SOME GENERAL FACTS ABOUT RESIDENTIAL HOME WARRANTIES.

What is a residential home warranty? This question covers a lot of territory. Today we will discuss the topic of warranties in general. There are broadly speaking two types of warranty that might apply to a residential contract. The first is an express warranty and the second is an implied warranty. However, before dealing with either of these warranties, we will need to address a persistent "urban" myth in the construction industry. Virtually every contractor in Arkansas is under the impression that there is a standard one-year builder's warranty. The myth seems to have two versions; in one, there is a statute that establishes the warranty. The second and most interesting is that the Arkansas Contractor's Licensing Board requires this warranty. Neither myth has any basis in fact or the law. Keep in mind, the Arkansas Contractors Licensing Board has only regulated homebuilders for a very short time. There is not a regulation or other requirement from that agency that establishes or defines such a warranty. Nor is there a statute that establishes a one-year builder's warranty. The source of this myth demonstrates how persistently the Arkansas Home Builder's Association has tried to protect the interests of Home Builders over the years. In the famous case Wawak vs. Stewart[1] in 1970, the AHBA filed a "friend of the court brief" in the case in an attempt to avoid the implied warranty imposed by that case. The AHBA argued unsuccessfully that the court should wait and allow the legislature to enact a residential builder's warranty and licensing statute proposed to the prior legislature. The attempt was rebuffed by the court and the proposed legislation never went further. Nearly 30 years later residential builders were regulated, but no such warranty was included. So, for those builders who are just referring to a 'one year's builder's warranty' in your documents, sorry.

An express warranty may be oral or in writing, it may be formed by words, even though the word 'warranty' is not used, or it can be created by use of a model home or sample. Basically any representation or promise made by a builder concerning the quality, size, 'greenness', or durability of the home that becomes part of the 'basis of the bargain' with the purchaser will create an express warranty that the home will be as represented or promised. The builder should be aware that the word 'warranty' need not be used or any formal writing. One recent trend concerns the new appetite of the public for green buildings. This is a very good trend from public policy viewpoint, but individual builders need to be aware that green representations or promises will create an obligation. The real problem with express warranties that are verbal is that the extent and intent are in reality not controlled. The promise that house is "green" may create very low expectations for some customers. However, remember to other customers "green" without further qualifications may take on very extensive requirements.[2] What to a builder may seem to be good salesmanship may in the end become a warranty obligation.

What should a builder take away from this express warranty discussion? The takeaway thought is that a residential contractor should take care when making promises about residential project. Remember, a purchaser will not be familiar with construction terms and may have an exaggerated expectation. The other area of concern is the time that a warranty will cover, as we already know there is nothing special about one year and without more, the promise might extend for five years, which is the period of the statute of limitations. If a builder has decided to offer a written warranty, care should be taken in making promises and every obligation should clearly state how long coverage lasts.

The second of the major warranty obligations are called 'implied warranties.' Where an express warranty is based on some promise or representation made by the builder an 'implied' warranty is one imposed by the law. These warranties can be imposed by statute such as under the UCC. You do not know it but you have a lot of experience with this type warranty. Virtually every product you buy somewhere in the packaging contains an attempt to limit these warranties. Most of us have purchased an extended product warranty, if you have ever tried to collect on one you also know that retail merchants have had much better luck in limiting these warranties than have builders. The famous 'warranty of habitability' that you may have heard has it basis in the UCC concept. In Arkansas, the basic law was established in the Wawak case, mentioned earlier, and which has been the law for nearly 40 years.[3] Essentially, the courts have imposed certain expectations on residential construction that are enforced as warranty obligations. These obligation can extend not only the customer but to subsequent purchasers. [4] While it is possible to limit or exclude these obligations, it is difficult and likely cannot be done without actually providing coverage. A builder cannot escape these implied obligations and will always be held to some level of responsibility. The real problem for builders is that the concept of habitability is not defined, but depends entirely on the Judge, jury or arbitrator in the particular circumstances. There was a complete article in this newsletter devoted only to the implied warranty.

We have now discussed the 'substance' of residential warranties, so what remains? A warranty is a powerful remedy available to customers, but not without limits. How is a warranty claim made? This is what lawyers refer to as a 'procedural' question. This is important since these rights powerful as they are can be lost because of the way the homeowner goes about making that claim. In this instance the claimant is required to give the builder reasonable notice of the breach of warranty and implied in this is the opportunity to fix the situation.[5] The concept of 'reasonable' has three aspects to be considered. The first is that while the notice need not list every single aspect, it must generally inform the builder that there is a problem and the nature and extent of the problem. The second is that the Notice must be given within a 'reasonable' time. While inexact, reasonable does mean that a homeowner cannot wait around long enough for the damages to become worse. Finally, the notice should allow the builder a reasonable opportunity to investigate.

The natural question then is how does this concept of 'notice' help me in a crisis? The question is a good one, if I do say so myself! By the time the builder has gotten to the point of receiving a notice from a homeowner about a warranty claim, all of the questions about express or implied, written or oral are past. After years of practicing law, I can say that normally contractors generally ignore these notices. The question is whether this is a good or a bad tactic. The answer is that in general it is a bad tactic. The notice once received should be investigated. If the claim is bogus, that will be apparent and a written response explaining why may very well avoid further litigation. If the claim is not bogus, then the builder now has a clear chance to cure the problem by the least expensive means. A homeowner may replace and entire roof when only a small section needs work. In court or before an arbitrator, the defense that repairs were more extensive than needed falls on deaf ears when the homeowner has given notice and no investigation or action was taken. The cost for any given repair if done by the contractor's own forces is less expensive as you are not required to pay some other builder's overhead and profit markup. Once the builder has decided not to act, control of the situation and its costs now revert to the

homeowner. If the contractor has a slam-dunk defense, then this may be wise, but in every other situation, this is a risky choice.

The contractor has four chances to avoid any warranty claim.

1. Be careful about the warranty promises that are made to the customer.

2. Build a perfect house.

3. Repair at early notice.

4. Win in court.

As it happens these are listed not only in the order in which they occur and from the cheapest and easiest to handle to the most expensive and difficult to handle. Great care should be taken in making representations about the nature of the home, or energy efficiency or what 'green' actually means. This is a real risk in today's competitive environment, promises made to 'sell' the customer can come back to haunt a builder. The builder can limit exposure by working out written warranties. The builder can limit exposure to the more outlandish results by considering arbitration clauses. The builder can look at the receipt of a warranty notice not as a terrible and irritating inconvenience, but as the last really good chance to avoid an appearance in court. All of these means of avoiding problems are also, just good business practice as well.

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[1] WAWAK v. STEWART, 247 Ark. 1093, 449 SW 2d 922 (1970) at Page 1099. The opinion notes " After the case at bar had been submitted to the court we invited the filing of amci curiae briefs, to avoid the possibility that persuasive arguments might be overlooked. The only brief that urges adherence to the old rule was filed by counsel for the Arkansas Home Builders Association. The AHBA brief makes one point that merits comment. [Page 1100] Counsel state that the AHBA "recognizes the need for the imposition of a warranty upon new construction." To that end the Association included a one-year warranty requirement in a bill that it sponsored, unsuccessfully, in the 1967 and 1969 sessions of the legislature. The main purpose of the bill, however, was to regulate the homebuilding industry by the creation of a governing board and the imposition of licensing requirements upon those engaged in the business. We are not impressed by the AHBA's suggestion that we await legislative action, even though the Association concedes that some form of warranty is needed. To begin with, the General Assembly's repeated refusal to enact the proposed law hardly gives assurance that it will be passed in the near future. Furthermore, whatever decision we reach in this case can have no effect upon the General Assembly's freedom to change the law as it sees fit. To the contrary, a judicial decision may focus legislative attention upon the problem."

[2] Construction Law Hand Book, Chapter 12.04, Page 402 "Where green building materials are not, in fact,

"green" by the customer's definition, or when the goods fail to meet some quality standard, contractors, manufacturers, distributors, and sellers all face potential liability for breach of those warranties depending on the facts of the particular case.

[33] Wawak V. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970)

[4] CURRY v. THORNSBERRY, 354 Ark. 631, 128 S.W.3d 438 (2003) Page 642 See Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970). In Blagg v. Fred Hunt Co., Inc., 272 Ark. 185, 612 S.W.2d 321 (1981), the builder-vendor's implied warranty of fitness for habitation was extended to subsequent purchasers "for a reasonable length of time where there is no substantial change or alteration in the condition of the building from the original sale." Blagg, 272 Ark. at 187. The implied warranty was limited in Blagg to latent defects which are not discoverable by subsequent purchasers upon reasonable inspection and which become manifest only after the purchase. Id.

[5] AMI 2507 ISSUES - BREACH OF UCC WARRANTY, the seventh factor requires Notice.