

I think it is fair to say that the Court's original opinion in this case reflected our lack of knowledge about the homebuilding industry, federal regulations that govern large segments of it, and the types of warranties that are widely used today. Nor is there any evidence in the record that tells us whether waivers of implied warranties or express warranties given in lieu of implied warranties have detrimentally impacted consumers and if so, what aspects of express warranties have proven to be deficient. Yet, in the face of our dearth of knowledge, we ventured to opine in amorphous terms what was required for an entire industry as a matter of *public policy*. That policy, once announced by this Court, is immutable unless the Court once again changes its mind,¹ or the Legislature acts. I now believe that it is unwise for this Court to make the kind of sweeping policy decision that it has made in this case without an adequate record or at least further briefing and argument.

Unlike the Legislature or a regulatory agency, this Court cannot hold hearings to determine whether regulation of an industry is needed and if so, what the precise contours of that regulation should be. We are limited to the record generated in a case, precedent from other courts, and scholarly ruminations. As already noted, we have no record here. And, the precedent from other courts weighs heavily in favor of allowing waivers of implied warranties in new home sales. Before this Court potentially voids hundreds if not thousands of express warranties and their accompanying waivers of implied warranties, we should know far more than we know today. Are we restoring rights to consumers or potentially voiding the

¹See *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392 (Tex. 1982).

purchase of homes for failure of consideration?² Are we assuring needed protections for consumers or needlessly adding to the cost of purchasing a home? Because we do not know the answers to these and many other questions, we should not undertake to issue a definitive decision unless and until we have more information. Accordingly, I would grant rehearing of this case. Because the Court does not, I dissent.

Priscilla R. Owen
Justice

OPINION DELIVERED: December 31, 2002

²The waiver of implied warranties that is in the record before us specifically says, in large type, that the purchaser is accepting express warranties in lieu of implied warranties and that “PURCHASER ACKNOWLEDGES AND AGREES THAT SELLER IS RELYING ON THIS WAIVER AND WOULD NOT SELL THE PROPERTY TO PURCHASER WITHOUT THIS WAIVER.”