



MEMORANDUM

TO: REF Attorneys and Paralegals

DATE: 1/31/89

FROM: Nancy Kramer and Mary Sabatini DiStephan *MSD*

RE: Housing Merchant Implied Warranty

The Housing Merchant Implied Warranty, a new provision of the General Business Law (Article 36-B), goes into effect on March 1, 1989, and applies to contracts of sale entered into on or after that date. The provision affects the sale of new dwelling units that are single-family homes or units in coops and condominiums of five stories or less, by imposing a general warranty against building defects.

Any plans that are not yet accepted and which will be affected must disclose the substance of the new provision and must include a copy of its full text. Affected plans that are already accepted where the sponsor is still selling units (whether the plan has gone effective or not) must be amended to make this disclosure before any sales may take place on or after the effective date.

The provision allows a sponsor to specifically limit the implied warranty that otherwise attaches to all covered units. If the sponsor does limit the warranty, that limitation must be disclosed in the Special Risks Section, and in the text.

We have devised a way of simplifying the process of amending outstanding plans in order to disclose the Housing Merchant Implied Warranty. If a sponsor chooses to follow this process, the amendment will be deemed accepted upon submission (like price change amendments). There is model disclosure language. If a sponsor submits an amendment that contains only this model disclosure and if the sponsor indicates in the transmittal letter that the amendment is submitted solely to disclose the Housing Merchant Implied Warranty and that the model format has been used, the amendment will be processed and automatically accepted. This should result in a very expedited treatment of these amendments.

Attached are copies of (1) the statute and (2) the model disclosure language.

NK:dc

attachments (2)

Model Language on Housing Merchant Implied Warranty

Effective March 1, 1989, a new law goes into effect which grants to buyers of most newly constructed units a Housing Merchant Implied Warranty. The following is a brief summary of that law. The full text of the law appears at page .

1. Housing affected: Newly constructed single-family homes and cooperative and condominium units in buildings of five stories or less.

2. Coverage:

(a) For one year, the home must be free from defects caused by workmanship or materials that do not meet the standards of the applicable building code; for items not covered by code, the construction must be in accordance with locally accepted building practices.

(b) For two years, the plumbing, electrical, heating, cooling and ventilation systems must be free from defects caused by unskillful installation.

(c) For six years, the home must be free from physical defects in the structural elements (foundation, floors, walls, roof framing) which make it unsafe or unliveable.

3. Not covered:

(a) A defect not caused by defective workmanship, materials or design.

(b) A patent defect which was obvious or would have been obvious upon inspection.

(c) Defects in items sold with the home, such as stoves, refrigerators, air conditioners, etc. There are implied warranties from the manufacturers of such goods which are described in other laws.

4. Notice:

Buyers must give notice of defects in their home in writing no later than 30 days after the end of the warranty period.

5. Limitation of the Warranty:

The Housing Merchant Implied Warranty can be limited. However, the limited warranty cannot permit construction which is below code or below locally accepted building practices, and the limited warranty time periods cannot be shorter than those described above. In this offering plan the Housing Merchant Implied Warranty (is) (is not) limited. (Describe limitation)

1/27/89

STATE OF NEW YORK

5395--A

1987-1988 Regular Sessions

IN SENATE

May 5, 1987

Introduced by Sen. KEHOE -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- recommitted to the Committee on Judiciary in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law and the civil practice law and rules, in relation to warranties on sales of new homes

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The general business law is amended by adding a new article
2 thirty-six-B to read as follows:

ARTICLE 36-B

WARRANTIES ON SALES OF NEW HOMES

5 Section 777. Definitions.

6 777-a. Housing merchant implied warranty.

7 777-b. Exclusion or modification of warranties.

8 S 777. Definitions. As used in this article, the following terms shall
9 have the following meanings:

10 1. "Builder" means any person, corporation, partnership or other en-
11 tity contracting with an owner for the construction or sale of a new
12 home.

13 2. "Building code" means the uniform fire prevention and building code
14 promulgated under section three hundred seventy-seven of the executive
15 law, local building code standards approved by the uniform fire preven-

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 tion and building code council under section three hundred seventy-nine
2 of the executive law, and the building code of the city of New York, as
3 defined in title twenty-seven of the administrative code of the city of
4 New York.

5 3. "Constructed in a skillful manner" means that workmanship and
6 materials meet or exceed the specific standards of the applicable build-
7 ing code. When the applicable building code does not provide a relevant
8 specific standard, such term means that workmanship and materials meet
9 or exceed the standards of locally accepted building practices.

10 4. "Material defect" means actual physical damage to the following
11 load-bearing portions of the home caused by failure of such load-bearing
12 portions which affects their load-bearing functions to the extent that
13 the home becomes unsafe, unsanitary or otherwise unliveable: foundation
14 systems and footings, beams, girders, lintels, columns, walls and parti-
15 tions, floor systems, and roof framing systems.

16 5. "New home" or "home" means any single family house or for-sale unit
17 in a multi-unit residential structure of five stories or less in which
18 title to the individual units is transferred to owners under a condomi-
19 num or cooperative regime. Such terms do not include dwellings con-
20 structed solely for lease, mobile homes as defined in section seven hun-
21 dred twenty-one of this chapter, or any house or unit in which the buil-
22 der has resided or leased continuously for three years or more following
23 the date of completion of construction, as evidenced by a certificate of
24 occupancy.

25 6. "Owner" means the first person to whom the home is sold and, during
26 the unexpired portion of the warranty period, each successor in title to
27 the home and any mortgagee in possession. Owner does not include the bu-
28 ilder of the home or any firm under common control of the builder.

29 7. "Plumbing, electrical, heating, cooling and ventilation systems"
30 shall mean:

31 a. in the case of plumbing systems: gas supply lines and fittings;
32 water supply, waste and vent pipes and their fittings; septic tanks and
33 their drain fields; water, gas and sewer service piping, and their ex-
34 tensions to the tie-in of a public utility connection, or on-site well
35 and sewage disposal system;

36 b. in the case of electrical systems: all wiring, electrical boxes,
37 switches, outlets and connections up to the public utility connection;
38 and

39 c. in the case of heating, cooling and ventilation systems: all duct
40 work, steam, water and refrigerant lines, registers, convectors, radia-
41 tion elements and dampers.

42 8. "Warranty date" means the date of the passing of title to the first
43 owner for occupancy by such owner or such owner's family as a residence,
44 or the date of first occupancy of the home as a residence, whichever
45 first occurs.

46 § 777-a. Housing merchant implied warranty. 1. Notwithstanding the
47 provisions of section two hundred fifty-one of the real property law, a
48 housing merchant implied warranty is implied in the contract or
49 agreement for the sale of a new home and shall survive the passing of
50 title. A housing merchant implied warranty shall mean that:

51 a. one year from and after the warranty date the home will be free
52 from defects due to a failure to have been constructed in a skillful
53 manner;

54 b. two years from and after the warranty date the plumbing, electri-
55 cal, heating, cooling and ventilation systems of the home will be free

1 from defects due to a failure by the builder to have installed such sys-
2 tems in a skillful manner; and

3 c. six years from and after the warranty date the home will be free
4 from material defects.

5 2. Unless the contract or agreement by its terms clearly evidences a
6 different intention of the seller, a housing merchant implied warranty
7 does not extend to:

8 a. any defect that does not constitute (i) defective workmanship by
9 the builder or by an agent, employee or subcontractor of the builder,
10 (ii) defective materials supplied by the builder or by an agent, em-
11 ployee or subcontractor of the builder, or (iii) defective design
12 provided by a design professional retained exclusively by the builder;
13 or

14 b. any patent defect which an examination ought in the circumstances
15 to have revealed, when the buyer before taking title or accepting con-
16 struction as complete has examined the home as fully as the buyer
17 desired, or has refused to examine the home.

18 3. In the case of goods sold incidentally with or included in the sale
19 of the new home, such as stoves, refrigerators, freezers, room air con-
20 ditioners, dishwashers, clothes washers and dryers, a housing merchant
21 implied warranty shall mean that such goods shall be free from defects
22 due to failure by the builder or any agent, employee or subcontractor of
23 the builder to have installed such systems in a skillful manner. Mer-
24 chantability, fitness and all other implied warranties with respect to
25 goods shall be governed by part three of article two of the uniform com-
26 mercial code and other applicable statutes.

27 4. a. Written notice of a warranty claim for breach of a housing mer-
28 chant implied warranty must be received by the builder prior to the com-
29 mencement of any action under paragraph b of this subdivision and no
30 later than thirty days after the expiration of the applicable warranty
31 period, as described in subdivision one of this section. The owner and
32 occupant of the home shall afford the builder reasonable opportunity to
33 inspect, test and repair the portion of the home to which the warranty
34 claim relates.

35 b. An action for damages or other relief caused by the breach of a
36 housing merchant implied warranty may be commenced prior to the expira-
37 tion of one year after the applicable warranty period, as described in
38 subdivision one of this section, or within four years after the warranty
39 date, whichever is later. In addition to the foregoing, if the builder
40 makes repairs in response to a warranty claim under paragraph a of this
41 subdivision, an action with respect to such claim may be commenced
42 within one year after the last date on which such repairs are performed.
43 The measure of damages shall be the reasonable cost of repair or
44 replacement and property damage to the home proximately caused by the
45 breach of warranty, not to exceed the replacement cost of the home ex-
46 clusive of the value of the land, unless the court finds that, under the
47 circumstances, the diminution in value of the home caused by the defect
48 is a more equitable measure of damages.

49 c. In addition to any other period for the commencement of an action
50 permitted by law, an action for contribution or indemnification may be
51 commenced at any time prior to the expiration of one year after the en-
52 try of judgment in an action for damages under paragraph b of this
53 subdivision.

54 5. Except as otherwise provided in section seven hundred seventy-
55 seven-b of this article, any provision of a contract or agreement for

1 the sale of a new home which excludes or modifies a housing merchant im-
2 plied warranty shall be void as contrary to public policy.

3 6. Except as otherwise provided in section seven hundred seventy-
4 seven-b of this article, other implied warranties may arise from the
5 terms of the contract or agreement or from course of dealing or usage of
6 trade.

7 § 777-b. Exclusion or modification of warranties. 1. Except in the
8 case of a housing merchant implied warranty, the builder or seller of a
9 new home may exclude or modify all warranties by any clear and conspic-
10 uous terms contained in the written contract or agreement of sale which
11 call the buyer's attention to the exclusion or modification of warran-
12 ties and make the exclusion or modification plain.

13 2. Except in the case of a housing merchant implied warranty, the bu-
14 ilder or seller of a new home may exclude or modify warranties with
15 respect to particular defects by any clear and conspicuous terms con-
16 tained in the written contract or agreement of sale which identify such
17 defects, call the buyer's attention to the exclusion or modification of
18 warranties and make the exclusion or modification plain.

19 3. A housing merchant implied warranty may be excluded or modified by
20 the builder or seller of a new home only if the buyer is offered a lim-
21 ited warranty in accordance with the provisions of this subdivision.

22 a. A copy of the express terms of the limited warranty shall be
23 provided in writing to the buyer for examination prior to the time of
24 the buyer's execution of the contract or agreement to purchase the home.

25 b. A copy of the express terms of the limited warranty shall be in-
26 cluded in, or annexed to and incorporated in, the contract or agreement.

27 c. The language of the contract or agreement for sale of the home must
28 conspicuously mention the housing merchant implied warranty and provide
29 that the limited warranty excludes or modifies the implied warranty.
30 Language to exclude all implied warranties is sufficient if it states,
31 for example, that "There are no warranties which extend beyond the face
32 hereof."

33 d. The limited warranty shall meet or exceed the standards provided in
34 subdivisions four and five of this section.

35 4. A limited warranty sufficient to exclude or modify a housing mer-
36 chant implied warranty must be written in plain English and must clearly
37 disclose:

38 a. that the warranty is a limited warranty which limits implied war-
39 ranties on the sale of the home; the words "limited warranty" must be
40 clearly and conspicuously captioned at the beginning of the warranty
41 document;

42 b. the identification of the names and addresses of all warrantors;

43 c. the identification of the party or parties to whom the warranty is
44 extended and whether it is extended to subsequent owners; the limited
45 warranty must be extended to the first owner of the home and survive the
46 passing of title but may exclude any or all subsequent owners;

47 d. a statement of the products or parts covered by the limited war-
48 ranty;

49 e. the clear and conspicuous identification of any parts or portions
50 of the home or premises that are excepted or excluded from warranty cov-
51 erage, and the standards that will be used to determine whether a defect
52 has occurred; provided, however, that:

53 i. any exception, exclusion or standard which does not meet or exceed
54 a relevant specific standard of the applicable building code, or in the
55 absence of such relevant specific standard a locally accepted building

1 practice, shall be void as contrary to public policy and shall be deemed
2 to establish the applicable building code standard or locally accepted
3 building practice as the warranty standard; and

4 ii. any exception, exclusion or standard that fails to ensure that the
5 home is habitable, by permitting conditions to exist which render the
6 home unsafe, shall be void as contrary to public policy.

7 f. what the builder and any other warrantor will do when a defect cov-
8 ered by the warranty does arise, and the time within which the builder
9 and any other warrantor will act;

10 g. the term of the warranty coverage and when the term begins ,
11 provided, however, that such term shall be equal to or exceed the war-
12 ranty periods of a housing merchant implied warranty, as defined in sub-
13 division one of section seven hundred seventy-seven-a of this article;

14 h. step-by-step claims procedures required to be undertaken by the ow-
15 ner, if any, including directions for notification of the builder and
16 any other warrantor; an owner shall not be required to submit to binding
17 arbitration or to pay any fee or charge for participation in nonbinding
18 arbitration or any mediation process;

19 i. any limitations on or exclusions of consequential or incidental
20 damages, and any limitations on the builder's and other warrantor's
21 total liability, conspicuously expressed on the first page of the
22 warranty. Notwithstanding the foregoing, a limited warranty shall not be
23 construed to permit any limitation on or exclusion of property damage to
24 the home proximately caused by a breach of the limited warranty, where
25 the court finds that such limitation or exclusion would cause the lim-
26 ited warranty to fail of its essential purpose, except that such
27 property damage may be limited by an express limitation on the builder's
28 or other warrantor's total liability in accordance with the provisions
29 of this paragraph.

30 5. a. This article shall not be construed to authorize or validate any
31 covenant, promise, agreement or understanding which is void and unenfor-
32 ceable under section 5-322.1 of the general obligations law.

33 b. This article shall preempt any local law inconsistent with the
34 provisions of this article. This article shall not preempt any builder
35 subject to its provisions from complying with any local law with
36 respect to the regulation of home builders except as expressly provided
37 herein.

38 c. Nothing in this article shall be construed to repeal, invalidate,
39 supersede or restrict any right, liability or remedy provided by any
40 other statute of the state, except where such construction would, as a
41 matter of law, be unreasonable.

42 § 2. Subdivision two of section two hundred thirteen of the civil
43 practice law and rules, as amended by chapter four hundred three of the
44 laws of nineteen hundred eighty-three, is amended to read as follows:

45 2. an action upon a contractual obligation or liability, express or
46 implied, except as provided in section two hundred thirteen-a of this
47 article or article 2 of the uniform commercial code or article 36-B of
48 the general business law;

49 § 3. This act shall take effect on the first day of March next suc-
50 ceeding the date on which it shall have become a law and shall apply to
51 new homes for which contracts of sale are entered into on and after such
52 effective date.