



## RECOURSE FOR A DEFECT IN A NEW HOME (ALABAMA LAW) FACT SHEET<sup>1</sup>



### The Simple Stuff:

1. Always conduct a home inspection before the closing.
  - not all defects can or will be discovered then
2. After you discover a defect in your new-construction home, you should start documenting the problem.
  - This may include taking photos or video of the defect and starting a written log that tracks any changes in the defect.
3. Look at the terms of the sales contract to determine whether the builder is responsible for fixing the defect and if so under what conditions.
  - The builder's responsibility should be outlined in the warranty section of the contract. You should find detailed information about how long the warranty lasts, the time frame in which you're required to notify the builder of the defect, any reimbursement provisions, and information that may restrict your legal remedies.

### New-Construction Warranty Laws in Alabama

Under Alabama law, new-construction homes may be covered by an implied warranty of habitability or an express warranty.

### Your Rights Under Alabama's Implied Warranty of Habitability

Alabama law gives homeowners an implied warranty of habitability, which in the absence of any express, written warranty, entitles the buyer to have defects arising from home's construction repaired or replaced by the builder. An implied warranty of habitability acts as legal assurance that the new constructed home is suitable for occupancy. (Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971)). The law is meant to protect buyers from shoddy builders and is available to buyers for six years following the sale of the home. (Ala. Code §6-2-34(9)).

Alabama law does not require the seller to be a professional home builder for the law to apply. The seller must simply have constructed the home for a commercial purpose. Nor does the seller's level of experience with the commercial sale of homes matter to your right to recover. For example, a dentist who decides to build her first ever home to sell, and hires a company to build it for her and then sells it to buyer who discovers a defect, would be bound by the implied warranty in the same way a professional builder would be.

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<sup>1</sup> Fact sheet was taken verbatim from the following website; <http://www.nolo.com/legal-encyclopedia/new-home-construction-defects-alabama-your-rights-against-the-builder.html> (June 15, 2017).

In order to successfully sue a builder under Alabama's implied warranty of habitability law, a buyer must prove six factors. (*Sims v. Lewis*, 374 So. 2d 298, 303 (Ala. 1979)).

Those six elements are:

1. the buyer purchased a new home from the seller
2. the seller built the home
3. the home was not lived in by any other person(s), including the seller, before the buyer's purchase; (*Waites v. Toran*, 411 So. 2d 127 (Ala. 1982))
4. the home was built by the seller for purposes of sale and was sold to the buyer in a defective condition impairing the home's intended use; (*Capra v. Smith*, 372 So. 2d 321, 323 (Ala. 1979))
5. the buyer was not aware of the defective condition and did not have any knowledge or notice by which the buyer "could have reasonably discovered it," and
6. the defective condition decreased the fair market value of the home, resulting in damage to the buyer.

However, there is a well-established trend in Alabama new-home construction contracts for the buyer to waive the right to an implied warranty of habitability. In exchange, a builder will offer an express, written warranty.

### **Your Rights Under the Alabama Builder's Express Warranty of Habitability**

An express warranty is a contractual agreement that the builder will repair or replace defects arising from a home's construction. It will not cover damage caused by the homeowner or guests.

If your contract contained an express warranty of habitability, it probably covers repairs for defects discovered after you begin occupying the home. The express warranty will have specific provisions establishing the warranty period, notice procedures, and the items covered.

If you believe the defects you discovered are covered by an express warranty, contact the builder immediately, in writing, within the warranty period. You'll need to precisely follow the method set out in the sale contract for requesting that the builder fix the problem. If you don't, the builder may have legal grounds upon which to refuse.

After receiving this notice, the contractor may want to perform inspections to determine whether your complaints are valid, what types of defects exist, and what actions are necessary for repairs. The express warranty will likely include a provision giving the seller-builder "a reasonable opportunity" to repair the defect after receiving your notice. This means that the builder may be entitled to several opportunities to attempt to repair the defect.

If you decide to make any repairs yourself, be sure to keep detailed records of any estimates you receive and the actual costs paid. This documentation will be important

for reimbursements you might claim from the builder and as evidence if you have to bring suit. You will also want to notify the builder that you intend to make repairs yourself prior to starting, especially if your contract requires it.

### **Possibility of Suing Alabama Home Builder for Fraud**

A home builder may be liable for fraud if he or she actively concealed a latent defect of which the builder was aware. (Ala. Code §6-5-102).

To recover, you would need to prove that the builder acted to keep you from discovering the defect. For example, let's say your newly constructed home has a storm shelter in the basement. During your final walk-through and inspection, the builder tells you the storm shelter's walls were plastered so that you can easily decorate the space. After you move in, however, you discover that the plaster really is meant to cover a massive crack in the foundation of the storm shelter's walls, which poses a major safety risk for your family. In this instance, the court is likely to find that the builder's actions were designed to keep you from finding the defective crack.

### **Is It Worth Suing an Alabama Builder Over Home Defects?**

Whether you can successfully sue an Alabama builder for a defect in your newly constructed home will depend on a number of factors, including the terms of agreement, especially if you have an express warranty, the builder's behavior, the evidence you have gathered regarding the defect, and some basic procedural issues.

One of the most important issues will be whether you've already waived your right to sue. Alabama courts have consistently held that the builder and buyer can agree to limit their respective rights or remedies in a real estate sales contract. This means that, if you signed onto any waivers of the implied warranty of habitability or other legal remedies in the contract, you can't undo this choice in the course of a lawsuit. You may, however, be able to recover if you can show that the builder deceived or coerced you into agreeing to the warranty.

You will also need to check your contract to determine whether it requires disputes to be resolved through arbitration. Arbitration is a form of alternative dispute resolution in which the parties present their arguments to a neutral third party known as an arbiter, who will render a final decision in the dispute. The decisions made by the arbiter are legally binding and fully enforceable in a court of law. If you file a lawsuit and your contract requires arbitration, the courts can dismiss your lawsuit and require you to enter arbitration, which is usually less favorable for the buyer.

Although a home buyer in Alabama may have many hurdles to overcome when suing for undisclosed defects, it is still possible to be successful. Each case must be analyzed individually, not just for success but also cost. Depending on the type of defect discovered, buyers may save more money by fixing small repairs themselves. For example, if the defect is replacing a door frame, tackling that on your own might make

more sense than consulting a lawyer. On the other hand, if the defect is substantial, like a large deep crack in the foundation, it may be worth pursuing action against the builder.

Before you file a lawsuit, consult a licensed Alabama attorney for advice on what legal remedies may be available under Alabama law and your likelihood of success in court. This will help you save money and determine whether a lawsuit is the most cost-effective choice.



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