

## The Implied Warranty of Habitability: Recent Developments

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Since the 1970s, courts in nearly all 50 states have recognized the implied warranty of habitability, (IWOH), which is based on the underlying public policy designed to "protect purchasers of new houses upon discovery of latent defects in their homes." In Illinois, the implied warranty was first recognized in the landlord-tenant context in *Jack Spring, Inv. v. Little* by requiring landlords to keep their property "habitable.". As courts have sought to further protect consumers, the warranty has expanded to include the protection of purchasers of new homes sold by a builder-vendor, as well as subsequent purchasers of existing homes. A recent First District Illinois Appellate Court decision extended IWOH claims against developers and subcontractors in instances where the original contractor is out of business.

In 2010, in *1324 W. Pratt Condominium Ass'n v. Platt Constr. Group, Inc.* the court dispensed with the requirement that the builder of the home also be the seller. This holding expanded the implied warranty of habitability to apply to the builder of a home even though the builder was not involved in the sale of the home. In June 2012, the same court was presented with another opportunity to further expand the implied warranty. In *Pratt II*, the court was faced with the question of whether a general contractor and its subcontractors could rely on a disclaimer of the implied warranty contained in the purchase and sale contract.

The contract contained the following disclaimer of the implied warranty:

"(c) *WAIVER-DISCLAIMER*. THE SELLER HEREBY DISCLAIMS AND THE PURCHASER HEREBY WAIVES THE IMPLIED WARRANTY OF HABITABILITY DESCRIBED IN PARAGRAPH 10(B) ABOVE AND THEY ACKNOWLEDGE, UNDERSTAND AND AGREE THAT IT IS NOT PART OF THE CONTRACT.

*Effective [sic.] and Consequences of this Waiver-Disclaimer.* Purchaser acknowledges and understands that if a dispute arises with Seller and the dispute results in a lawsuit, Purchaser will not be able to rely on the Implied Warranty of Habitability described above, as a basis for suing the Seller or as a basis of a defense if Seller sues the Purchaser."

The general contractor argued that because the buyer and seller agreed to waive the warranty as to

the seller, it was only logical that the waiver would apply to the general contractor and its subcontractors as well. According to the general contractor, once the implied warranty was waived, it was forever gone and could not be resurrected.

The court, however, disagreed and held that the general contractor could not meet the high standard required to prove that the buyers knowingly waived the implied warranty as to the general contractor because the disclaimer only referenced the developer and the buyer. The court found "nothing whatsoever in the contract to indicate that the individual unit owners agreed to disclaim the warranty as to [the general contractor] or [its subcontractor], or that they were even aware of the possible consequences of disclaiming the warranty as to these two parties."

## The Implications

*Pratt II* reinforces the fact that general contractors and subcontractors that are engaged in constructing residential buildings in Illinois are at risk for a breach of implied warranty of habitability claim. Although the developer often protects itself from this exposure through a disclaimer in the purchase-sale contract, which is enforceable under Illinois law, the contractor and its subcontractors often do not have this protection because they are not explicitly included in the disclaimers contained in the sales documents.

The *Pratt II* court noted that the general contractor could not take advantage of the disclaimer because the disclaimer did not explicitly identify the general contractor or its subcontractors. Had the general contractor been expressly identified in the waiver, the buyer may not have been able to maintain the claim. Contractors working on residential projects for developers may want to consider requesting that developers specifically add a reference to the general contractor in the waiver of implied warranty of habitability to bar future claims.

Of course, the waiver of the implied warranty must meet certain standards to be enforceable. Specifically, a waiver is valid only if the disclaimer language was brought to the buyer's attention, the consequences of agreement were made known to the buyer, and the buyer knowingly waived his rights to pursue an action for any alleged breach of the implied warranty of habitability.

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