



Radon Liability

by William Ethier

With more and more information about radon hitting the streets, builders are beginning to get concerned about their potential liability. Builders can limit or control potential radon liability in several ways:

Don't create contractual responsibility for this natural health hazard. Radon is unlike other environmental health hazards, such as asbestos or formaldehyde, which are man-made conditions. Do not give any warranties that would cover radon, such as warranties on merchantability, habitability or fitness for purpose. Express warranties should be very specific, enumerating each item or condition that you intend to warrant. Avoid using general or broad terms. Warranties on workmanship, whether for radon reduction or mitigation techniques or any other work in the home, should be referenced to the standards of construction in the county and state in which the builder works.

Disclaimer or waive all warranties, expressed or implied, that are not specifically enumerated. While some state courts will not enforce this disclaimer as to implied warranties, the trend seems to be to allow the disclaimer or waiver. Make the disclaimer language simple, clear and conspicuous (for example, putting it in all capital letters). The important point is to be up-front with potential buyers, letting them know exactly what is warranted and what is not. Do not leave any room for interpretation by a judge. Also, a disclaimer of implied warranties is more likely to hold up in court if the builder offers a limited express warranty. A specific disclaimer and notice regarding radon or indoor air quality might be in order. The trade-off, of course, is that some buyers will walk if they see this language. The trick is to educate, inform, and warn potential buyers as much as possible without scaring them off. A valid disclaimer, while eliminating a builder's contractual or warranty liability, may not affect a negligence or strict liability claim. Talk to your attorney about the specific language to use. (Samples are provided below but do not use the sample language

without review and editing by your own attorney.)

Use construction techniques that the experts say help to prevent radon from getting into homes. Builders and buyers should know, however, that we are at the beginning of a learning curve with this whole issue. We do not know exactly what works and no construction technique is foolproof. Also some techniques may add significant costs to the price of a home. (See "A Radon Guide for New Construction," NEB 10/87 for some specific recommendations, and contact NAHB's Technical Services Department or the NAHB Research Center for questions related to construction and the radon research that NAHB and the U.S. Environmental Protection Agency are doing.)

Consider inserting an "indemnification and hold harmless" clause in contracts with foundation or ventilation subcontractors in order to pass off liability to responsible parties. There are several ways you can write radon contract provisions, and some samples have been provided, but you are strongly advised to consult your attorney. There are significant differences in law among the states and your attorney may advise you not to include one or more of these provisions or parts of them in your contracts for various reasons. Or your attorney may advise combining various parts of the three provisions into one. When referring to the samples, please note that the language in brackets [] is not part of the contract provision but is a note on the ways the provision could be modified.

For those wishing more information on contracts in general, NAHB has published "A Builder's Guide to Contracts and Liability." For information call 800/368-5242, ext. 463. ■

William H. Ethier is the Associate Litigation Counsel for the National Association of Homebuilders (NAHB). This article is an adaptation of a recent memo from Ethier to NAHB members and officers.

SAMPLE RADON CONTRACT PROVISIONS

Sample #1: Radon Notice and Disclaimer: The United States Environmental Protection Agency (EPA) and the State Department of (Health or Environmental Protection) have expressed concern over the presence of radon gas in homes. Prolonged exposure to high levels of indoor radon or its progeny may affect the health of residents. Builder has made no investigation to determine whether there is radon gas or other environmental pollutants in the home or affecting the premises, although such conditions may exist. Builder has made no analysis or verification of the extent of the environmental or health hazard, if any, that may affect the premises or residents.

Builder makes no representation or warranty as to the presence or lack of radon or hazardous environmental condition, or as to the effect of radon or any such condition on the premises or residents. BUILDER FURTHER DISCLAIMS AND PURCHASER WAIVES, UNLESS OTHERWISE EXPRESSLY PROVIDED FOR IN BUILDER'S LIMITED WARRANTY, ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE WARRANTIES OF GOOD WORKMANSHIP, HABITABILITY, MERCHANTABILITY, AND FITNESS OF PURPOSE, AND INCLUDING ANY WARRANTIES THAT COULD BE CONSTRUED TO COVER THE PRESENCE OF RADON OR OTHER ENVIRONMENTAL POLLUTANTS, THE ONLY WARRANTIES BUILDER PROVIDES TO THE PURCHASER ARE THOSE CONTAINED IN THE LIMITED WARRANTY.

Sample #2: Radon Notice: Radon is a naturally occurring gas that is caused by the radioactive decay of the element radium. Since radium is contained in the earth's crust and dissolves readily in water, radon can be found virtually everywhere. Preliminary studies suggest that prolonged indoor exposure to high levels of radon gas may result in adverse health consequences.

This Notice serves to advise the purchaser that above average levels of radon gas may accumulate in any home, regardless of the type of home or who builds it. Specific radon levels depend on an array of factors, including site-specific variables such as soil type and conditions, wind and climate conditions, geology and groundwater, and building-specific variables such as construction materials and techniques, age of the structure, heating, ventilating and air conditioning systems and occupant upkeep and living habits. Also, indoor radon levels can fluctuate on a yearly, seasonal or even daily basis.

Because of the multitude of factors involved, it is difficult to predict whether a residence may be subject to high radon levels, unless tests to determine actual radon concentrations are conducted on a completed structure. The United States Environmental Protection Agency (EPA) and the Department of Energy are conducting extensive investigations regarding this matter.

The EPA has issued testing protocols that radon testing firms and homeowners should follow when testing homes. The homeowner may wish to make arrangements to test his home for radon. Costs for radon test kits vary from \$10 to \$50 or more. EPA publishes list of EPA-approved suppliers of such test kits. If you decide to measure the level of radon gas in your home, and if your test detects an elevated level, you may wish to take steps to conduct longer term testing or reduce the level detected. [If the builder has utilized sub-slab ventilation, the contract can state here:] One step you may wish to take is to install or have installed a small ventilation fan as recommended by EPA to vent gas from beneath the slab. Builder has prepared this home for the addition of a sub-slab ventilation system. You may wish to contact EPA or your states' environmental protection office for further information on whether to install such a fan and on the choice of a fan. [Provide the address and phone number of EPA's regional office and the applicable state office].

[Alternatively, the builder may offer to test the home, at the purchaser's expense, by stating:] Builder shall deliver to purchaser, at closing, a certificate from a firm that participates in the U.S. EPA's Radon Measurement Proficiency Program indicating what level of radon was present in the home at the time of the screening. Purchaser acknowledges that builder has not independently gathered any of the information that is contained within the certificate and is merely providing purchaser with information that has been made available to it by an independent firm. Purchaser further acknowledges that builder is not warranting the accuracy of the screening or the information contained within the certificate. Any rescreening of the residence or update of the certificate shall be performed by purchaser at its sole expense. [See also the No Contingency clause below.]

The EPA has also issued a technical guidance manual for new home construction. The purchaser acknowledges, however, that the builder does not claim or possess any special expertise in the measurement or reduction of radon, nor does the builder provide any advice to purchaser as to acceptable levels or possible health hazards of the gas. The builder has relied on the expertise of the government agencies that have been studying this issue and the builder has constructed the home with the following techniques, as recommended by the EPA guidance manual: [describe construction techniques such as sub-slab ventilation, extra caulking, etc.] Since no known construction technique is foolproof, the builder assumes no responsibility for the operation, maintenance or effectiveness of sub-slab ventilation systems or any other devices or methods intended for the reduction of radon gas levels.

Sample #3: Contract Not Contingent On Radon: The United States Environmental Protection (EPA) does not have mandatory regulations regarding radon levels in homes. The EPA, however, has issued "A Citizen's Guide to Radon," [which the purchaser acknowledges receiving from the builder.]____(purchaser's initials). This guide explains, among other things, what the owner of a home should do upon receiving the results of a radon test. Radon is measured in terms of picoCuries per liter (pCi/l). It is important for the purchaser to know that the EPA discussion of pCi/l and its suggested actions are based on the average annual level of radon in a home. A short term (3-7 days) test of radon levels is not, in most cases, a reliable measure of the average annual level.

Therefore, purchaser(s) agrees that this contract is *not* contingent on radon testing results or the presence or lack of radon in the home. The purchaser(s) further agrees that he (they) shall not extend the closing date or withhold payment, or any portion thereof, of the contract price from the builder for any reason, including radon testing results or the presence of radon in the home. By closing the purchase of the property, purchaser will be deemed to have released builder from any and all claims and liabilities relating to or arising from the presence of radon or other environmental hazards on the property and from any and all responsibility for mitigating any elevated levels of radon gas or other environmental hazards that may be discovered on the property.

The builder may consider providing an exception to the no contingency clause where a short term test reveals levels of radon in excess of 200 pCi/l, since at these levels EPA suggests that immediate mitigation measures be taken. At levels below 200 pCi/l, follow-up long term measurements (3 months to 1 year, depending on the level a short term test reveals) should be performed. Based on the long term test results a decision on further testing or mitigation measures can then be made.