



action for real estate fraud<sup>1</sup> and deceptive trade practices, including a long list of specific acts and practices,<sup>2</sup> breaches of express and implied warranties,<sup>3</sup> and “unconscionable” conduct,<sup>4</sup> defined as “an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.”<sup>5</sup>

Faced with a showing that these seven causes of action do not provide home buyers adequate relief for defective homes and that something as clumsy as a judge-created implied warranty of habitability, ill-defined and unwaivable, not used in any other state, to be litigated for years at a tremendous cost, is just what is needed to provide adequate redress, I would readily join the Court’s opinion. But without any information from any source on whether an unwaivable implied warranty helps or hurts, I am unwilling to guess. The Court knows no more than I do about the subject but does not view judicial ignorance as any hindrance to judicial action. We have not heard one word of evidence for or against an unwaivable implied warranty of habitability. No economists have testified about the likely impact on the market. No studies of existing problems have been presented. Indeed, no one has testified at all. Associations of home builders, national, state, and local, have told us in an amicus brief that an unwaivable implied warranty cannot be effectively enforced against irresponsible builders and will only increase responsible builders’

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<sup>1</sup> TEX. BUS. & COM. CODE § 27.01.

<sup>2</sup> TEX. BUS. & COM. CODE §§ 17.46(b)(1)-(26), 17.50(a)(1).

<sup>3</sup> *Id.* § 17.50(a)(2).

<sup>4</sup> *Id.* § 17.50(a)(3).

<sup>5</sup> *Id.* § 17.45(5).

risks beyond those undertaken with insurance-backed express warranties, thereby increasing home prices without improving home quality.<sup>6</sup> Are they right? Would consumer groups show that an unwaivable implied warranty would provide needed protection? We do not know. We are judges. We do not need to know.

In 1968, the Court held in *Humber v. Morton* that a new-home builder impliedly warrants that the home is constructed in a good and workmanlike manner and is suitable for human habitation.<sup>7</sup> Fourteen years later, in 1982, we held in *G-W-L, Inc. v. Robichaux* that the implied warranties created in *Humber* could be waived by clear language.<sup>8</sup> The Court's 1987 decision in *Melody Home Manufacturing, Inc. v. Barnes* cast doubt on this holding,<sup>9</sup> and there the matter lay until today. Now, thirty-four years after creating the two implied warranties, the Court explains that though they are often confused, even by the Court itself in *Robichaux*, they are really quite different, that the implied warranty of habitability only protects against conditions that are "dangerous, hazardous, or detrimental to [the homeowner's] life, health or safety",<sup>10</sup> that the implied warranty of habitability cannot be waived unless the buyer actually knows of the defect, and that the warranty of good and workmanlike construction cannot be waived unless the parties

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<sup>6</sup> Brief of Amicus Curiae National Association of Home Builders, Texas Association of Home Builders, the Greater Houston Builders Association, and the Home Builders Association of Greater Dallas.

<sup>7</sup> 426 S.W.2d 554, 555 (Tex. 1968).

<sup>8</sup> 643 S.W.2d 392, 393 (Tex. 1982).

<sup>9</sup> 741 S.W.2d 349, 355 (Tex. 1987).

<sup>10</sup> *Ante* at \_\_\_\_.

otherwise agree on “enough detail”.<sup>11</sup> The implied warranty of habitability imposes “strict liability” on home builders for the defects it covers.<sup>12</sup>

It is certainly this Court’s prerogative to expound the common law of Texas, and toward that end, to determine sound legal policy. But the responsible exercise of this prerogative can never be grounded in the personal views of those who happen to be serving on the Court at the time. The contrary position, stated by JUSTICE MAUZY in *Melody Home*,<sup>13</sup> has been rejected by the people of Texas in judicial elections since. On what does the Court base today’s policy statement that an implied warranty of habitability should not be waivable?

Not on any evidence. None has been offered in this case. The parties have had no opportunity to present evidence because the trial court dismissed the action on the pleadings. Not on any developments in Texas jurisprudence. The Court cites no cases in which waivers of the implied warranty of habitability have posed problems. Not on any other state’s jurisprudence. On the contrary, several jurisdictions would appear to allow a waiver of an implied warranty of habitability, either by court decision<sup>14</sup> or by statute.<sup>15</sup>

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<sup>11</sup> *Ante* at \_\_\_\_.

<sup>12</sup> *Ante* at \_\_\_\_.

<sup>13</sup> 741 S.W.2d 349, 361-362 (Tex. 1987) (Mauzy, J., concurring).

<sup>14</sup> *Board of Managers of the Village Ctr. Condo. Ass’n, Inc. v. Wilmette Partners*, 760 N.E.2d 976, 980-981 (Ill. 2001) (recognizing that the implied warranty of habitability can be waived if specifically referred to by name); *Bullington v. Palangio*, 45 S.W.3d 834, 839 (Ark. 2001) (acknowledging that the implied warranty of workmanship and the implied warranty of habitability are distinct, and that either or both can be waived); *Tusch Enters. v. Coffin*, 740 P.2d 1022, 1030 (Idaho 1987) (noting that the implied warranty of habitability can be disclaimed).

<sup>15</sup> MINN. STAT. ANN. §§ 327A.02 (1), 327.04 (West 1995) (codifying one-, two-, and ten-year warranties and allowing waiver on substitution of express written warranties offering substantially the same protections); N.Y. GEN. BUS. LAW §§ 777-a (1), 777-b (3) (McKinney 1996) (codifying one-, two-, and six-year home warranties and allowing exclusion

The parties do not cite and the Court has not found even one reported decision in the country that prohibits waivers of an implied warranty of habitability. In sum, no evidence or authority remotely suggests that today's decision is sound policy.

The Court opines that the implied warranty of habitability is “an essential part of a new home sale”,<sup>16</sup> but experience is all to the contrary. Texas managed to survive without this “essential part of a new home sale” until 1968, and since then, we are told, express warranties have largely taken the place of implied warranties. Amicus curiae tell us that almost 300,000 homes were enrolled in ten-year, insured, express warranty programs in the past five years, and that from 1987 to 1998, one such insurer paid on average more than \$40,000 per accepted structural claim. “Essential” means “indispensable”.<sup>17</sup> If this information is correct — and as I have said, the Court does not know one way or the other — then an implied warranty of habitability simply cannot be said to be indispensable to a new home sale.

The plaintiff home buyers in this case have not even made allegations that, if proved, would support the Court's ruling. Their petition alleges only that their homes have experienced “significant foundation movement and damage”, “sheetrock cracks, cracks in the exterior veneer, differential elevation of the slab outside of accepted building tolerance, cracks in the foundation, [c]racking of doors and windows and other signs of foundation damage and movement.” These allegations, according to the Court, would not

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or modification if the buyer is offered a limited warrant complying with statutory terms); VA. CODE ANN. § 55-70.1(A) - (C) (West 2002) (codifying implied warranties and allowing warranties to be waived and new dwellings sold “as is” in specified manner). *But see* LA. REV. STAT. ANN. § 9:3444 (West, Supp. 2002) and 31 50 (West 1997) (codifying one-, two-, and seven-year warranties, with exclusions, disallowing waiver, and providing for exclusivity).

<sup>16</sup> *Ante* at \_\_\_\_.

<sup>17</sup> WEBSTER'S THIRD NEW INT'L DICTIONARY 777 (1981).

even invoke the implied warranty of habitability, which covers only “conditions that are dangerous, hazardous, or detrimental to their life, health or safety.”<sup>18</sup> Nor do the plaintiffs argue that existing legal remedies are inadequate.

Without allegations, evidence, authority, or experience as support, the Court forces every home builder to provide, and every home buyer to accept, an implied warranty of habitability. Any freedom to contract differently is denied. A buyer who would prefer a nationwide insurer’s ten-year guarantee of the structural soundness of a new home to the implied warranty of a local builder cannot exchange one for the other. More sophisticated buyers and sellers who wish to quantify and apportion the risks of structural defects cannot do so. Like it or not, for better or for worse, the Court has ordered that market practices that have freely developed over decades must now be displaced by something seven judges have decided will be much better for everyone.

The Court has attempted to draw its opinion narrowly, strictly limiting the scope of the implied warranty of habitability. Still, any change in the common law that is this significant raises questions that must be litigated. Does the implied warranty of habitability ever terminate? Does it extend to subsequent purchasers? Can an action for breach ever be time-barred? What is the limitations period? When does an action for breach accrue? Does the discovery rule apply? Does the warranty cover defects that do not manifest themselves until long after the sale? What if the builder could not possibly have known of the

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<sup>18</sup> *Ante* at \_\_\_\_.

defect? Are non-economic damages recoverable, such as for mental anguish? These uncertainties, which can be avoided by express warranties, are necessarily part of the implied warranty package.

Without explanation, the Court rejects petitioners' plea that today's new rule not be retroactive, voiding the waivers obtained in exchange for express warranties in hundreds of thousands of home sales over decades. The impact of this aspect of the Court's ruling cannot be known.

Uncertainty, cost, and delay in civil litigation are subjects of mounting concern. For various reasons, parties are searching out alternatives. Some are insisting on arbitration, which is exploding. Mediation, which was virtually unheard of in Texas less than twenty years ago, is now used in almost every case in metropolitan counties. The number of cases actually tried to judgment continues to decline in Texas courts and in federal courts nationwide. The civil litigation system is not providing a dispute resolution mechanism acceptable to much of its market, and the demand for alternatives grows. Faced with the frustration of its central mission, the civil litigation system cannot break its addiction to open-ended rules, ill-defined obligations, and multiple, overlapping causes of action. Today's rule contributes to the problems without any demonstrated benefit.

I would hold that an implied warranty of habitability, strictly defined as the Court has done, can be waived by a buyer who clearly states a willingness to accept a reasonable express warranty instead or who knowingly agrees to accept the risk of structural defects. This appears to be most consistent with current practices. I would leave, either for a case with an evidentiary record or for the Legislature, the determination whether more or different provisions should be adopted to ensure protection for home buyers and the health of the home sales market.

Accordingly, I respectfully dissent.

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Nathan L. Hecht  
Justice

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