**Mississippi’s New Home Warranty Act: A Guide to**

**Consumers’ Rights and Responsibilities**

**By Robert P. Wise[[1]](#footnote-1)**

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 The Legislature enacted the Mississippi New Home Warranty Act in 2004 to protect both consumers and homebuilders who wish to build a new home. Consumers should be aware that the Act is a mixture of rights and responsibilities. The Act provides a way to recover attorney’s fees where there have been code violations by the general contractor, provided that the contractor’s rights to notice of the defects and to cure are respected. For the general contractor, provision of the requirements of the Act to the new home buyer starts the clock on statutory warranties that can eventually expire. The Mississippi Legislature passed the Act to ensure for consumers that the process of building a dream home will give them the benefit of their bargain.

**1. Application of the New Home Warranty Act**

 First, who does the New Home Warranty Act apply to? The Act warrants various aspects of the quality of a home that is six years old or less, and its requirements apply to “builders” and “owners” of a home.

 A “builder” is defined as “any person, corporation, partnership, or other entity which constructs a home or engages another to construct a home, including a home occupied initially by its builder as his residence, for the purpose of sale.” Miss. Code Ann. § 83-58-3(a). The act is therefore directed to the responsibilities of general contractors who have built homes, not their subcontractors. Further, it is not an excuse for the builder that he once occupied the home as a residence.

 An “owner” is defined as “the initial purchaser of a home or any of his successors in title to a home during the time warranties provided under this act are in effect.” § 83-58-3(f). The warranties thus extend to later purchasers who purchase within the warranty periods provided by the Act.

 **2. Warranties Provided by the Act**

 If a consumer purchases a home which has been built within the prior six years the home is likely warranted under the Act, although the consumer also has certain responsibilities to carry out to invoke the Act’s protections. Under the Act, a builder warrants that: 1) One year following the warranty commencement date, the home will be free from *any* defect due to noncompliance with the building standards; and 2) six years following the warranty commencement date, the home will be free from *major structural defects* due to noncompliance with the building standards. Miss. Code Ann. § 83-58-5(1). Notice that both warranties provided by the Act are only for noncompliance with applicable building codes and standards.

 **3. Commencement of the New Home Warranties**

 The statute defines the “warranty commencement date” as “the date legal title to a home is conveyed to its initial purchaser or the date the home is first occupied, **whichever occurs first**.” § 83-58-3(g). A consumer should be aware that the period of warranty begins to run whenever the home is occupied or whenever title is conveyed to an initial purchaser, and he should perform due diligence upon purchase to determine whether or not he is protected by the Act (*e.g.,* Did the builder “occupy” the building prior to purchase, thereby limiting the period of his liability?). Also, the warranty periods can be extended if the builder fails to deliver a written notice of the Act’s requirements at the closing following completion, “for a period of time equal to the time between the warranty commencement date and the date notice was given.”

§ 83-58-7.

 The Act defines **major structural defect** as “any actual physical damage to the following designated load-bearing portions which affects their load-bearing functions, as follows to wit: i) Foundation systems and footings; ii) Beams; iii) Girders; iv) Lintels; v) Columns; vi) Walls and partitions; vii) Floor systems; viii) Roof framing systems.” § 83-58-3(e).

 As noted, the Act only warrants the quality of the work with regards to the applicable building standards. The building standards are defined by the Act as such:

(b) "Building standards" means the standards contained in the building code, mechanical-plumbing code, and electrical code in effect in the county, municipality, or other local political subdivision where a home is to be located, at the time construction of that home is commenced, or, if the county, city, or other local political subdivision has not adopted such codes, the Standard Building Code, together with any additional performance standards, if any, which the builder may undertake to be in compliance.

§ 83-58-3(b).

 While there are remedies available under Mississippi law to compensate the homebuyer whose damages resulted from mere negligence, standard breach of contract or some other common law claim, the provisions of the New Home Warranty Act only create consumer remedies for contractor violations of the building codes.

 **4. Warranty Exclusions**

 The consumer should be aware that there are many exclusions, to which the act does not apply *unless* the parties agree in writing that the provisions do apply. § 83-58-5(2). Below is a list of the exclusions (with emphases added):

(a) **Defects in outbuildings** including detached garages and detached carports, except outbuildings which contain the plumbing, electrical, heating, cooling or ventilation systems serving the home; swimming pools and other recreational facilities; driveways; walkways; patios; boundary walls; retaining walls; bulkheads; fences; landscaping, including sodding, seeding, shrubs, trees, and planting; off-site improvements including streets, roads, drainage and utilities or any other improvements not a part of the home itself.

(b) **Damage to real property** which is not part of the home covered by the warranty and which is not included in the purchase price of the home.

**(c) Any damage to the extent it is caused or made worse by any of the following:**

(i) **Negligence**, improper maintenance or improper operation **by anyone other than the builder** or any employee, agent or subcontractor of the builder.

(ii) **Failure by anyone other than the builder** or any employee, agent or subcontractor of the builder to comply with the warranty requirements of manufacturers of appliances, equipment or fixtures.

(iii) **Any change, alteration or addition made to the home by anyone after the initial occupancy by the owner, except** any change, alteration or addition performed **by the builder**, or any employee, agent, or subcontractor of the builder.

(iv) Dampness, condensation or other damage due to the **failure of the owner to maintain adequate ventilation or drainage**.

(d) **Any loss or damage which the owner has not taken timely action to minimize.**

(e) Any defect in, or any defect caused by, materials or work **supplied by anyone other than the builder,** or any employee, agent or subcontractor of the builder.

(f) **Normal wear and tear or normal deterioration**.

(g) **Loss or damage which does not constitute a defect in the construction** of the home by the builder, or any employee, agent or subcontractor of the builder.

(h) Loss or damage resulting from war, accident, riot and civil commotion, water escape, falling objects, aircraft, vehicles, **acts of God,** lightning, windstorm, hail, flood, mud slide, earthquake, volcanic eruption, wind driven water and changes in the level of the underground water table which are not reasonably foreseeable.

(i) **Insect damage and rotting of any kind.**

(j) **Mold or mold damage, except in cases where the builder's negligence was a proximate or contributing cause of the mold or mold damage.**

(k) Any condition which **does not result in actual physical damage** to the home.

(l) **Failure of the builder to complete construction of the home**.

(m) **Any defect not reported in writing by registered or certified mail to the builder or insurance company, as appropriate, prior to the expiration of the period of coverage of that defect plus thirty (30) days.**

(n) **Consequential damages.**

(o) Any loss or damage to a home caused by soil conditions or soil movement if the home is constructed on land owned by the initial purchaser **and the builder obtains a written waiver from the initial purchaser for any loss or damage caused by soil conditions or soil movement.**

(p) **Any defect** in an electrical, plumbing, heating, air conditioning or similar fixture not manufactured by the builder **for which the manufacturer provides a warranty regardless of duration.**

(Emphasis added).

The consumer should be aware that unless he contracts with the builder to include the above scenarios within the scope of the warranty, by default they are excluded under the Act. **However, the builder may not contract to reduce his responsibilities under this warranty, nor may the owner waive any of the provisions, “provided the home is a single family dwelling to be occupied by the owner as his home.”** § 83-58-5(3). Note that last bit appears to imply the Act is speaking to single family owner-occupied dwellings only, not to properties constructed for rental or occupied as duplexes or as apartments.

**5. Owner’s Required Notice of Defects and Builder’s Right to Cure**

 One of the critical sections of the Act concerns the notice that the owner must give to the builder in order to obligate the builder to correct any mistake. **Under the statute, the owner must, “before undertaking any repair himself,” give the builder “written notice within ninety (90) days after knowledge of the defect by registered or certified mail, advising him of the defects and giving the builder a reasonable opportunity to cure the defect.”**

§ 83-58-7. Notice that it is mandatory that the owner give the builder a timely, written notice of the defects that includes a reasonable opportunity to the builder to cure the defects. The Owner, no matter how disgusted he may be with his builder, cannot simply make the repairs himself or hire new builders to do the repairs and then invoke the Act’s terms against the builder **except to make immediate repairs that are necessary for safety reasons or to halt further deterioration and minimize damages**: the builder’s right to cure must be respected. Indeed,

§ 83-58-17 (3) states:

(3) If the owner files a civil action without first complying with the provisions of this chapter, the court shall dismiss the action without prejudice, and the action may not be refilled until the claimant has complied with the notice requirements of this chapter.

 The reference to the claimant’s compliance with “…the notice requirements of this chapter” includes the requirement that the owner’s notice give the builder “a reasonable opportunity to cure the defect” (§ 83-58-7). Thus, by Mississippi statute it arguably a condition precedent to the owner’s assertion of claims against the builder for defects in civil litigation that the owner have given the “a reasonable opportunity to cure the defect”, at least where the defect complained of involves code violations. *Id.*

 However, note there is an exception to the owner’s written notice requirement to the builder under § 83-58-7 where the owner must take timely action to “minimize loss or damage”. Indeed, one of the many exceptions to a builder’s liability under the Act is for, “[a]ny loss or damage which the owner has not taken timely action to minimize.” See § 83-58-5(2)(d). Therefore, the Act codifies the owner’s common law duty to take necessary, timely action to mitigate his damages, with or without prior written notice to the builder. However, the owner should consider giving the builder the written notice as soon as the repairs made to stop further damage have been done, and that he will expect the builder to cure any remaining defects, and to be responsible for all costs of repair under the Act.

 Under § 83-58-7 also, the builder must present the owner with “written notice of the requirements of this chapter at closing”, which means upon completion of all of the construction. *Id.* As noted, if the builder fails to give the owner notice of the provisions of this Act, the warranties will be extended “for a period of time equal to the time between the warranty commencement date and date notice was given.” *Id.* Thus, the builder will want to give the owner a notice of the requirements of the Act to start the clock running on the warranty periods provided by the Act.

 **6. Commencement of Legal Action to Enforce Warranties; Attorney’s Fees**

 Any legal action to enforce the provisions of the warranty provided by the Act must commence within thirty (30) days after the expiration of the appropriate period of warranty period. § 83-58-9. If the owner sues the builder and the court (or other dispute-resolution mechanism, such as arbitration panel or mediator) finds that the owner has a valid cause of action, the owner is entitled to “actual damages, including attorney fees and court cost, arising out of the violations” of the warranties. § 83-58-17(1).

 **7. Interpretations of the Act**

 Thus far, the courts have not waded in deeply to interpret the provisions of the Act. However, the cases that have mentioned the Act have found no liability on the basis of the Act alone, but in conjunction with common-law claims such as negligence or breach of contract. In *DiMa Homes, Inc. v. Stuart*, 873 So. 2d 140, 145 (Miss. 2004), the court found that, because “there was no evidence that the matters for which the damages were awarded constituted violations of the building code or other code” the damages did not fall within the statute.

 Nonetheless, in *DiMa Homes* the Court found although there was no Home Warranty Act violation, every contract contains an implied warranty written into it by law of reasonably skilled workmanship that was violated in that case, making an award of damages appropriate. The Court stated:

 Regardless of the statute or the contract, every building contract has an implied term regarding reasonably skilled workmanship:

Unless he represents that he has no greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

*DiMa Homes, Inc. v. Stuart*, 873 So. 2d 140, 145 (Miss. 2004), citing the *Restatement (Second) of Torts* § 299A (1965) as quoted in *George B. Gilmore Co.v. Garrett,* 582 So.2d 387, 391-392 (Miss.1991). The *DiMa Homes* case, therefore, is significant in stating there is a common law implied warranty of skilled workmanship apart from any application of the statutory New Home Warranty Act.

 In *Little v. Miller*, 909 So. 2d 1256 (Miss. Ct. App. 2005), the plaintiff brought claims for tortious breach of warranty and contract, negligent misrepresentation and gross negligence against a contractor for unsatisfactory work done on his home. The chief defense to plaintiff’s common law claims for breach was that it concerned landscaping, which is excluded under the New Home Warranty Act. *Id.* at 1258. The court highlighted § 83-58-17(2), which states that “nothing in this chapter shall prevent the owner from filing a cause of action based on breach of contract and remedies attendant to such cause of action.” *Id.* Though the court eventually upheld summary judgment against the plaintiff, it ruled that the New Home Warranty Act is an alternative rather than the exclusive remedy for breach in a construction contract. *Id.*

 When the Mississippi legislature created the New Home Warranty Act, it strengthened the consumer protections for the state’s homeowners. It also created responsibilities for those homeowners—duties they must take in order to affirmatively protect their rights. Below is a quick checklist for the consumer to use when purchasing a newly constructed home. While the remedies under this Act are not exclusive, they should provide greater satisfaction to the consumer and greater clarity to the builder.

 **8. Consumer’s Checklist when Purchasing Newly-Constructed Home**

* To the extent possible, be aware of the building and zoning codes and of the builder’s compliance with them.
* At the closing following the completion of construction, the builder is required to provide the homeowner with a copy of the Act and its provisions; if he does not, the warranty for defects caused by violations of building standards are extended.
* If there are defects which are covered under the Act, the homeowner must give the builder notice within 90 days of discovering the defect. The homeowner should not take unilateral action to repair the damage, except as absolutely necessary to prevent the existing damage from getting worse or to remedy a dangerous condition.
* The homeowner should keep good records of all transactions and communications with the builder.
* Make sure the builder takes out any permits needed for construction from the local municipality or county or district so that the local authorities will be required to inspect your builder’s work, thus requiring the builder to bring the home up to local building standards before a certificate of occupancy is granted.

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