



## Residential Construction Warranties in Texas



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Most homeowners—and most residential builders and developers—know that the sale of a new residence comes with certain warranties to the buyer about the condition of that building. But the parties may not be entirely clear as to the contours of those warranties, and whether or how they may waive them. The 2010 demise of the Texas Residential Construction Commission, and the end to the statutory construction warranties the TRCC was created to implement, left the state of residential construction warranties in Texas somewhat uncertain. Prior to the TRCC, Texas courts recognized the existence in most residential construction contracts of an implied warranty of good and workmanlike performance, and an implied warranty of habitability. The Texas Legislature created the TRCC in 2003 and gave it the authority to create statutory warranties, which the TRCC did, superseding and effectively doing away with these implied warranties.<sup>1</sup> But following the sunset of the TRCC, and the warranties it created, the Legislature gave no guidance on what warranties would replace those under the TRCC. In the absence of any such guidance, the courts appear to have reverted back to the implied warranties established prior to the TRCC.

### Implied Warranty of Performance in a “Good and Workmanlike Manner”

In the absence of language to the contrary, a builder conveys an implied warranty that a new home will be built in a good and workmanlike manner, the same as would “a generally proficient builder engaged in similar work and performing under similar circumstances.”<sup>2</sup> In 2002, the Texas Supreme Court expressly reaffirmed the existence of the implied warranty of workmanship, and it clarified the warranty and differentiated it from the warranty of habitability. Courts refer to this implied warranty as a “gap-filler,” meaning that it comes into play unless the parties otherwise provide how the builder is to perform.<sup>3</sup>

A builder may replace or supersede the implied warranty of workmanship by inserting contract language describing how the work is to be performed, although the contract may not simply disclaim the warranty.<sup>4</sup> This creates an express warranty that overrides the implied warranty. In order to be sure that the contract’s terms properly take the place of the implied warranty, the parties should specify the work to be provided, the manner in which it will be performed, and how the service will perform. For example, a court found contract terms sufficient when they stated that the builder would provide a particular type of foundation repair (the work to be provided), that it would be in a good and workmanlike manner (the manner in which it would be performed), and that the foundation would not need adjustments due to settling, or, if it did, the builder would perform the adjustments at no cost (how the service would perform).<sup>5</sup>

The implied warranty of workmanship appears to be back in full force following the sunset of the TRCC. The Texas Supreme Court recently made favorable mention of the warranty, although it was in a case concerning repair work rather than initial building.<sup>6</sup> Other recent court cases since the TRCC’s demise have also relied on the existence of the implied warranty of workmanship. While most of these cases concerned residences constructed before or during the TRCC’s tenure,<sup>7</sup> it is notable that the courts involved showed no hesitation whatsoever in determining what law to apply.

### Implied Warranty of Habitability

The implied warranty of habitability requires the builder to provide a safe, sanitary dwelling that is fit for human habitation.<sup>8</sup> In differentiating the two implied warranties, the court in *Centex* noted that the warranty of workmanship “focuses on the builder’s conduct,” while the warranty of habitability “focuses on the state of the completed structure.”<sup>9</sup> What this means is that, even though the two implied warranties may often overlap, the only thing that matters for the warranty of habitability is the end product. The standard to violate this warranty is high, however—it applies to defects that render the property unsuitable for its intended use as a home.<sup>10</sup>

Unlike the warranty of good and workmanlike performance, a builder may not generally disclaim the implied warranty of habitability.<sup>11</sup> However, the warranty only applies to latent, or unknown, defects—therefore, if the purchaser buys the house with express and full knowledge of any specific defects that will affect its habitability, the warranty can be waived.<sup>12</sup>

Like the implied warranty of workmanship, recent court cases appear to have recognized the implied warranty of habitability as it existed prior to the TRCC.<sup>13</sup>

### Express warranties

Of course, a builder may always choose to include one or more express warranties in the contract. An express warranty is simply any warranty that is set forth in writing, normally in the construction contract or sales contract, and it can make any guarantee that the parties see fit. Express warranties may cover any number of items, for any given period of time—for example, a builder may warrant against foundation failure for a period of ten years. Other warranties may state a standard by which the builder will construct the house—for example, that it will be done in “a good and workmanlike manner according to the plans and specifications.”

Express warranties may be in addition to the implied warranties mentioned above, or they may replace the implied warranty of workmanship provided they adequately set forth the terms of performance. Additionally, parties should ensure that their documents are consistent as to what express and implied warranties they extend, and verify they do not conflict. In one instance, the builder and purchaser entered into an agreement that disclaimed all implied warranties and extended an express warranty regarding foundation defects that replaced the implied warranty of workmanship. But in a later-signed residential construction contract, the builder also warranted construction in a “good and workmanlike manner.” The court held that, even though the builder did not violate the foundation warranty, the builder could still be liable for violating its later express warranty of good and workmanlike performance—even though that is normally an implied warranty that the builder had attempted to disclaim.<sup>14</sup>

### Conclusion

The penalties for breaching these warranties can be quite severe. Depending on the circumstances, a breach of an express or implied warranty may be actionable under the Texas Deceptive Trade Practice Act. This can result in an award of treble damages plus attorneys’ fees to an aggrieved purchaser. Residential builders and developers should therefore carefully consider what express and implied warranties they may be setting out in their contract documents, and may wish to consider reviewing even those forms that they consider standard or that “we’ve always used.”

1. *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 914 n.11 (Tex. 2007).
2. *Centex Homes v. Buecher*, 95 S.W.3d 266, 273 (Tex. 2002). The Texas Supreme Court originally recognized this implied warranty in 1968, but significantly clarified it in *Centex*. See *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).
3. *Id.*; see also *Mid-Continent Cas. Co. v. Castagna*, 410 S.W.3d 445, 461 (Tex. App.—Dallas 2013, pet. denied).
4. *Centex*, 95 S.W.3d at 274–75.
5. *Gonzales v. Southwest Olshan Found. Repair Co., LLC*, 400 S.W.3d 52, 57 (Tex. 2013).
6. *Id.* at 56.
7. E.g., *Castanga*, 410 S.W.3d at 461; *Jones v. Pesak Bros. Constr., Inc.*, 416 S.W.3d 618, 633 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Yost v. Jered Custom Homes*, 399 S.W.3d 653, 662 (Tex. App.—Dallas 2013, no pet.).
8. *Centex*, 95 S.W.3d at 273.
9. *Id.* at 272–73.
10. *Id.* at 275.
11. Contrast this with the implied warranty of suitability—an analogous warranty implied in commercial, rather than residential, real estate contracts—which the Texas Supreme Court has held parties may contractually waive. *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007).
12. *Centex*, 95 S.W.3d at 274–75.
13. E.g., *Yost v. Jered Custom Homes*, 399 S.W.3d 653, 662–63 (Tex. App.—Dallas 2013, no pet.); *Old HH, Ltd. v. Henderson*, No. 03-10-00129-CV, 2011 Tex. App. LEXIS 9669, at \*10–14 (Tex. App.—Austin Dec. 9, 2011, no pet.).
14. *Design Tech Homes, Ltd. v. Maywald*, No. 09-11-00589-CV 2013 Tex. App. LEXIS 7251, 13-14 (Tex. App.—Beaumont June 13, 2013, pet. denied).