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The Honorable Edward G. Rendell
Governor
Room 225, Main Capitol Building
Harrisburg, PA 17120

Dear Governor Rendell:

You have requested our opinion pursuant to Section 204(a) of the Commonwealth Attorneys Act, 72 P.S. 732-204(a), regarding the constitutionality of House Bill No. 1467 (HB1467), which has been passed by both houses of the General Assembly and presented to you for approval or veto. Upon careful review, and after consulting with the Office of General Counsel, we have concluded that HB1467 violates Article III, Section 18 of the Pennsylvania Constitution, and that its constitutionality under Article V, Section 10(c) is suspect.

Article III, Section 18 authorizes the General Assembly to enact workers compensation laws, but provides otherwise, in relevant part, that "in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property...."

HB1467 would establish a mandatory procedure for claiming damages or other relief against a contractor because of a construction defect in a dwelling. The claimant would be required to follow the procedure prior to filing a lawsuit and as a condition of recovering the full amount of damages to which the claimant would be entitled by law upon successful prosecution of such lawsuit. The bill provides in Section 4 that "[t]his act shall not apply to any claim for personal injury or death." The bill does not similarly exempt a claim for injury to property. The bill proceeds in Section 5(h) to limit the amount that a claimant may recover in a lawsuit seeking damages or other relief on account of a construction defect in a dwelling.

The limit set by Section 5(h) is conditional in that a claimant may recover the full amount of damages to which the claimant would be entitled by law if, in the mandatory procedure, the contractor offers the claimant either no monetary settlement or repair or a monetary settlement or repair that a judge or jury later determines to have been unreasonable. A conditional limitation, particularly one that hinges on so tenuous a thread as a claimant's prediction of how a judge or jury later will view the reasonableness of a contractor's offer, nonetheless is a limitation on the amount that a claimant may recover for an injury to property, which Article III, Section 18 prohibits.

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In *Singer v. Sheppard*, 464 Pa. 387 (1975), the Pennsylvania Supreme Court rejected an Article III, Section 18 challenge to a provision of the No-Fault Motor Vehicle Insurance Act that eliminated recovery in tort for “non-economic damages” for a defined class of accident victims. *Id.* at 396-397. Observing that the Act, rather than restricting damages, created two classes of accident victims, each with different, but unlimited, compensable damages, the Court held that “[n]othing in Article III, Section 18 prevents the abolition or modification of a cause of action.” *Id.* at 397. HB1467 neither abolishes nor modifies any cause of action; thus *Singer* is inapposite.

The Supreme Court has had little occasion to discuss the purpose of Article III, Section 18. In *Singer*, the Court said that the original purpose of Section 18 was to invalidate a statute that had imposed absolute dollar maximums on the damages recoverable by a negligently injured plaintiff. *Id.* at 396. In *DeJesus v. Liberty Mutual Insurance Company*, 439 Pa. 180, 184 (1970), the Court said that “the purpose of Section 18, as amended, was to permit the General Assembly to enact a workmen’s compensation program, but to preclude the enactment of general legislation covering injuries other than those arising in the course of employment.” Both statements were context-specific; neither affords much assistance in our review of HB1467.

As Commonwealth Court has explained regarding the construction of provisions of the Pennsylvania Constitution by the courts:

“the fundamental rule of construction which guides us is that the Constitution’s language controls and must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” Moreover, the general principles governing the construction of statutes apply also to the interpretation of constitutions. Thus, when the language of a constitutional provision “is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given it.”

Jubelirer v. Pennsylvania Department of State, 859 A.2d 874, 876 (Pa. Cmwlth. 2004), *aff’d*, 582 Pa. 364 (2005) (citations omitted).

We, too, must be guided by the language of Article III, Section 18, interpreted in its popular sense, which admits of but one interpretation: that the General Assembly may not limit the amount that may be recovered for injuries resulting in death or for injuries to persons or property. HB1467 limits the amount that may be recovered for injuries to property because of a construction defect in a dwelling; it is therefore, in our opinion, unconstitutional.

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Article V, Section 10(c) provides that "[t]he Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts...." The Supreme Court has interpreted this provision as conferring upon it exclusive power to prescribe the rules of practice and procedure in all actions in the Pennsylvania courts. *Payne v. Department of Corrections*, 582 Pa. 375 (2005).

HB1467 provides in Section 3(a) that "[i]n every action subject to this act, the claimant shall, no later than 75 days before initiating an action against a contractor, provide service of written notice of claim on the contractor" and in Section 3(b) that "[s]ervice of the notice of the claim shall be the *equivalent of service of a lawsuit* or demand for arbitration with respect to imposing on the contractor a legal obligation to pay as damages the cost of any repairs and/or monetary payment made to settle the claim." (emphasis added).

By making service of a written notice of claim the equivalent of service of a lawsuit, HB1467 arguably makes the mandatory procedure that follows, the provisions of which are conspicuously procedural in tone and effect, *procedural* within the meaning of Article V, Section 10(c). *See, e.g.*: Section 3(c) (claimant to provide contractor with evidence); Section 5(a) (content of claimant's notice of claim); Section 5(b) (contractor to serve written response to notice of claim within 15 days); Section 5(d) (contractor to provide written response, with discoverable evidence, within 15 days of inspection or testing); Section 5(e) (claimant barred from initiating action without in-person meeting with contractor). Having concluded that HB1467 violates Article III, Section 18, we needn't render a definitive opinion as to whether it also violates Article V, Section 10(c). It is sufficient to observe that the constitutionality of HB1467 under Article V, Section 10(c) is suspect.

In summary, it is our opinion, and you are so advised, that HB1467 violates Article III, Section 18 of the Pennsylvania Constitution, and that its constitutionality under Article V, Section 10(c) is suspect. Since our opinion is rendered in aid of your decision to approve or veto HB1467, our advice is not binding.

Sincerely,



TOM CORBETT
Attorney General

cc: Honorable Barbara Adams