

New Home Construction Cases: A Buyer Cannot Waive—and a Builder Cannot Disclaim—the Implied Warranty of Habitability Even if the Builder Provides an Express Warranty in Exchange

Zambrano v. M & RC II, LLC et al.

Arizona Court of Appeals | July 29, 2021

By: [Eileen GilBride](#)

Zambrano signed a purchase agreement to buy a newly built home. The agreement provided the buyer waived, and the Builder disclaimed, the implied warranty of habitability and workmanship; and that instead, the Builder's 40-page express warranty—given in exchange for the waiver—would be the only warranty that applied. Zambrano sued the Builder for breach of contract and breach of the implied warranty, alleging popped nails in the drywall and other defects affecting the home's foundation. The Builder moved for summary judgment alleging Zambrano waived, and the Builder disclaimed, all implied warranties. The trial court granted the Builder's motion, and Zambrano appealed.

The court of appeals reversed, concluding that the public policy underlying the implied warranty of habitability and workmanship outweighed the public policy in enforcing a freely negotiated waiver. The Builder and its amicus argued that allowing homeowners to opt for a comprehensive, robust express warranty that clearly sets forth the parties' rights and obligations—instead of an amorphous implied warranty laden with ambiguity, which allows both parties to fudge on their rights and responsibilities—makes good policy and reduces unnecessary litigation costs, thus promoting housing availability and affordability. The court stated, however, that longstanding public policy reasons support the judicially created, implied warranty that protects home buyers such as Zambrano: "house-building is frequently undertaken on a large scale, . . . builders hold themselves out as skilled in the profession, . . . modern construction is complex and regulated by many governmental codes, and . . . homebuyers are generally not skilled or knowledgeable in construction, plumbing, or electrical requirements and practices."

The court did note the "trend in some states to allow waivers of the implied warranty." It said, however, that "Arizona may one day change course and allow for an implied-warranty waiver or disclaimer. But we cannot chart that new direction without further guidance from our supreme court. Until then, Arizona courts will continue to prohibit such waivers and disclaimers as some states continue to do."

The Builder is certain to give the Arizona Supreme Court a chance to provide that guidance. We will keep an eye on this case and report about any further decisions.

[View this Law Alert and download the Court's opinion on our website.](#)

ABOUT THE AUTHOR



[Eileen GilBride](#) leads JSH's [Appellate Department](#). She focuses her practice on representing clients in federal and state appellate matters and dispositive motions. She also counsels and assists trial lawyers in the substantive areas of their practices, from the answer stage through the post-trial motion stage. Eileen has handled more than 500 appeals at every level of the state and federal courts, in Arizona and other states, which have resulted in more than 80 published decisions.

egilbride@jshfirm.com | 602.263.1736 | [jshfirm.com/egilbride](https://www.jshfirm.com/egilbride)