



C R E S C E N T T I T L E

Presents:

**New Home Warranty Act and New
Construction Addendum**

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The New Home Warranty Act ("NWHHA") - A General Overview

❖ Purpose –

- Promote commerce and to protect Louisiana homebuyers.
- Sets out the exclusive remedies, warranties, and preemptive periods in relation to the rights of homeowners and builders in home construction projects in Louisiana.
- No other provisions of law relative to warranties and redhibitory vices and defects shall apply.
- Warranties provided under the NHWHA are from the builder.



The New Home Warranty Act ("NHWHA") - A General Overview

- ❖ Why should the NHWA matter to real estate agents?
 - New Home – NHWA warranties cannot be waived or restricted by the buyer or builder.
 - Preowned Home – Most sales include a waiver of redhibition through which the buyer waives warranty rights for defects in the property absent fraud.
 - If your buyer is looking at two properties - one covered by the NHWA and one not - understanding the potential benefits of the NHWA protections can help your buyer make a more informed decision on which home to purchase.
 - If you represent a seller of a home that is less than five years old, the home should still be covered by the NHWA, at least for certain potential defects. That warranty automatically transfers to the buyer. This should make the home more appealing to buyers.



What "Homes" are covered by the NHWA?

- ❖ "Home" is defined as:
 - Any new structure designed and used only for **residential** use, together with all attached and unattached structures, constructed by the builder, whether or not the land was purchased from the builder.
 - Includes structures containing multiple family dwellings or residences
- ❖ This obviously applies to new, single family homes.
- ❖ Condos and apartment complexes can also fit in this definition.



What "Homes" are covered by the NHWA? (cont.)

❖ What about additions to existing homes?

- *Quaternary Res. Investigations, LLC v. Phillips*, 2018-1543 (La. App. 1 Cir. 11/19/20), *writ denied*, 2020-01450 (La. 3/2/21), 311 So. 3d 1059, analyzed but did not decide the issue.
- The court explained that the legislative purpose and history of the NHWA indicates that additions are not covered by the NHWA.
- However, there is jurisprudence holding that the plain language of the NHWA demonstrates that “a builder need not construct the entire home to qualify as a builder, where the construction of a mere addition to a home suffices.” *See Palermo v. Homes & More, Inc.*, 2019-295 (La. App. 3rd Cir. 12/18/19), 286 So. 3d 557, 563 (“[A] clear reading of the statute reveals that a ‘builder’ is one that ‘constructs a home, or addition thereto[.]’ La. R.S. 9:3143(1).”)

❖ What about renovations to existing homes that do not include additions?



What "Homes" are covered by the NHWA? (cont.)

- ❖ Mobile homes – Not covered by the NHWA. *Dalme v. Blockers Manufactured Homes, Inc.*, 779 So.2d 1014, 2000-00244 (La. App. 3 Cir. 1/25/01).
- ❖ Unattached structures not constructed for use for residential purposes – Not covered if owner hires the builder for just that purpose. *Lang v. Sproull*, 36 So.3d 407, 45,208 (La. App. 2 Cir. 4/28/10).
 - But may be covered when constructed as part of the home building process.



Who is a "Builder" under the NHWA?

- ❖ “Builder” is defined as:
 - Any person, corporation, partnership, LLC, joint venture, or other entity which constructs a home, or addition thereto, including a home occupied initially by its builder as his residence.
 - Still a builder regardless of whether or not the consumer purchased the underlying real estate with the home.
 - A general contractor is a "builder" even if the general contractor does not construct the entire home itself. The general contractor is contractually responsible for ensuring the structure is fully built and for delivering the completed property to the owners as a new home.
 - A subcontractor is not a "builder" because subcontractors do not construct the entire structure and deliver it to the owner as a new home.
- ❖ The builder is required to give the owner written notice of the requirements of the NHWA at the time of the closing or at the time of execution of the construction contract, if no closing.



Who is an "Owner" under the NHWA?

- ❖ An "Owner" includes:
 - Initial purchaser
 - i.e., any person for whom a home is built or the first person to whom a home is sold upon completion of construction)
 - Subsequent purchasers, including their heirs, invitees, or assigns.
- ❖ Warranties automatically transfer, without charge, to a subsequent owner who acquires title to the home. However, the transfer of the home does not extend the duration of any warranty.



What defects are covered and for how long?

❖ One Year –

- Free from any defect due to noncompliance with the building standards or due to other defects in materials or workmanship not regulated by building standards.
- Broadest but shortest warranty provided under the NHWA.
- Even seemingly minor issues such as cracked plaster, yellowing paint, and “rubbing off” of new paint can give rise to a potential claim for recovery under this portion of the NHWA. *See Bynog v. MRL, LLC*, 05-122 (La. App. 3 Cir. 6/1/05), 903 So.2d 1197.
- Deviations from the “plans and specifications” for a home may also be recoverable. *Thorn v. Caskey*, 32-310 (La. App. 2 Cir. 9/22/99), 745 So.2d 653.

❖ “Warranty commencement date” –

- The date that legal title to a home is conveyed to its initial purchaser or the date the home is first occupied, whichever occurs first.



What defects are covered and for how long? (cont.)

❖ Two Years –

- Plumbing
- Electrical
- Heating, cooling, and ventilating systems
- Exclusive of any appliance, fixture, and equipment



What defects are covered and for how long? (cont.)

❖ Five Years –

- **Major structural defects**

- “Major structural defect” means any actual physical damage to the following designated load-bearing portions of a home caused by failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable:

- (a) Foundation systems and footings
- (b) Beams
- (c) Girders
- (d) Lintels
- (e) Columns
- (f) Walls and partitions
- (g) Floor systems
- (h) Roof framing systems.



Major Structural Defects (cont.)

- ❖ Courts are expanding the definition of a major structural defects.
 - *Shaw v. Acadian Builders and Contractors, LLC*, 2013-0397 (La. 12/10/13).
 - Water intrusion due to defects in the application of Tyvek paper and stucco, which allowed water intrusion and deterioration of the OSB sheathing supporting and stabilizing the studs in the home, was a major structural defect subject to the 5 year warranty period and not the general 1 year warranty period.
 - The important question is whether actual physical damage to a load-bearing portion has been caused by a failure of that load-bearing portion.



What defects are covered and for how long? (cont.)

❖ Minimum Warranties –

- The 1, 2, and 5 year warranty periods are the minimum required warranties and shall not be waived by the owner or reduced by the builder provided the home is a single or multiple family dwelling to be occupied by an owner as his home.
- The parties are free to contract for greater warranties than provided in the NHWA.



Exclusions Provided in the NWHHA

❖ Exclusions for the above warranties –

- Unless the parties otherwise agree in writing, the builder's warranty shall exclude the following items:
 - (1) Fences, landscaping, including but not limited to sodding, seeding, shrubs, existing and new trees, and plantings, as well as off-site improvements, all driveways and walkways, or any other improvement not a part of the home itself.
 - (2) After the first year, the concrete floor of a basement and the concrete floor of an attached or unattached garage that is built separate from a foundation wall or other structural element of the home.
 - (3) 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.



Exclusions Provided in the NWhA (cont.)

- (4) Any damage to the extent it is caused or made worse by any of the following:
- (a) Negligence, improper maintenance, neglect or improper operation by anyone other than the builder or any employee, agent, or subcontractor of the builder.
 - (b) 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.
 - (c) Failure by the owner to give written notice by registered or certified mail to the builder of any defect within the time set forth in R.S. 9:3145.
 - (d) Any change of the grading of the ground by anyone other than the builder, or any employee, agent, or subcontractor of the builder.
 - (e) 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.
 - (f) Dampness, condensation, or other damage due to the failure of the owner to maintain adequate ventilation or drainage.



Exclusions Provided in the NWA (cont.)

- (5) Any loss or damage which the owner has not taken timely action to minimize.
- (6) 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.
- (7) Normal wear and tear or normal deterioration.
- (8) 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.
- (9) Loss or damage resulting from war, accident, riot and civil commotion, water escape, falling objects, aircraft, vehicles, acts of God, lightning, windstorm, hail, flood, mudslide, earthquake, volcanic eruption, wind driven water, and changes in the level of the underground water table which are not reasonably foreseeable.
- (10) Any damage caused by soil movement which is covered by other insurance.
- (11) Insect damage.
- (12) Any loss or damage which arises while the home is being used primarily for a nonresidential purpose.
- (13) Any condition which does not result in actual physical damage to the home.



Exclusions Provided in the NWA (cont.)

(14) Bodily injury or damage to personal property.

(15) Any cost of shelter, transportation, food, moving, storage, or other incidental expense related to relocation during repair.

(16) 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 specified in Subsection A of this Section for such defect plus thirty days.

(17) Consequential damages.

(18) 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.

(19) Mold and mold damage.



What does the Owner do if a defect is discovered?

❖ Notice of Defect to Builder –

- Before undertaking any repair himself or instituting any action for breach of warranty, the owner must give the builder **written notice, by registered or certified mail, within one year after knowledge of the defect**, advising him of all defects and giving the builder a reasonable opportunity to comply with the provisions of the NHWA.
- Failure to provide proper notice will usually result in a loss of rights under the NHWA.

❖ If the builder fails to remedy the defects, the owner can file a lawsuit –

- Must file suit within **30 days** of expiration of the applicable warranty period.
- This is a preemptive period. Different than redhibition, under which the claims period can be interrupted if the seller is attempting repairs. Failure to timely file suit under the NHWA results in a complete loss of rights under the NHWA.



What damages are recoverable under the NHWA?

- ❖ Actual damages, including attorney fees and court costs, arising out of the builder's violation.
- ❖ Damages for a single defect shall not exceed the reasonable cost of repair or replacement necessary to cure the defect.
- ❖ Damages for all defects in the home shall not exceed the original purchase price of the home.
- ❖ Consequential damages such as pain and suffering, mental anguish, or loss of use are generally not recoverable.



What damages are recoverable under the NHWA? (cont.)

- ❖ While the NHWA remedies are said to be exclusive, courts have found that when there is a written contract between an owner and builder, and the builder fails to complete his obligations under the contract, he can also be sued for breach of contract as well as for claims under the NHWA.

Example: If a builder fails to finish construction of the home within the time required by the construction contract, the owner may, depending on the contract terms, have a claim for breach of contract to recover delay related damages (e.g., additional rental expenses, finance costs, storage expenses, etc.). If the owner also finds defective construction after completion, then the owner may also have a NHWA claim.



Louisiana Residential Agreement to Buy or Sell - New Construction Addendum

- ❖ If the property is a completed new construction, under construction, or to be constructed, then line 158 of the LREC Residential Agreement to Buy or Sell should be checked, and a New Construction Addendum should be completed and made part of the contract.

156 **NEW HOME CONSTRUCTION:** If the property to be sold is completed new construction, under construction, or to
157 be constructed, check one:
158 A new home construction addendum, with additional terms and conditions, is attached.
159 There is no new home construction addendum.
160

- ❖ LREC offers an optional New Construction Addendum form.
- ❖ LREC addendum is not a mandatory form, and the parties are free to modify the form or use a different form.



New Construction Addendum – Completed Construction

❖ Completed Construction –

- Sale will proceed in much the same way as the sale of a preowned home, except that inspections may be handled a little differently under the New Construction Addendum and the home is subject to the New Home Warranty Act, not redhibition.



New Construction Addendum – Under Construction

❖ Under Construction –

- If the home is under construction, "A list of items to be completed, changes or selections to be allowed by Builder for Purchaser's selection shall be attached to this addendum to become a part of same signed by all parties."
- Give careful consideration to what's included on this list.
- Quality of materials and pricing?
 - Example – “Wood flooring” - hardwood flooring vs. laminate wood flooring.
- Allowances for items?
- Material availability issues and schedule delays.



New Construction Addendum – New Construction or To Be Constructed

❖ New Construction or To Be Constructed -

- Selected if construction has not yet commenced.
- Addendum gives the option to attach a floor plan and/or specifications – the more detailed the better.
- Louisiana Licensed Residential Contractor –
 - It is important that the builder be properly licensed.
 - Contracts entered into with unlicensed contractors are null and void in Louisiana.
 - License status can be quickly verified through the online database of the Louisiana State Licensing Board for Contractors at <https://lslbc.louisiana.gov/contractor-search/>



New Construction Addendum – General Observation

❖ General Observation on Items Needing Completion or Correction (i.e. "punch list" items) -

- “In the event delays in completing or correcting items noted by Buyer are beyond the Builder's control and cannot be completed prior to the act of sale the date for the Act of Sale shall be extended accordingly and agreed to by all parties in writing.”
 - Escrow agreement rather than delay the closing? May depend on whether home can be occupied.



Louisiana Residential Agreement to Buy or Sell

New Construction Addendum

() **Completed Construction**

() **Under Construction:** A list of items to be completed, changes or selections to be allowed by Builder for Purchasers selection shall be attached to this addendum to become a part of same signed by all parties.

() **New Construction or To Be Constructed** under observations and/or inspections of the applicable state and/or local governing authorities, and to prevailing code standards.

Floor Plan attached and initialed as part of this Agreement () Yes () No

Specifications attached and a part of this Agreement () Yes () No

Completion: Subject to any delays beyond the control of Builder, such as inclement weather or other adverse working conditions, fire or other casualty, riots, material delivery days or on account of any acts of God, the home shall be completed on or before _____ 20__ unless otherwise amended between parties.
All changes to construction or allowances shall be in writing and signed by all parties.

Builder (defined by law as a person, corporation, partnership, limited liability company, joint venture or other entity):

Name(s): _____

Physical Address: _____

Louisiana Licensed Residential Contractor () Yes () No

License Number: _____

Inspection and Final Walk Through of New Construction: Within _____ days of the anticipated date of the closing, Seller and/or his agent shall notify Buyer and his agent, that the New Home is available for inspection, which inspection shall be scheduled by Buyer with Seller (whose agent or employee may accompany Buyer on such inspection).

Utilities for inspections shall be provided by _____ and shall remain in service during the inspection period.

A third party inspector who conducts the inspection shall be a state licensed professional proficient in the home component being inspected:

- Licensed Home Inspector with the Louisiana Home Inspectors Board (www.lsbhi.state.la.us)
- State Registered Professional Engineer (www.lapels.com)
- Third Party Provider registered with the Louisiana State Uniform Construction Code Council (www.dps.louisiana.gov/lsucce)

The standard for completion shall be the most recent edition or version of:

- Residential Construction Performance Guidelines (www.nahb.org)
- Louisiana State Uniform Construction Code (www.lsucce.louisiana.gov/codes.html)

Any deficiencies discovered that are beyond inspectors scope of certification must be verified by the appropriate engineer or licensed professional certified in that field, at the expense of _____.

Within 48 hours of such inspection or final walk-through, Buyer shall prepare a written list of any items requiring corrective action or completion, which items shall be corrected or completed prior to closing. In the event delays in completing or correcting items noted by Buyer are beyond the Builder's control and cannot be completed prior to the act of sale the date for the Act of Sale shall be extended accordingly and agreed to by all parties in writing. All other defects shall be governed by Louisiana's New Home Warranty Act. Louisiana State Uniform Construction Code compliance shall be deemed met when a Certificate of Occupancy by the authority having jurisdiction has been submitted by seller.

Buyer

Seller

Buyer

Seller

Date

Date





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