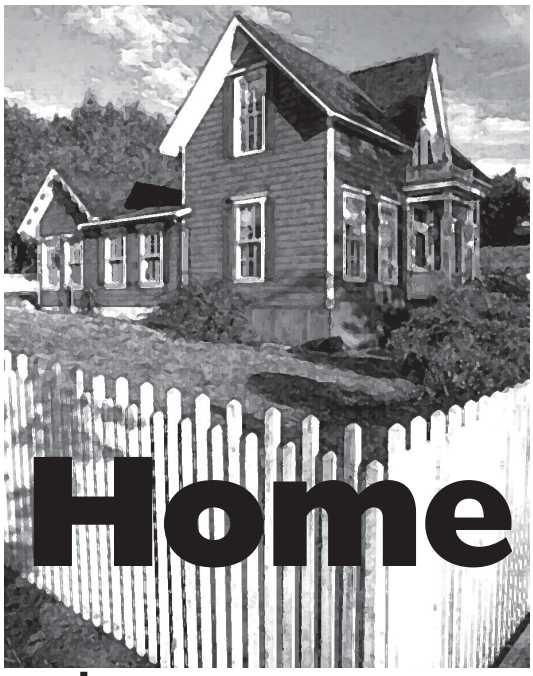

# Buying a Home in Texas
# What the Law Implies

By Julie Guzzo*

## I. INTRODUCTION

Recent litigation in Texas has brought to light some of the tensions existing between sellers and purchasers in the residential home market. Specifically, the extent of consumer protection afforded by implied warranties in the homebuilding and selling industry was examined recently by the Texas Supreme Court in *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002).

An implied warranty is "[a] warranty arising by operation of law because of the circumstances of a sale, rather than by the seller's express promise." Black's Law Dictionary 1582 (7th ed. 1999). In the home construction industry, two implied warranties have a unique impact on the market: the implied warranty of good and workmanlike construction and the implied warranty of habitability. Both of these warranties enhance the protections available to a prospective homebuyer in the event there is a problem with the home; conversely, they also affect the potential liabilities of a homebuilder or seller. Implied warranties directly affect contract drafting for the purchase of homes.

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At issue in *Centex Homes* was whether the implied warranties of good and workmanlike construction or habitability could be waived or disclaimed. The Supreme Court of Texas held that the implied warranty of habitability *generally* may not be disclaimed by a manufacturer, builder, or seller of a home; however, the implied warranty of good and workmanlike construction may be expressly disclaimed. A discussion of the evolution of homebuyer rights in Texas will demonstrate that the *Centex* decision may have eroded an important consumer protection by allowing homebuilders to even partially disclaim these implied warranties.

## II. BACKGROUND

Early common law in Texas adopted the *caveat emptor* ("buyer beware") doctrine in real property transactions. In 1968, the Supreme Court of Texas articulated its disfavor of the *caveat emptor* doctrine in the home purchasing context:

> The old rule of caveat emptor does not satisfy the demands of justice in such cases. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of caveat emptor to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice.
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> *Humber v. Morton*, 426 S.W.2d 554, 561 (Tex. 1968).

In *Humber*, the plaintiff brought suit against her homebuilder when her house partially burned down the first time she used the fireplace. She alleged the house was not

suitable for human habitation because the fireplace and chimney were not properly constructed. Defendant homebuilder Morton maintained he was not liable because an independent contractor had done the fireplace work, and furthermore, the doctrine of caveat emptor applied to all sales of real estate. The trial court granted the homebuilder summary judgment on the grounds that the doctrine of caveat emptor applied to the sale of a new house by a builder, and, therefore, no implied warranty of habitability arose from the sale. On appeal, the Texas Supreme Court held that in building a house and selling it as new, the builder impliedly warranted that the house was constructed in a good workmanlike manner and was suitable for human habitation. *Id.* at 555. The *Humber* court explained:

> The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser, but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.
> *Id.* at 562.

**The Texas Supreme Court emphasized that although the two implied warranties are often carelessly lumped together, they are in fact distinct and different warranties with distinguishable purposes.**

After the creation of the implied warranties of habitability and good and workmanlike construction in *Humber*, the Supreme Court in *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex. 1982) was asked to determine what action was sufficient to disclaim them. In *G-W-L*, Robichaux contracted with Goldstar for construction of a home, and on its completion, its roof sagged. Robichaux sued for breach of express and implied warranties. The trial court found no express warranties, but found the roof was not constructed in a good and workmanlike manner. On appeal, Goldstar maintained there was no breach of implied warranty because the parties agreed there were no express or implied warranties. The contract between Goldstar and Robichaux provided:

> This note, the aforesaid Mechanic's and Materialman's Lien Contract and the plans and specification for identification by the parties hereto constitute the entire agreement between the parties hereto with reference to the erection of said improvements, there being no oral agreements, representations, conditions, warranties, express or implied, in addition to said written instruments.
> *Id.* at 393.

The *Robichaux* court held that the implied warranties could be waived, but the language waiving the warranty "must be clear and free from doubt," and that the contract clause in issue was sufficiently clear and free from doubt. The court, in dicta, stated, "The parties to a contract have an obligation to protect themselves by reading what they sign…Unless there is some basis for finding fraud, the parties may not excuse themselves from the consequences of failing to meet that obligation." In effect, the *Robichaux* court reinstated the *caveat emptor* doctrine to the context of contracting. Consumers might have expected the Texas Supreme Court to enforce the implied warranties created by the *Humber* court, but instead the Court limited the warranties' effectiveness by requiring unsophisticated homebuyers to read and understand their purchase agreements carefully or suffer the consequences.

Just five years later, the Texas Supreme Court again visited the issue of implied warranties in a slightly different context in *Melody Homes Manufacturing Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987). In *Melody Homes*, the Barneses sued Melody Homes Manufacturing Company for breach of the implied warranty of good and workmanlike construction after they experienced flooding and dampness in the house, based on faulty repairs. Melody Homes maintained that repair services did not carry an implied warranty that they would be performed in a good and workmanlike manner. The Texas Supreme Court, however, held that the implied warranty of good and workmanlike construction extended to repairs. *Id.* at 354. The court pointed out that when Barneses discovered the defect in their home, they could have immediately sued for damages, but instead they exercised their option to give Melody Homes the opportunity to repair and cure the problem. The court stated, "The parties' choices to allow and make repairs relate back to the original purchase and were a continuation of the transaction." Thus, the implied warranty applied to the repair job because it "related back" to the original purchase.

The *Melody Homes* court further held that the implied warranty that repair or modification services of existing goods or property will be performed in a good and workmanlike manner may not be waived or disclaimed. *Id.* at 355. The court founded its holding on public policy and the more protective trend in consumer protection legislation. The court then stated, "To the extent that it conflicts with this opinion, we overrule *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392." *Id.* Following the decision in *Melody Home*, it is fair to say that most courts and commentators believed that *Robichaux* had been overruled, and that implied warranties in the sale of a home could not be waived. This was the content in which *Centex* arose.

The question before the Texas Supreme Court in *Centex Homes v. Buecher* was to what extent *Melody Homes* overruled *G-W-L*. At trial, homeowners brought a class action against the homebuilder, Centex, seeking an injunction preventing Centex from asserting the implied warranties of habitability and good and workmanlike construction had been waived. Centex had a one-year limited express warranty in lieu of, and waiving, the implied warranties of habitability and good and workmanlike construction. The pertinent language stated:

> Purchaser agrees to accept said homeowner's warranty at closing in lieu of all other warranties, whatsoever, whether expressed or implied by law, and including but not limited to the implied warranties of good workmanlike construction and habitability. Purchaser acknowledges and agrees that seller is relying on this waiver and would not sell the property to purchaser without this waiver.

The San Antonio Court of Appeals majority, citing *Melody Homes* and *Humber* approvingly, held that both the implied warranties at issue could not be waived "by getting the homeowner to sign a contract of adhesion." *Buecher v. Centex Homes*, 18 S.W.3d 807, 809 (Tex. App.—San Antonio, 2000) The San Antonio court strongly asserted the same public policy rationales referenced in *Humber* and *Melody Homes* and applied the anti-waiver holding from *Melody Homes* to the context of new home construction. *Id.* at 811.

Centex Homes appealed to the Texas Supreme Court, contending that *Melody Homes* should be limited to prohibiting waiver of implied warranties only in the repair services context. *Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002). Centex relied on *Robichaux*, arguing that a purchaser of a new home can waive the implied warranties of good and workmanlike construction and habitability if the waiver language is clear and free from doubt. The homeowner plaintiffs countered that *Robichaux* was overruled by *Melody Homes*. The Texas Supreme Court noted that several authorities have had trouble determining how much *Robichaux* survives *Melody Homes* and, therefore, revisited their holdings in *Robichaux*.

The Texas Supreme Court emphasized that although the two implied warranties are often carelessly lumped together, e.g. *Robichaux*, they are in fact distinct and different warranties with distinguishable purposes. *Id.* at *5 (citing *Evans v. J. Stiles, Inc.*, 689 S.W.2d 399, 400 (Tex. 1985). The *Centex* court noted that the implied warranty of good workmanship focuses on the builder's conduct, and the implied warranty of habitability focuses on the completed structure. The implied warranty of good workmanship establishes a default requirement that the builder perform with a minimum standard of care. As a default rule, the good workmanship warranty attaches to a new home sale if the parties' agreement doesn't provide otherwise. The parties, however, are free to define for themselves the quality of workmanship they find acceptable. On the other hand, the implied warranty of habitability, according to *Centex*, is not based on purely contractual bases, but rather has public policy undertones. The court stated, "This implied warranty is more limited in scope, protecting the purchaser only from those defects that undermine the very basis of the bargain." Based on these policy arguments, the court held that the warranty of habitability can be waived only to the extent that defects are adequately disclosed. In short, the implied warranty of good and workmanlike construction can be waived using a standard form contract, but the implied warranty of habitability may not be generally disclaimed.

Now that the court has clarified just what the law on waiver of implied warranties in the home purchasing market in Texas is, consumers, and their attorneys, should understand that implied in law protections afforded to them have been severely limited. It is expected that every contract pertaining to a home purchase surely will disclaim the warranty of workmanlike construction, replacing it with a much more limited express warranty. Additionally, purchasers must also be careful about "full disclosure" statements that may be designed to afford a basis for the builder's claim that even the implied warranty of habitability has been disclaimed. Many things in this world are cyclical, including judicial trends. We have seen the pendulum swing from the days of caveat emptor to a height of protection and paternalism in *Melody Homes* and the San Antonio Court of Appeals interpretation of *Melody Homes* in *Buecher v. Centex Homes*, the lower court opinion brought to the Texas Supreme Court for review. Now the Texas Supreme Court has taken a step back in the direction of caveat emptor and stripped consumers of default application of very important protections in what, for many, is the most significant transaction in their lives.

* Julie Guzzo is a law student at the University Of Houston Law Center.