



14 TIPS TO PREVENT CONSTRUCTION DEFECT LIABILITY

Use a Written Warranty

Many builders believe they should not provide warranties on the homes they build. They reason that if there is no warranty, then they can not be sued. Nothing can be further from the truth. If there is no written warranty, the court will write one for you with assistance from Oregon statutes. Your first line of defense should be a carefully drafted limited warranty stating what you will cover and what you will not cover. It is much better to have a warranty that you write than one written for you by a court at the request of a home owner's lawyer.

Bind Future Purchasers to Your Warranty

Future purchasers of your homes may argue they did not know about your warranty and therefore the court should write a new warranty on terms more favorable to the purchasers. Don't let this happen. Record a memorandum of your warranty in the real property records so you can argue that all future purchasers acquire the homes you build subject to your expressed written limited warranty. This is a tip that can save you thousands and thousands and thousands of dollars in attorney fees, not to mention your time and energy spent defending a suit.

Establish Time Limits

You can limit the duration of your warranties and limit the period of time in which lawsuits can be brought. If you do not like the six-

year period of time for bringing lawsuits in contract actions, for example, set your own time limit. You can do this. You should do this.

Set the Standards by Which Your Work Will be Judged

Do you want a circuit court judge setting standards for your performance with the urging of a home owner's attorney, long after a home is built? Of course not. Instead, establish the National Association of Home Builders' *Construction Industry Standards*, 2nd ed. as the guide for measuring your performance. Use standards written by home builders for home builders, not self-serving standards after the fact requested by lawyers.

Do Not Warrant Products & Materials Manufactured by Others

Home buyers would not be able to afford the homes they want if you did not use manufactured products such as pre-hung windows, roof trusses, siding systems, roofing products, etc. . . If one of these products fail, the manufacturer of the product, not you, should stand behind the product. The same is true of appliances. However, with appliances, there is also a federal warranty that can apply to builders if you do not take certain steps. We have helped home builders transfer manufacturers' warranties to their purchasers and make clear that the manufacturers are responsible for these products, not the builder.

Disclaim Warranties Implied by Courts & Statutes

The most important reason to have a written warranty is to clearly state what you do not cover. You do not want to be liable for vague, implied warranties that must be interpreted by courts. You and your purchasers need certainty. The best way you can provide this certainty is by disclaiming implied warranties and specifically stating the standards by which the homes you build are to be measured, the NAHB standards.

Alan Thayer is an Oregon business attorney with over 20 years experience representing businesses huge and small. He welcomes your questions and comments. Call 541-345-2325 or email Alan at athayer@ptlaw.com.



Require Owners to Maintain Their Homes

Modern homes are complex assemblies of mechanical systems, structural elements and decorative finishes. They must be maintained. Failure to properly perform this maintenance can result in catastrophic failure. If that happens, the home owners will blame you. We have helped many home builders by creating a maintenance manual designed to reduce call backs and help home owners maintain their homes. You

can require home owners to maintain their homes as a condition of your written limited warranty.

Document the Agreed Completion Date

Some builders clearly specify a completion date in writing, others discuss completion orally and still others refuse to quote a completion date (as if this will protect the builder). Whether you state a date or not, every purchaser with whom we have had contact has had a completion date in mind. Often times the purchaser's expectations are different than the builder's expectations. This can create conflict and bad will and can certainly result in home owners contacting attorneys. If you do not state completion dates, a court will not hesitate to establish what the court believes should have been a "reasonable" completion date. These problems can be avoided.

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Make your best estimate, add as much time as you think is necessary as a cushion, clearly document the date in your agreements with your purchasers and, when dates need to be adjusted, for whatever reason, do so in writing.

Require Advanced Notice of any Potential Claim

Hopefully the Oregon Legislature will enact a statute requiring advance notice before a home owner can bring a warranty claim. Why wait? Your contracts create the law between you and your customers. If this is a provision you want (and you should), then you can add it to your contracts. We have helped some of the best builders in Oregon establish this very requirement. And it applies to all claims that may be brought against the builders, not just warranty claims. The contractual requirement can be and should be

more comprehensive than the proposed statute.

Protect Yourself With a Mold Disclaimer

You build in a moist, humid climate. Mold is a fact of life in Oregon.

take advantage of legal strategies

You should make clear that you can not be responsible for damage to home contents and physical ailments due to mold or other organic growths. Home builders we have worked with have also added additional layers of protection such as making clear they are not liable for consequential damages (contents, physical ailments, alternate lodging, etc. . .). When a jury awards a Texas home owner \$32 million for damage, builders in Oregon should pay attention and take advantage of every appropriate legal strategy available.

Agree to Arbitrate Rather than Litigate

There is only one sure way to protect yourself from the uncertainties of judicial ruling and jury wards - have all of your purchasers and all of your subcontractors agree to arbitrate any disputes. A timely, cost effective arbitration before an expert familiar with your industry benefits everyone involved. Why more home builders do not include effective arbitration provisions in their contracts, I have no idea. I can assure you, however, that some of Oregon's best home builders include agreements to arbitrate in their contracts and those arbitration provisions are enforceable.

Require Subcontractors to Stand Behind You & Meet the NAHB Standards

You want your subcontractors to be obligated to meet the same standards you are obligated to meet. Liability insurance companies are requiring home builders to have written agreements with subcontractors as a condition of obtaining insurance. If your agreements with your purchasers require you to meet the NAHB standards, then you should require your subcontractors to meet that same standard. Otherwise, there is a risk that in the event of a problem, you can be held to one standard, your subcontractor can be held to a different standard and, if that different standard is lower, you may be financially responsible for a subcontractor's mistake. This is a result that can be and should be avoided with proper agreements. Don't worry about complaints from the subs. Many of the best builders in the state are requiring their subcontractors to sign contracts as a condition of doing business. Blame it on the insurance companies or blame it on the lawyers but require a signed contract as a condition of doing business with you.

Use Change Orders

You do not want your purchasers to give instructions to a subcontractor's employee and become upset when a change that was never reported to you is not made. Let your customers know that all changes must be in written change orders signed by both you and the purchaser. In the change orders, document the change in the work to be performed, the increase or decrease in price as a result of the change and the affect the change has on the completion date (see above). Requiring and using written change orders are the only way to avoid the "he said-she said" disputes. Use custom change orders that integrate with the agreements you use with your home buyers and your subcontractors. Have pads of these change orders printed and always have a pad in your vehicle. Change

orders can be a hassle but failing to require and use integrated change orders can result in hassles that are much bigger and more costly.

Prevent Future Liability With Goodwill Service Agreements

There are times when you make repairs or make changes that you are not required to make just to keep a customer happy. Everyone in business does this. You do not want this goodwill service, however, to be used against you as an admission of liability or to

create warranties where none exist. Many of our clients, home builders and clients in other industries, use a Goodwill Service Agreement to make sure that they are not punished for their good deeds. You should do the same.