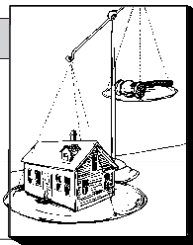


When Sales Hype Becomes A Warranty

by Reina A. Calderon, Esq.



Good builders of new homes are often proud of their work and zealous of their reputations. Frequently, when marketing their services to a new home buyer, they are tempted to treat the purchase and sales contract as a marketing tool. Statements in their purchase and sales contracts that promise the new home will be "a first class dwelling with first class

A statement that the home will be a "first-class dwelling" may be construed as an express warranty.

materials" or constructed "in a workmanlike fashion" may be construed by courts as creating express warranties. These statements have more than a marketing impact—they can create legally enforceable guarantees of workmanship that will survive, under the terms of most purchase and sales contracts and under state and federal law, for at least some time after the closing.

Where There's Smoke...

The case law surrounding express warranties can be confusing. One of the primary distinctions that courts typically make is whether the statement—and express warranties can be created verbally as well as in writing—was one that a purchaser could justifiably rely upon as a guarantee of the builder's performance. "Is it merely sales talk and puffery—or is it an express warranty?" courts will ask. If the statement is the former, the buyer will not be able to recover—at least not on a theory of breach of express warranty. But the distinction is not very clear. In a case where the builder's sales brochure had stated that the builder had a "good reputation," that it "had been building homes for 35 years," and that "all homes were good homes," the court held that the purchaser was *not* entitled to recover from the builder on a breach of express warranty theory. (*Shapiro v. Kornicks*, 124 N.E. 2d 175, Ohio, 1955.) Contrast that case with one in which the builder told the purchaser that an uncompleted house would be "completed right," that he "took pride in his homes," and that he "watched every detail." In that case, the court held that the purchaser could recover on the express representation of the builder.

Don't Go It Alone

Sound conflicting? The warranty question is one area where it does not pay for the builder to negotiate the purchase and sales contract without legal assistance. Without guidance it's easy to be pressured by the buyer's lawyer into giving his client "a little comfort" or assurance that the building won't fall down next year, the brickwork won't crack, the basement won't be filled with water

next spring, or the roof won't leak. Moreover, builders in many states have to worry about warranties that courts in those states—either because of state statutes or judge-made law—imply in construction contracts, regardless of what the builder expressly warrants. Typically, the warranty implied is that the builder warrants that the new home is habitable and/or that it is constructed in a good and workmanlike manner or using reasonable construction methods. Implied warranty cases and statutes run against the grain of the familiar "caveat emptor"—or "buyer beware" rule that courts have traditionally applied in the context of a real estate purchase. Because jurisdictions are divided regarding whether an implied warranty of habitability is recognized, it's particularly important to have competent legal advice in the contract negotiation stage. In addition, some states permit limitations, under particular circumstances, of implied and express warranties. It's important for the builder to know whether and what warranties he can limit and how he can limit them legally under his state's laws. And in some cases, the federal Magnuson-Moss Act, a consumer warranty statute with complicated requirements regarding warranty and service contract programs, may set limits on how warranties may be limited or disclaimed with respect to certain personal property classified under the Act as "consumer products."

Avoid Making Problems

From a risk management point of view, however, knowing something about the law of express warranties—and particularly the unexpected ways in which they can be created—may prove very useful to the builder in managing his everyday sales and marketing efforts. Unlike implied warranties, which the court or the legislatures impose, the creation of express warranties is, with proper education of the builder's sales and marketing staff, almost entirely within the builder's control. The basic rule is a common-sense one: If there's a chance that the project as delivered won't conform to a statement or representation made in advance about it, the statement or representation shouldn't be made. It's important to keep in mind that "Statements" and "representations" can be other than oral or written. Models, plans, specifications, and other graphic or visual depictions are representations creating express warranties, the breach of which will create liability. (*Wheaton Park, Inc. v. Lombardi*, 149 A.2d 422, D.D.C., 1959.) Sales and marketing personnel should be educated so that they avoid using pictorial images in sales brochures or other graphic depictions that "set the mood" but may ultimately be misleading to purchasers. For instance, if your project is located in a resort town on the ocean, but the project is situated three or four miles

from the beach, it may be misleading to present photographs of swimming and sailing in a brochure without a statement that the project is located three or four miles from the beach.

Builders may create express warranties unexpectedly where, in an effort to define what it is they have contracted to build or deliver, they attach a set of plans and specifications to the purchase and sale contract and agree to build in accordance with those plans and specifications. In such circumstances, it has been held that an express warranty that the building is *properly* constructed according to the attached plans and specifications is created. (*Lipson v. Southgate Park Corp.*, 189 N.E. 2d 191, 1963.) In Connecticut, if a builder contracts to deliver a certificate of occupancy at the closing, that promise creates an express warranty that the building will be constructed in a workmanlike fashion and according to accepted building practices. (*Maier v. Arsenault*, 100 A.2d 403, 1953.)

In summary, builders would do well to consider all possible forms of representation as capable of creating express warranties, and to think carefully about their chances of living up to the promises they make. ■

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