Warranties for new home construction would seem to be fairly straightforward. One might think that a warranty should be strictly a matter of the contract with warranty documents between the seller and buyer.

But what happens when warranties are created or imposed by the law in the absence of contract or the intention of the seller? Such is the realm of implied warranties.

Simply stated, an implied warranty arises by operation of law and exists regardless of any intention of the seller to create it. The warranty springs from the seller's breach of some duty, which amounts to taking advantage of the purchaser by reason of some superior knowledge or the reliance by the purchaser on the seller's representation or judgment.

Implied warranties are particularly troublesome because they are created by operation of law, without any intent of the seller.

A Legal History

Implied warranties were first recognized in English courts during the early 19th Century. Suits for breach of warranty were first brought in tort (non-contract) as actions on the case for deceit the breach treated as an offense against society rather than as a matter merely between private litigants.

While express warranties were routinely enforced in the United States, implied warranties were slow to be recognized. With some exceptions, the general rule of law for the greater part of the 19th Century was caveat emptor or “buyer beware.” The tables were slanted clearly toward the seller.

With mass production and the industrial revolution, however, the caveat emptor doctrine gradually receded and the notion of sellers’ implied warranties of quality expanded.

At this point in our modern legal history, the pendulum has swung the other way and, in this writer’s opinion, substantially favors the buyers and their attorneys. There are now many different versions of implied warranties, and the law varies from state to state.

A comprehensive examination of all types of implied warranties is beyond the scope of this article and, likely, your tolerance to read. The themes of the implied warranties, however, generally remain the same.

Accordingly, this article will present a quick overview of the general categories of implied warranties, beginning first with those arise from the common law (which is the evolving law that develops from cases and judicial decisions), and continuing to those that arise from statutes enacted by the legislative branches.

Types of Warranties

Let's first examine the common law theories.

First, there exists the implied warranty that a structure has been constructed in a workmanlike manner.

A workmanlike manner does not mean the best construction available; rather, it means that the work is in accordance with the accepted norms of the industry.

A contractor can, of course, create an express warranty that the work will be of a higher quality, which may exceed the workmanlike manner standard.

This calls for the contractor to avoid “puffing” or other superlative language in its contract documents and collateral marketing materials – such documents with unsubstantiated superlative claims are a favorite exhibit of the plaintiff’s attorney.

Second, there exists the implied warranty of fitness of plans and specifications (constructability).

Put simply, there is a duty to use due care in the preparation of the plans and to ensure that they are reasonably fit for the buyer’s intended use.

On the other hand, when an owner gives a contractor a set of plans and specifications for constructing a building, there is an implied warranty from the owner that the plans and specifications are fit to make the improvement.
One limitation on the owner’s warranty of constructability is a disclaimer of liability, i.e., a warning that the plans and specifications are incomplete and the owner disclaims responsibility for delays/problems resulting from completion or revision of the drawings.

Also, where the contractor knows that the design is inadequate, the contractor is obligated to inform the owner of the omission in order to give him an opportunity to correct the problem.

Third, there is an implied warranty that the building constructed will be in accordance with the plans on file with the local building authorities.

This can be a dangerous warranty. It runs in favor of the initial purchaser of a newly constructed residence.

Because plans and details of buildings typically change considerably from the time of drawings until actual construction, there may be slippage between making changes and filing these changed plans with the local building authority which issued the permit and keeps a record of the plans. It is the duty of the party holding the permit to update the plans on file.

Fourth, there is an implied duty to build in compliance with the developments restrictive covenants. In one case, a developer had recorded covenants and restrictions which required the dwelling units to have an enclosed garage and sufficient driveway to accommodate two cars.

There was a further restriction against parking on the property in other than an enclosed garage. The plans for the structure reflected the size of the garage ultimately built. However, the garage as built was too small to accommodate two regular-sized cars. The court determined that the developer breached its implied warranty to build in accordance with the restrictive covenants.

Fifth, there is an implied warranty of fitness and merchantability, which has also been referred to as a warranty of habitability. It has been called “the breach of a warranty implied by law by consumer protection minded courts in the sales of real estate as an exception to the late common law rule of caveat emptor.” The warranty obligation does not sound in negligence.

Courts have been asked to determine the coverage of this warranty in various cases. A court has decided that the implied warranty of habitability or fitness does not extend to a defective sea wall that was on residential subdivision lots. An inadequate sewer system was found to be violative of the implied warranty of fitness of a residence.

It has also been held that defective work in roads, subdivision drainage, and a footbridge was not covered by the implied warranty of habitability of a residence. On the other hand, the warranty of habitability was held applicable to settlement of a lot creating cracks in a house where the house and lot were sold as a package.

The fact that the house and the lot were sold under separate contracts does not preclude the implied warranty of habitability of the lot-house package.

The measure of damages for such a breach of warranty, where repair can be done, is the cost to repair which substantially gives the owner to which he or she is entitled.

**Uniform Commercial Code**

With respect to the statutory implied warranties, the most common source is from the Uniform Commercial Code.

The Uniform Commercial Code has been adopted in all of the United States except Louisiana, and includes provisions on two implied warranties in the sale of goods.

The first of these is the warranty of merchantability. Briefly, the warranty of merchantability means that goods that are sold by someone in the business of selling goods must be normal and conform to any promises made on the container or label.

It does not mean that the goods have to be the best available, but they do have to be of fair and average quality.

This warranty may be in addition to express warranties.

Note that courts have held that Uniform Commercial Code implied warranties apply to goods that are installed, particularly where they handle a dangerous force such as electricity.

The implied warranty of merchantability is not a proper legal theory for recovery of economic loss (as distinguished from personal injury or property damage) without privity of contract.
An action for breach of an implied warranty pursuant to performance of a contract does not lie where there is no privity of contract.

The statutory warranty of fitness of goods is also found in the Uniform Commercial Code. It applies only to the sale of goods. Where the seller of a product knows the intended use of its product, there is an implied warranty that a product will be suitable for the purpose for which it is sold.

For this warranty to come into play, the seller must know the particular purpose for which goods are required. The seller must also know that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods.

Where these two preconditions exist, the goods furnished are warranted to be fit for the purpose for which they are intended. This warranty may also be in addition to an express warranty.

Finally, there are a myriad of condominium and new homebuyer statutes that codify the Uniform Commercial Code warranties and a number of the common law warranties (i.e., the warranty of habitability). These statutes either directly incorporate by reference the other implied warranties or create new and complicated hybrids.

As many developers and builders know, these statutes are used with great frequency by the plaintiff’s lawyers when a condominium association is going through the turnover process a few years after the initial construction.

Protect Yourself

Now that I have laid out the various themes of these unintended, implied warranties, the question arises: “How can I, as a prudent builder, insulate myself, as much as possible, from these unintended warranties.” While it is impossible to completely deflect liability, the following are some suggestions:

- Ensure that your contract documents and marketing materials disclaim the implied warranties where permissible. This is state-by-state question of law. For example, in most states, the implied warranties under the Uniform Commercial Code can be disclaimed.

  This is likely common sense, but when a dispute with a homeowner arises, go the extra mile in addressing the homeowner’s concerns, even if it is, in your opinion, not a construction defect.

  Too many construction defect cases could be avoided by the builder implementing an inexpensive fix and obtaining a full release before the homeowner visits his friendly plaintiff’s attorney.

  For disputes that cannot be settled, make sure that you have a strong mediation and/or arbitration provision in your contract, along with an express jury trial waiver. Juries are substantially biased against builders.

Richard T. Petitt is the managing member of Petitt Worrell Craille Wolfe. PWCW maintains offices in Tampa and Atlanta and is counsel to some of the nation’s largest homebuilders.

• Have a clearly stated express warranty that defines, in certain terms, the terms of the warranty and the construction standards that apply.

• Have your contract documents and marketing materials reviewed by competent construction attorney on a yearly basis.