

## NEW CONSTRUCTION – WHAT WARRANTY?

*By James Goldsmith*

Does new residential construction come with a warranty? What do you tell new home buyers about the builder's warranty? If you are confused or uncertain, there is good reason.

Pennsylvania common law (case law) holds that a vendor-builder of new construction impliedly warrants that the home is selling is constructed in a reasonably workmanlike manner and that it is fit for habitation. By its very nature, an implied warranty is far less specific than one that is in writing. It also contains fewer exclusions!

A written warranty, due to the specific and enumerated exclusions, may actually provide less coverage than no warranty at all! That is because the written warranty will most likely limit or exclude the full force and effect of the implied warranty.

The statute of limitation within which to bring suit for a breach of the implied warranty of habitability is four years. That period may actually be extended if the condition which constitutes a breach of the warranty is one that could not have been reasonably discovered within four years. The "discovery rule" generally provides that the statute of limitation is four years from the date when the condition could have first been discovered by one exercising reasonable diligence.

There are builders who enroll their properties with third-party warranty providers. These companies, for a fee paid by the builder, administer and assume all warranty obligations. The liability of the third-party warranty is premised on a requirement that the builder has constructed the property according to plans that meet the warranty company's requirements. Failure on the part of the builder to comply with those requirements may render the warranty useless or of limited benefit. In that case, the builder will become the warrantor.

A benefit to third-party warranties is that they are likely to exist even if the builder goes under or has insufficient assets to cover warranty situations. And that leads us to the question of the worth of a builder's warranty. Builders who are incorporated or take some other form of legal entity may be judgment proof. It may own no equipment and hold few, if any, assets. When it fails to properly address a warranty issue, your buyer may have very limited recourse, or none at all.

So, how do you properly protect your buyers who seek to buy new construction? By recognizing the complexity of warranty issues, you are off to a good start. Too many buyers have purchased new construction without a thought of the warranty other than some vague knowledge of having to complete a "punch-list" within some period following settlement. If the builder provides a written warranty, get a copy well in advance of signing any agreement to purchase. The written warranty is very bit important as the features, costs and other considerations that the buyer will factor when deciding whether to purchase.

Determine whether the warranty is provided by a third party and obtain all of the written materials intended for the purchaser. If there is neither a builder-supplied warranty nor a third-party warranty, then advise your client of the implied warranty and assure that there is no provision in the contract limiting or excluding that warranty. Also ask for references. Knowing how the builder treated others is valuable information.

Finally, and without question, advise your buyers to consult an attorney who can provide a detailed analysis of the warranty issues and who can best answer your buyers' questions. Advising your buyers to consult counsel should be standard practice. When you put the advice in writing, whether on paper or by email, you buy yourself reduced risk, peace of mind and an easier night's rest.

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