires a building permit until after they obtain the permit.

Under the current rule, where a midpoint or final inspection is required by state law or local ordinance, the seller must provide the inspection certificate to the buyer. This proposed rule retains this provision, but in the event the inspector does not physically issue a certificate, the seller may provide a summary of inspection information to the buyer instead of a copy of the certificate.

Under the current rule, sellers must provide manufacturers' product warranties either at the time the buyer and seller enter into the contract or when the product is installed. Under this proposed rule, the seller has the option of providing written manufacturers' warranties at the completion of the project – as long the option is specified in the contract.

Under the current rule, if a home improvement contract contains liquidated damages that penalize a buyer for breaching the contract, the liquidated damages may not exceed 10% of the contract price or \$100, whichever is less. This proposed rule maintains the 10% limit, but it repeals the \$100 maximum.

Under the current rule, the seller may not substitute products or materials from those specified in the home improvement contract, or for those which the seller represented would be used, without prior consent from the buyer. If the home improvement contract is in writing, the prior consent must also be in writing.

The proposed rule maintains the same procedure for altering written contracts as contained in the current rule. However, the proposed rule also allows for buyer authorized verbal alterations to the contract, but only if the following conditions are met:

- The alteration does not represent any additional cost to the buyer
- The alteration does not represent a decrease in the value of the finished product.
- The seller maintains documentation of the alteration, and that the buyer authorized the alteration.

Under the current rule, the seller is required to provide the buyer with lien waivers before accepting final payment. Further, if the contract requires partial payments at various stages in the performance of the contract, the seller is required to provide lien waivers for the proportionate value of all labor, services and products or materials furnished or delivered as of the time partial payment is made. Under the proposed rule, the seller is required to provide the lien waivers if the buyer requests them. Under the proposed rule, the seller is required to provide notice to the buyer that the buyer has a right to request the lien waivers, and retain evidence that the buyer acknowledged receipt of the notice.

Under the current rule, sellers are required to give buyers timely notice of any impending delay in contract performance. If the home improvement contract is in writing (or required to be in writing), the buyer must agree in writing to the change in the schedule. This proposed rule provides that sellers are not responsible for delays caused by action or inaction of the buyer, destructive acts of nature, or disruptive civil disorder.

Under the current rule, if a seller represents that insurance or some other form of protection is provided, the contract must clearly state the terms, conditions and limitations, as well as the name and address of the insurer. Further, the seller is required to furnish a copy of the insuring or protection agreement to the buyer before final payment is made. This proposed rule does not substantially change this requirement, except that it allows the contractor to provide a proof of insurance document rather than the entire policy or agreement.

The current rule contains protections for buyers in the event that the seller fails to complete the project, but also assigns the rights to collect payment to a third party. This proposed rule does not alter this provision, but it inserts an explanatory note.

Under current rules, sellers who provide basement waterproofing services are regulated as home improvement contractors under Ch. ATCP 110 and under Ch. ATCP 111 – Basement Waterproofing Practices. This proposed rule consolidates the content of Ch. ATCP 111 into a section of ATCP 110, without making any substantive changes.

Summary of, and Comparison with, Existing or Proposed Federal Statutes and Regulations.

The federal government does not, in general, regulate home improvement practices.

Comparison with Rules in Adjacent States

Most states, including all of Wisconsin's neighbors, have home improvement practices laws. Many of the provisions in ATCP 110 are common in these other states as well.

Illinois regulates home improvement practices through its Home Repair and Remodeling Act and its Home Repair Fraud Act. These provisions are generally similar to Wisconsin's Home Improvement Practices rule.

Iowa grants consumers a private right of action, which enables consumers to sue businesses that engage in deceptive or unfair practices, misrepresentation, or failure to disclose material facts. This law covers home improvement practices, among other areas.

Contractors who do home improvement work in Minnesota and Michigan are required to obtain a license from the state (there are some exceptions). In Minnesota, licensed contractors are required to pay into the Minnesota Contractor's Recovery Fund. This fund compensates people who have suffered losses due to a licensed contractor's fraudulent, deceptive or dishonest practices, misuse of funds, or failure to do the work the contractor was hired to do.

Summary of Factual Data and Analytical Methodologies

The Wisconsin Builders Association estimates that this proposed rule would result in cost savings of roughly \$1 million per year for remodelers and homeowners. This estimate is based on a projection that the proposed rule simplifies compliance and reduces paperwork by about 2 hours per job. Based on an average wage-plus-overhead amount of \$50 dollars per hour, and

that there are roughly 10,000 remodeling projects per year in Wisconsin, the total savings is \$1 million.

On a national basis, fixr.com (a web-based contractor referral service) has reported the extent of the home improvement industry on a national basis.

United States Annual Averages 1995 - 2009

	Number of Projects	Total Expenditure	Average Cost Per Project
Room additions and alterations	1,156,018	\$ 23,141,745,151	\$ 20,019
Systems and equipment	9,462,782	\$ 15,061,419,820	\$ 1,592
Outside attachments	549,917	\$ 3,560,131,931	\$ 6,474
Kitchen remodels	1,052,211	\$ 10,638,971,786	\$ 10,111
Other property additions and replacements	3,758,351	\$ 19,767,613,249	\$ 5,260
Exterior additions and replacements	5,636,949	\$ 23,734,265,908	\$ 4,210
Interior additions and replacements	5,186,460	\$ 13,211,085,021	\$ 2,547
Bath remodels	1,030,736	\$ 6,475,917,156	\$ 6,283
Disaster repairs	528,062	\$ 6,448,663,562	\$ 12,212

<http://www.fixr.com/infographics/us-home-improvement-industry-at-a-glance.html>

Complaints against home improvement contractors are consistently ranked in the top ten complaint categories received by The Bureau of Consumer Protection. In 2012, DATCP received 391 written complaints against home improvement contractors.

Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Analysis

DATCP has consulted with the Wisconsin Builders Association and the National Association of Remodelers – Milwaukee Chapter on the economic impact and the small business impact of this rule.

Effect on Small Business

DATCP anticipates that this rule would affect small business. The existing ATCP 110 regulates businesses that provide home improvement services. Many of these businesses are “small businesses.” They include general contractors, landscapers, plumbers, roofers, window installers, cabinet makers, electricians, and many more. Some of changes to ATCP 110 proposed in this rule will have an effect on some of these businesses. However, DATCP anticipates that those effects will be beneficial. The proposed rule streamlines existing regulations to make them easier for home improvement providers to comply. But the rule does not eliminate these regulations, thereby preserving important protections for consumers. This rule may benefit home improvement contractors in the following ways:

- General contractors working on significant reconstruction projects would no longer be regulated under this proposed rule. Currently, Ch. ATCP 110 does not regulate new home construction but it does regulate home improvement projects. Under this proposal, major reconstructions – those projects where the price of the contract is greater than the assessed value of the preexisting structure -- would be treated like new home construction.
- For all home improvement contractors, this rule provides some additional flexibility (as long as certain conditions are met). Including:
 - Building permits need only be obtained before work on that portion of the project concerning the building permit. Otherwise, all required building permits must be obtained before any work is completed.
 - Sellers can provide written manufacturers’ warranties at the conclusion of the work. Otherwise, written manufacturers’ warranties must be provided at the time the product is installed.
 - Under very limited circumstances, sellers can deviate from the written contract based on verbal agreements between the buyer and the seller.
 - The seller cannot be held responsible for delays in contract performance if the seller can demonstrate that delay was caused by actions or inactions of the buyer, destructive acts of nature, or disruptive civil disorder.

Environmental Impact

This rule does not have an environmental impact.

DATCP Contact

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1 **SECTION 1.** ATCP 110.01 (2) is amended to read:
 2 ATCP 110.01 (2) “Home Improvement” means the remodeling, altering, repairing,
 3 painting, or modernizing of residential or non-commercial property, or the making of additions
 4 thereto, and includes, but is not limited to, the construction, installation, replacement,
 5 improvement or repair of driveways, sidewalks, swimming pools, terraces, patios, landscaping,

1 fences, porches, garages, basements and basement waterproofing, fire protection devices, heating
2 and air conditioning equipment, water softeners, heaters and purifiers, wall-to-wall carpeting or
3 attached or inlaid floor coverings, and other changes, repairs or improvements made in or on,
4 attached to or forming a part of the residential or non-commercial property, ~~but does not include~~
5 ~~the construction of a new residence~~. The term extends to the conversion of existing commercial
6 structures into residential or non-commercial property. “Home improvement” does not include
7 the construction of a new residence or the major renovation of an existing structure.

8 **SECTION 2.** ATCP 110.01 (2m) is created to read:

9 ATCP 110.01 (2m) “Major renovation of an existing structure” means a renovation or
10 reconstruction contract where the total price of the contract is more than the assessed value of the
11 existing structure at the time the contract is initiated.

12 **SECTION 3.** ATCP 110.02 (3) (d) is repealed.

13 **SECTION 4.** ATCP 110.02 (6) (L) to (n) are amended to read:

14 ATCP 110.02 (6) (L) ~~Fail~~ Where the buyer requests lien waivers under s. ATCP 110.025
15 (2), fail to give or furnish to the buyer lien waivers in writing from all contractors, subcontractors
16 and material suppliers at or prior to the time final payment is made on the home improvement
17 contract.

18 (m) Where partial payments are required at various stages in the performance of the
19 contract, and the buyer requests lien waivers under s. ATCP 110.025 (2), fail to give or furnish to
20 the buyer lien waivers in writing from all contractors, subcontractors and material suppliers for
21 the proportionate value of all labor, services and products or materials furnished or delivered as
22 of the time partial payment is made.

1 (n) Fail to ~~disclose~~ provide notice to a buyer as required under s. ATCP 110.025 (1),
2 before the buyer enters into a home improvement contract, that the buyer is entitled to receive
3 written lien waivers ~~according to pars. (L) and (m)~~.

4 **SECTION 5.** ATCP 110.02 (7) (c) is repealed.

5 **SECTION 6.** ATCP 110.023 is created to read:

6 ATCP 110.023. **Substituting products or materials; altering the written contract.** (1)

7 No seller shall substitute products or materials for those specified in the home improvement
8 contract, or for those which the seller represented would be used in the home improvement,
9 without the prior consent of the buyer. Except as provided in sub. (2), if a written home
10 improvement contract is required under s. ATCP 110.05 (1) or the buyer signs a written contract,
11 the buyer's consent under this paragraph shall also be in writing.

12 **Note:** According to s. 137.15 (3), stats., "If a law requires a record to be in writing, an
13 electronic record satisfies that requirement in that law."

14 (2) **VERBAL AUTHORIZATION.** The seller may act on alterations to the contract that are
15 verbally authorized by the buyer, if all the following conditions are met:

16 (a) The alteration does not represent any additional cost to the buyer.

17 (b) The alteration does not represent a decrease in the value of the materials used or the
18 services provided.

19 (c) The seller maintains documentation of the following:

20 1. The manner in which the buyer communicated the authorization for the alteration. In
21 this subd., "manner" means face-to-face discussion, phone call, or some other method of
22 communicating.

23 2. The name of the buyer who authorized the alteration.

1 3. The date and time that the buyer authorized the alteration.

2 4. A description of the alteration.

3 (d) The seller must report any alterations documented pursuant to subd. (c), to the buyer
4 before final payment is accepted.

5 **SECTION 7.** ATCP 110.025 is created to read:

6 ATCP 110.025 **Lien waivers.** (1) A seller shall provide notice to buyer that buyer may
7 request written lien waivers from all contractors, subcontractors, and material suppliers at or
8 prior to the time any payment is made on the home improvement contract. Notice shall be
9 provided before the buyer and seller enter into a home improvement contract. The notice shall
10 meet the requirements listed in pars. (a) to (c).

11 (a) The notice shall be in writing and consist of the following, verbatim statement:

12 ***Notice of Consumer's Right to Receive Lien Waivers***

13 *If a consumer requests lien waivers, a seller of home improvement services must provide*
14 *lien waivers from all contractors, subcontractors and material suppliers. This Wisconsin law*
15 *protects consumers from having liens filed against their property. Lien waivers prevent the*
16 *filing of a lien on your home in the event that a contractor does not pay suppliers or*
17 *subcontractors.*

18 *For more information about home improvement law, contact the Wisconsin Consumer*
19 *Protection Bureau at 1-800-422-7128 or www.datcp.wi.gov.*

20
21 (b) The notice shall be provided as a separate document, written in a clear and
22 conspicuous font, in a format that the buyer can retain.

23 (c) The seller shall retain evidence of the buyer's acknowledgement of receipt of the
24 notice.

25 (2) Upon request from the buyer, the seller shall provide the buyer with lien waivers in
26 writing from all contractors, subcontractors and material suppliers for the proportionate value of
27 all labor, services and products or materials furnished or delivered as of the time payment is

1 made. Unless the buyer specifies that the lien waiver request applies only to the final payment,
2 the seller shall provide lien waivers at the time any partial payments are made.

3 **SECTION 8.** ATCP 110.027 is created to read:

4 **ATCP 110.027 Delay in contract performance.** (1) A seller must give the buyer timely
5 notice of any impending delay in the home improvement contract performance if performance
6 will be delayed beyond a deadline specified in the home improvement contract. The notice shall
7 specify any reasons for the delay, and shall specify new proposed deadlines by which the seller
8 will begin and complete the work. If a written home improvement contract is required under s.
9 ATCP 110.05 (1) or the buyer signs a written contract, no change in performance deadlines is
10 effective unless the buyer agrees in writing to the change.

11 **Note:** According to s. 137.15 (3), stats., “If a law requires a record to be in writing, an
12 electronic record satisfies that requirement in that law.”

13 (2) Notwithstanding sub. (1), a seller shall not be responsible for delays in contract
14 performance if the seller can demonstrate any of the following:

15 (a) The delay was caused by actions or inactions of the buyer.

16 (b) The delay was caused by a destructive act of nature such as tornado, flood or fire.

17 (c) The delay was caused by disruptive civil disorder such as a strike, hostile action, or
18 war.

19 **SECTION 9.** ATCP 110.03 (1) is amended to read:

20 **ATCP 110.03 (1)** Before a buyer enters into a home improvement contract, the seller
21 shall inform the buyer of all building or construction permits that are required for the home
22 improvement. ~~No~~ Except as provided in sub. (4), no seller may start work under a home
23 improvement contract until all required state and local permits have been issued.

1 **SECTION 10.** ATCP 110.03 (3) and (4) are created to read:

2 ATCP 110.03 (3) Pursuant to sub. (2), if the state or local inspector who completed the
3 inspection does not issue an inspection document, the seller may provide a summary of the
4 inspection to the buyer. The summary shall include the inspector's name, the date of the
5 inspection, and inspection number or some other way to identify the inspection in the state or
6 local building inspection database.

7 (4) Notwithstanding sub. (1), if the home improvement contract includes subprojects, no
8 seller may start work on any subproject of a home improvement contract that requires state or
9 local permits until all permits required for that subproject have been issued.

10 **SECTION 11.** ATCP 110.04 (1) is amended to read:

11 ATCP 110.04 (1) A seller shall give a buyer a copy of every written warranty made with
12 respect to labor, services, products or materials furnished in connection with a home
13 improvement. If a seller makes any oral warranty, the seller shall document that warranty in
14 writing and give a copy to the buyer. The seller shall provide all warranty documents to the
15 buyer at the time the buyer enters into a home improvement contract, except that a
16 manufacturer's product warranty may be provided ~~when that product is installed.~~ at any of the
17 following times:

18 (a) At the time the buyer enters into a home improvement contract.

19 (b) At the time the product is installed.

20 (c) At the conclusion of the project, if specified in the contract.

21 **SECTION 12.** ATCP 110.05 (4) and (7) are amended to read:

22 ATCP 110.05 (4) Where a representation is made that insurance or some other form of
23 protection will be provided, the contract shall clearly state the terms, conditions and limitations

1 thereof, as well as the name and address of the insurer or the person who is furnishing such
2 protection, if different from the seller. A copy of the insuring or protection agreement,
3 declarations page, or some other document that shows evidence of insurance or other protection
4 shall be furnished to the buyer before final payment is due under the contract.

5 (7) Liquidated damages for breach of contract by the buyer if made a part of the contract
6 shall not exceed 10% of the contract price ~~and in no event more than \$100.~~

7 **SECTION 13.** ATCP 110.06 (1) **Note** is created to read:

8 **ATCP 110.06 (1) Note** Under this section, where the seller assigns the debt to a finance
9 company before completing the contract and then fails to complete the contract, the finance
10 company is subject to the same claims and defenses the buyer has against the contractor.

11 **SECTION 14.** ATCP 110.09 (title) is created to read:

12 **ATCP 110.09 Basement waterproofing practices.**

13 **SECTION 15.** ATCP 111 Title and preamble notes are repealed.

14 **SECTION 16.** ATCP 111.01 is renumbered to ATCP 110.09 (1).

15 **SECTION 17.** ATCP 111.02 (title) and (1) to (4) are renumbered to ATCP 110.09 (2)
16 (title) and (a) to (d).

17 **SECTION 18.** ATCP 111.02 (5) is repealed.

18 **SECTION 19.** ATCP 111.02 (6) and (7) are renumbered to ATCP 110.09 (2) (e) and (f).

19 **SECTION 20.** ATCP 111.03 (intro) and (1) are renumbered to ATCP 110.09 (3) (intro)
20 and (a) and amended to read:

21 ATCP 110.09 (3) **PROHIBITED PRACTICES.** No seller of basement waterproofing services,
22 products or materials shall engage in the following unfair trade practices or unfair methods of
23 competition:

1 (a) Make or offer to make any guarantee with respect to basement waterproofing services
2 unless the guarantee meets the requirements of s. ~~ATCP 111.04~~ ATCP 110.09 (4), and is
3 furnished to the buyer in writing with a seller's analysis prior to final execution of any contract.

4 **SECTION 21.** ATCP 111.03 (2) to (6) are renumbered to ATCP 110.09 (3) (b) to (f).

5 **SECTION 22.** ATCP 111.03 (7) is renumbered to ATCP 110.09 (3) (g) and amended to
6 read:

7 ATCP 110.09 (3) (g) Sell basement waterproofing services using the pressure pumping
8 method unless the need or effectiveness of such method is established in a seller's analysis
9 verified by an engineer's analysis furnished to the buyer prior to the sale, and the work is
10 guaranteed as provided under ~~ATCP 111.04~~ s. ATCP 110.09 (4).

11 **SECTION 23.** ATCP 111.03 (8) to (10) are renumbered to ATCP 110.09 (3) (h) to (j).

12 **SECTION 24.** ATCP 111.04 (intro) and (1) to (3) are renumbered to ATCP 110.09 (4)
13 (intro) and (a) to (c).

14 **SECTION 25.** ATCP 111.05 is renumbered to ATCP 110.09 (5).

15 **SECTION 26.** ATCP 111.06 is repealed.

16 **SECTION 27. INITIAL APPLICABILITY.** This rule first applies to home improvement
17 contracts that are entered into on the effective date of this rule.

18 **SECTION 28. EFFECTIVE DATE.** This rule takes effect on the first day of the third month
19 following publication in the Wisconsin administrative register, as provided in
20 s. 227.22(2)(intro.), Stats.

Dated this _____ day of _____, _____.

WISCONSIN DEPARTMENT OF AGRICULTURE,
TRADE AND CONSUMER PROTECTION

By: _____
Ben Brancel
Secretary