First Commerce Title

Office: 318-752-8080 Fax: 318-752-8426
2708 Village Lane, Bossier City, LA 71112
www.firstcommercetitle.com

Title Notes Article October 2004

New Home Warranties

from the desk of David M. Touchstone

In the pursuit of justice, the sages who first devised our law in the little town of Rome, 2500 years ago discovered that there are or ought to be two warranties implicit in the sales of all things. The first is that the seller actually owns the thing he is selling; today we refer to this first warranty as the warranty of title. The second warranty is that the thing sold ought to be free of hidden defects, the kind of defects that a buyer could not be expected to detect on a reasonable inspection. This second warranty is known to Louisiana lawyers as the warranty against redhibition or redhibitory defects. This article will not address warranty of title claims, but will be confined to the claim of hidden defects or defects that first become apparent after conclusion of the sale. More specifically, this article will examine the law applicable to new homes. In a later article, I will explore with you the law pertinent to hidden defects in existing homes as well as other nonresidential structures.

DAVID M. TOUCHSTONE
First Commerce Title, President

Until 1986, the law in Louisiana made no discrimination between cases involving defects in new homes and cases involving defects in existing homes. Both were covered under the law of redhibition. Up until 1986, law suits founded upon complaints of substandard workmanship or substandard materials often depended on whether the complained of conduct should be treated as a violation of a construction contract or as a defect arising out of a completed sale. This type of dispute often centered on the degree to which the homeowner was involved in negotiating the construction plans, whether the home was built on land owned by the contractor or owned by the homeowner, as well as other factors. If the case was treated as one of sale, the law of redhibition applied. If, on the other hand, the case was treated as one involving a construction contract, the law of building contracts applied. Whichever characterization was given to the case had potent implications for the outcome. For instance, many redhibition claims are time barred by the passage of one year from discovery of the defect whereas defects governed by the law of building contracts are time barred by either five or ten years, depending on the type of materials used. Additionally, characterization of the claim also had a significant effect on the amount of

damages recoverable and the items for which damages could be recovered.

Clearly, the pre-1986 law applying to new homes was unsatisfactory, in that homeowners of identical houses with identical defects could receive vastly different treatment of their claims depending on whether a court would treat their claim as arising under the law of sale or the law governing building contracts.

Furthermore, the law governing building contracts was written in 1808 and was based on even more ancient statutes. While, from a conceptual perspective, the antiquity of the building construction laws is not problematic, the fact is that most construction nowadays employs technical methods and materials completely foreign to those used at the time this legislation was enacted. Therefore, the pre-1986 laws were not sufficiently attuned to modern construction methods and materials in that there were few distinctions as to the extent of the warranty that should be applied to different types of defects.

And then there was the matter of "small print." We live in an age in which ever increasing technical specialization and advancement gives suppliers an ever increasing advantage over consumers. Who among the readers of this article is able to negotiate a customized licensing arrangement with Bill Gates for the use of Microsoft products? Microsoft holds all the cards because Microsoft has the technical know-how and a superior mastery of information regarding its products. On a much smaller scale, the same equation often governs the negotiating relationship between the homebuyer and the contractor. Thus, before 1986, it was a pretty simple thing for the builder to insert warranty waiver language in the buy/sell agreement (or construction contract) or for the builder to have the home buyer sign a warranty waiver at closing. These waivers sometimes significantly limited the homebuyer's recourse for defects which came to light at a later time.

To remedy these incongruities, the Louisiana legislature enacted the New Home Warranty Act in 1986. This act covers all residential construction occurring after 1986. Note that I said residential construction; it does not apply to construction which is not for residential purposes. As to residential construction in which the home has been sufficiently completed for the home buyer to take title or take possession, the New Home Warranty Act does away with the distinction that bedeviled the courts as to whether conflicts arose under the law of sale or the law of construction contracts; it simply supplants both bodies of law. Under the New Home Warranty Act, it does not matter whether the home buyer owns the land before construction, is intimately involved at every stage of negotiating the construction contract and the construction itself, or, on the other hand, never lays eyes on the house until ten months after the builder completed it as a speculative venture. Both scenarios will be governed by the New Home Warranty Act if title has transferred or the homebuyer has taken possession.

For the New Home Warranty Act, as with all warranties, time is of the essence. That is to say, two of the most important questions involving any warranty are: when does it start and when does it end? The warranty periods arising under the New Home Warranty Act commence upon the transfer of ownership (usually a deed) from the builder

to the homeowner or the date the homeowner takes physical possession of the new home, whichever occurs first. That's the date the clock starts ticking on a countdown to the eventual termination of the warranty periods. Interestingly, it should be noted that as long as the warranty periods have not elapsed, any owner of the new home has a right to make a claim in warranty. For instance, if the initial homebuyer resells the home six months after purchase, the second homebuyer steps into the shoes of the initial homebuyer and is equally entitled to assert a violation of warranty as to any warranty that has not elapsed. However, in this scenario, the clock would not start anew, but would be considered as having six months already elapsed.

You may have noted that I have referred to warranty periods, not warranty period. This is due to the fact that the New Home Warranty Act provides for a three tiered approach for warranty violations. For "major structural defects", there is a five year warranty. Major structural defects are limited to those in which there is actual physical damage to the following load bearing portions of the home caused by failure of these load bearing portions to the extent that the home becomes unsafe, unsanitary, or is otherwise unlivable: foundation systems and footings, beams, girders, lintels, columns, walls and partitions, floor systems, and roof framing systems. The following types of defects are covered by a two year warranty: plumbing, heating, cooling, and ventilating systems exclusive of any appliance, fixture, and equipment which arises out of noncompliance with building standards or other defects in workmanship or materials not regulated by building standards. All other types of defects arising out of noncompliance with building standards or defects in materials or workmanship not governed by building standards are warranted for one year. With respect to defects in appliances, fixtures, and equipment which are not due to installation errors, the homebuyer will have warranty rights against the manufacturer of the appliances, or fixtures, or equipment which will be governed by the traditional law of redhibition.

If, before reading this article, you already knew something about the New Home Warranty Act, you might have been surprised that I said that major structural defects are warranted for five years. When these statutes were enacted in 1986, major structural defects were warranted for ten years. In 2001, the legislature amended the provision regarding major structural defects to reduce the warranty term to seven years. In 2004, yet again, the legislature reduced the builder's exposure for major structural defects, this time to five years. The new five year version went into effect on August 15, 2004. Presumably, it will apply to sales taking place after August 15, 2004, or to instances in which homeowners take possession after August 15, 2004.

The warranties provided under the New Home Warranty Act are minimum warranties which are not waivable. In other words, should the builder obtain a written waiver from the homebuyer, the effect of which would be to reduce the warranties established by the New Home Warranty Act, such waiver would not be enforceable in a court of law, and the court would disregard the waiver. While the warranties recognized in the New Home Warranty Act are not reducible, they can be increased. If the homebuyer and the builder so choose, they can enter into a written contract by which any of

the warranties can be increased in scope and/or duration. In one recent case in which a court of appeals construed the New Home Warranty Act, the court held that the parties' contract providing that the home would be built according to certain identified plans and specifications increased the scope of the builder's warranty. The court, in this case, reasoned that the particular plans and specifications called for construction methods which exceeded the requirements of the building code which would have otherwise governed the contract, and, thus, the parties had contractually agreed to a broader warranty.

There are many types of defects which are explicitly NOT COVERED under the New Home Warranty Act. It would be too cumbersome to list all of them here, but among some of the non-covered defects are those attributable to: mold or mold damage, insect damage, normal wear and tear, fences, landscaping, off site improvements, and driveways and walkways. Here again, it is possible for the parties to contract for a broader warranty.

If one of your clients contacts you regarding a defect which may be covered under the New Home Warranty Act, here's what you should do. First, tell your client to take no corrective action, unless such corrective action is immediately necessary to mitigate the problem. The New Home Warranty Act does require the homebuyer to take whatever steps are necessary to minimize loss or damage. Whether or not the situation is one that requires the homebuyer to take mitigating action, the New Home Warranty Act requires the homebuyer to give written notice by certified or registered mail to the builder informing the builder of ALL of the defects known to the homebuyer. Failure to give the required notice will very likely bar the homebuyer from taking subsequent legal action to enforce his warranty rights. If your client has a complaint which you believe may be covered under the New Home Warranty Act, you should advise your client to immediately write a letter to the builder, informing the builder of all known defects and making demand on the builder to correct these defects. It is recommended that the letter give a deadline to the builder to respond, and this deadline should be reasonable and commensurate with the nature of the defects. A court of appeals ruling on a case arising out of the construction of a home in Benton has recently held that a demand for the builder to respond within five days was reasonable; and even though the builder argued that he could not have remedied all the complained of matters in five days, the court held that when he failed to contact the homebuyers within the five days, the homebuyers were entitled to hire another contractor to complete the required repairs. The letter should be sent by certified mail, return receipt requested. If the builder is not adequately responsive to the demand or if you fear that the applicable warranty period is about to elapse, you should advise your client to seek legal assistance without delay. To protect yourself, you should advise your client that time is of the essence and that the client's rights might be lost if he delays in seeking legal counsel. In no event, other than one requiring an immediate effort to mitigate, should your client attempt repair of the defect without going through the above described notice procedure.

Finally, this business about advising homebuyers with complaints arising under the New Home Warranty Act falls within the

old adage "that a little knowledge is a dangerous thing." If you are an old hand, you might be aware of that part of redhibition law that interrupts the running of prescription (or in common law jargon: "tolls the statute of limitations"). In redhibition, a seller is entitled to an opportunity to repair the defect and for so long as the seller persists in attempts to repair the defect, the bar of the buyer's claim that would otherwise eventually arise due to passage of time does not occur, in that the time never starts running. Apparently, this is NOT the case as to complaints arising under the New Home Warranty Act. The time periods set forth for expiration of warranties under the New Home Warranty Act are declared in the act to be "preemptive" rather than "prescriptive." Legal actions which are time barred by preemption rather than prescription are not susceptible to interruption. Therefore, even though the New Home Warranty Act requires the homebuyer to give notice to the builder to make corrections, it is likely that the builder's attempts to correct will not interrupt the running of and expiration of the warranty periods. This is a matter yet to be decided in the courts, but you better play it safe. The best advice you can give your client, in addition to giving an immediate written notice by certified mail, is to get to a lawyer without delay. By doing so, you will shift from yourself to the lawyer any potential malpractice claim arising out of the homebuyer's failure to timely file a legal action to protect his claim.

If you are representing a builder in the sale of a new home, you should be aware that the New Home Warranty Act requires the builder to "give the owner written notice of the requirements of this chapter at the time of closing." The best way for the builder to give the homebuyer notice is to hand him a copy of the New Home Warranty Act and have him sign a receipt for same. As yet, there have been no appellate decisions explicating what penalty, if any, the builder will suffer by his failure to give notice; but this is the sort of thing that Louisiana courts take seriously, and failure to give the notice may significantly impair the builder's protections which would otherwise be available to him under the act. Query: would a builder whose rights were impaired due to failure to give the required notice to the homebuyer have a malpractice action against the listing agent who failed to advise the builder of the requirement of notice? My advice to you is: don't find out the hard way.

From the homebuyer's side of things, if the worst case scenario plays out and your homebuyer is forced to resort to legal action against the builder, attorney fees can be recovered from the builder, should the homebuyer prevail in the legal action.