

RECEIVED No. <b>00-0479</b>	
IN SUPREME COURT OF TEXAS	IN THE SUPREME COURT OF TEXAS
JUN 08 2000	
CENTEX HOMES And	CENTEX REAL ESTATE CORPORATION
JOHN T. ADAMS, Clerk	d/b/a CENTEX HOMES
By _____ Deputy	

*Petitioners.*

MICHAEL M. BUECHER, et al.,

*Respondents.*

**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS, TEXAS ASSOCIATION OF BUILDERS, THE GREATER HOUSTON BUILDERS ASSOCIATION, And THE HOME BUILDERS ASSOCIATION OF GREATER DALLAS**

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**NAHB 00-0479**

NATIONAL ASSOCIATION  
OF HOME BUILDERS

REGULATORY & LEGAL AFFAIRS DIVISION  
Construction Liability & Legal Research Department



JOHN T. ADAMS, Clerk  
W. \_\_\_\_\_ Deputy

June 5, 2000

VIA FEDERAL EXPRESS

Mr. John T. Adams  
Clerk  
Supreme Court of Texas  
201 W. 14<sup>th</sup> Street, room 104  
Austin, Texas 78701

Re: *Centex Homes and Centex Real Estate Corporation d/b/a Centex Homes v. Michael A. Buecher, et al.*: no. \_\_\_\_\_, in the Supreme Court of Texas

Dear Mr. Adams:

Enclosed are the original and twelve copies of the Brief of Amicus Curiae National Association of Home Builders, Texas Association of Builders, The Greater Houston Builders Association, and The Home Builders Association of Dallas.

Please acknowledge receipt by placing your file mark on the enclosed extra copy and returning it to me in the enclosed self-addressed envelope.

Sincerely,

David S. Jaffe

cc: w/encl:	Bryan A. Woods	(by certified mail)
	Samara L. Kline	(by certified mail)
	Charles J. Pignuolo	(by certified mail)
	Stephen Paxson	(by certified mail)
	Carl Wilkerson	(by certified mail)

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF TEXAS

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CENTEX HOMES And CENTEX REAL ESTATE CORPORATION  
d/b/a CENTEX HOMES

*Petitioners,*

v.

MICHAEL M. BUECHER, et al.,

*Respondents*

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME  
BUILDERS, TEXAS ASSOCIATION OF BUILDERS,  
THE GREATER HOUSTON BUILDERS ASSOCIATION, And  
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The amici, who represent the home builders of Texas and the nation, urge the Court to grant the petition for review in this case and reverse the judgment of the court of appeals. As set forth in the Petition for Review, the court of appeals' opinion conflicts with this Court's opinion in *G-W-L, Inc. v. Robichaux*, 643 S.W. 2d 392 (Tex. 1982). In addition, the court of appeals' opinion is out of step with the practical reality of the home building industry and the law throughout the country. By applying *Robichaux* to uphold the parties' agreement in this case, the Court will insure freedom of contract for Texas home buyers and builders, promote certainty and predictability in everyday commercial transactions, and enforce the reasonable expectations of parties to those transactions.

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**STATEMENT OF INTEREST**

This Brief is filed on behalf of the following associations:

•The National Association of Home Builders, ("NAHB") represents 200,000 builder and associate members organized into approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico, including 30 regional and local associations in Texas representing 9,790 members building most of Texas' housing. NAHB's interest is in seeing that suppliers of housing can do the job they are most qualified to do: build and operate housing for millions of Americans at prices that are affordable. NAHB is the voice of the American shelter industry.

•The Texas Association of Builders ("TAB") is a nonprofit trade association formed over 50 years ago to promote home ownership and to serve the common interests of participants in the residential construction industry in Texas. Of its statewide membership, approximately 3,100 firms are directly involved in residential construction or remodeling.

•The Greater Houston Builders Association ("GHBA") is a non-profit trade association that was chartered in 1943 to promote home ownership, foster free enterprise and serve the common interests of the participants in the residential construction industry. It represents all aspects of the residential construction industry in the greater Houston metropolitan area. The GHBA has approximately 1,350 corporate, business, and professional members. Four of the five largest home builders in America, as well as hundreds of small businesses and sole proprietorships, who build from five to 50 homes a year, are active members of the GHBA.

•The Home Builders Association of Greater Dallas ("HBA") is a non-profit trade association representing the interests of the residential construction industry in Dallas County and five surrounding counties. Current membership is approximately 2,060, which includes about 800 home builders and many residential remodeling contractors and real estate developers. The HBA is directly involved in the business of residential development, construction, remodeling and/or repair.

The fees for preparation of this brief have been paid by NAHB.

## II

### SUMMARY OF ARGUMENT

The issue presented in this case - whether a builder and home buyer may, by express written contract, disclaim the implied warranties of habitability and construction in a good and workmanlike manner - has significant practical consequences for the residential construction industry. The Fourth Court of Appeals' opinion ignores the practical reality of the homebuilding industry today and runs counter to a well-established state and national industry practice of ensuring certainty and predictability by providing express warranties to new home buyers in lieu of implied warranties. The court of appeals' decision denying the parties the right to waive the implied warranties by proper language puts Texas at odds with all other state courts that have considered the question, none of which appears to have held such disclaimers to be void as against public policy. The result of the court of appeals' decision would be increased uncertainty and risk for home buyers and builders, increased litigation and increased prices (or a decreasing supply) of new homes in Texas. If allowed to stand, the court of appeals' opinion threatens to profoundly and unnecessarily harm the home buying public and the home building industry in Texas without providing commensurate benefits to either.

### III

#### ARGUMENT

##### **A. THE BUILDING INDUSTRY PLAYS A VITAL ROLE IN A HEALTHY ECONOMY**

The court of appeals' opinion disrupts an industry that is a vital participant in a healthy economy. Housing is a critical component of local economic development - creating jobs and demand for goods and services, generating revenues, and providing affordable housing.

Residential construction provides significant income and jobs for local workers. For example, NAHB estimates that each single family home built during a one year period in San Antonio, El Paso, Houston, and Lubbock added an average of \$78,000 dollars in income and 1.9 jobs per home to their local economies through direct impact of construction and the ripple effect. For multifamily, the equivalent figures are \$34,900 dollars in income and 0.7 jobs. Based on the level of production indicated by building permits issued in Texas in 1998, this would result in a total one-year impact of roughly \$9.8 billion of local income and 229,000 jobs for Texas residents.<sup>1</sup>

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<sup>1</sup> These figures are based on weighted averages of numbers in four studies: *The Local Economic Impact of Home Building in San Antonio, Texas*, December 1996, National Association of Home Builders; *The Local Economic Impact of Home Building in El Paso, Texas*, April 1997, National Association of Home Builders; *The Local Economic Impact of Home Building in Lubbock, Texas*, July 1997, National Association of Home Builders; *The Local Economic Impact of Home Building in Houston, Texas*, April 1998, National Association of Home Builders.

The impact of a new household occurs year after year as the house remains occupied, and this causes a permanent increase in the level of economic activity, jobs, and wages.<sup>2</sup> Home buyers who occupy the new homes also spend money on items produced by local businesses. In turn, that spending causes its own ripple as local businesses and workers buy from other local businesses.

Given the vital role the residential construction industry plays in the Texas economy, it is important to consider the impact of the court of appeals' decision on the industry. A state where housing is scarce or not competitively priced loses a competitive edge over other communities or states and, as a result, will lose new economic opportunities. The ability to compete efficiently in the home building industry and to price a home optimally depends on the degree to which overall costs are certain and predictable. The court of appeals' decision exposes home builders to increased risk of uncertainty, liability and litigation expenses, which will be reflected in home prices.<sup>3</sup> The court of appeals' decision also creates a

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<sup>2</sup> Based on the average of the same four Texas metro areas mentioned above, NAHB estimates that this ongoing effect for single family construction would be \$24,000 in local income and 0.7 local jobs in Texas per home. For multifamily, the equivalent figures are \$14,800 in income and 0.4 jobs per housing unit. Based on 1998 permits, this would result in a total of roughly \$3.3 billion dollars of local income and 95,000 jobs for local residents in Texas. *Id.*

<sup>3</sup> The impact will be greatest on buyers and builders of low to moderate income housing. Builders who are unable to disclaim the vaguely-defined implied warranties will be forced to raise their prices to cover the increased cost and risk associated with implied warranties and related increased litigation. And consequently, low to moderate income home buyers, who often only marginally qualify for the financing necessary for them to buy a house, will be priced out of the market. Accordingly, those who are on the cusp of qualifying for new home purchases will no longer be able to afford to purchase a new home. Similarly, the

disincentive to build in Texas as compared to other states, none of which appears to absolutely preclude waiver of implied warranties as the court of appeals did. Given the resulting negative effects on the industry, the economy, and the availability of affordable housing if builders and buyers are prohibited from agreeing to disclaim implied warranties in exchange for express warranties, the court of appeals' opinion is not only wrong as a legal matter, but bad public policy for Texas.

**B. THE GREAT WEIGHT OF AUTHORITY SUPPORTS THE VIEW THAT WAIVERS OF IMPLIED WARRANTIES ARE NOT VOID AS AGAINST PUBLIC POLICY**

As the cases cited in the Petition for Review demonstrate, courts throughout the country have recognized that new home implied warranties can be waived. Although these states might disagree on what constitutes an adequate disclaimer, they agree that disclaimers of implied warranties are not void *per se* as against public policy. See cases cited at page 12 of the Petition; see also Note, *The State of Caveat Emptor in Alaska as it Applies to Real Property*, 13 Alaska L. Rev. 237,256 (1996) ("courts seem to agree that disclaimers of implied warranties are not contrary to public policy"). These states allow the parties freedom to contractually define their respective responsibilities, thereby making clear that the builder does not guarantee a "perfect" home and bringing definition and certainty to future dealings between parties.

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builders who build affordable housing will be negatively impacted - they will

In contrast to the express performance standards typically included in express warranties, implied warranties requiring the builder to provide a "habitable" home and to perform good and workmanlike construction create uncertainty and unpredictability because they are vague. Often, neither a buyer nor a builder can ascertain responsibility for claimed deficiencies in a house until litigation resolves the question, because there is no consensus among the courts as to what constitutes "habitability," the type and extent of defects covered by the implied warranties, or the duration of the implied warranties. See, e.g., 1 Steven G.M. Stein, *Construction Law* ¶5B.01[2][c] (courts have often been troubled in their attempts to classify a defect as being within or beyond the coverage of the implied warranty of habitability). And the legal obligations imposed by implied warranties cannot be so easily determined, since the breach of such a warranty is premised on the often varying professional judgment of engineers, architects, and members of the building and repair trade. To protect both home builders and buyers from the uncertainties inherent in the implied warranties, as well as lawsuits that typically follow uncertainty, the standard practice in Texas and throughout the country has been to define the responsibilities of the builder expressly, either in express homeowners warranties or by statute.

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build fewer homes because fewer people will be able to purchase them.

**C. THE COURT OF APPEALS MISCONSTRUES THE CONTRACT AT ISSUE AND IGNORES SIGNIFICANT PROTECTION AFFORDED BUYERS**

The court of appeals' majority opinion misunderstands and unfairly criticizes the nature of the contract between Centex and the plaintiffs by referring to it as a "contract of adhesion" presenting buyers with a "Hobson's choice." *Buecher v. Centex Homes*, No. 04-99-00337-CV, 2000 WL 339432, at \*1 (Tex. Civ. App. – San Antonio, March 31, 2000). First, as the concurring opinion in the court of appeals recognized:

Every day throughout the state, homebuyers negotiate with home sellers over the terms of the transaction. As it happens, some consumers are better negotiators than others. But they all share the position of greatest strength in the transaction – the ability to walk away from a deal they do not like.

*Id.* at \*5 (Green, J. concurring). Further, a person seeking a home has numerous options from which to choose when dealing with a builder who will not negotiate terms and conditions. A consumer may choose another builder from among the thousands of large and small builders in Texas, or the consumer may opt for a preexisting home rather than new construction.

In addition, buyers are uniquely positioned to obtain objective information before purchasing a newly-constructed home. Between the time a home buyer signs a contract and the time the sale is closed, the buyer is free to inspect the home, retain one or more outside professional inspectors, and consult realtors, attorneys or other professionals.

In the case of custom homes, buyers often possess extensive experience with real estate transactions. Typically, these sophisticated customers and the builders they choose agree to disclaim the vague implied warranties of habitability and construction in a good and workmanlike manner in exchange for specific express warranties with clear, certain and agreed upon standards for performance, producing an agreement similar to the one in this case.

Likewise, builders who build for a broader market generally offer their own express warranties, or 10-year warranties issued by warranty companies and backed by third party insurance companies. Insured warranties offer builders and customers the extra protection of having a third party stand behind the home. Typically, these warranties include detailed performance guidelines, which establish criteria for determining whether a problem constitutes a defect, and if so, what will be done to correct it. Similarly, home buyers using FHA and VA backed mortgages who tend to purchase homes in the lower end of the price spectrum, obtain the benefit of those agencies' requirement of a 10-year, insured express warranty.<sup>4</sup>

These warranties are not illusory; they offer significant tangible benefits to home buyers. Nationally, over the period between 1977 and 1998, the ten-year

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<sup>4</sup> Under present regulations, The Department of Housing and Urban Development (HUD) requires either that a new home be approved by HUD or that the home be covered by a "consumer protection or warranty plan acceptable to the Secretary," before a borrower may obtain an FHA-insured loan in excess of 90 percent of the value of the home or the sale price, whichever is less. 24 C.F.R. §203.18 (West 2000).

insurance backed warranty industry paid in excess of \$1 billion to repair approximately 50,000 claims, an average of \$22,000 per accepted structural claim. In Texas, almost 300,000 homes were enrolled in ten-year insured warranty programs in the past five years. Between 1987 and 1998, Home Buyers Warranty Corporation, one of the largest providers of ten-year insured warranty programs in Texas paid on average more than \$40,000 per accepted structural claim to home owners in Texas.

Finally, a variety of other remedies and protections are available to home buyers with construction defect claims. These are more than ample to redress abuses by the "unscrupulous" builders that the *Humber* implied warranties originally targeted. See *Humber v. Morton*, 426 S.W.2d 554, 562 (Tex. 1968). For example, a buyer may sue for breach of contract when a builder fails to comply with applicable building codes. See *Tips v. Hartland Developers, Inc.*, 961 S.W.2d 618, 622 (Tex. App. – San Antonio 1998, no writ) (implied covenant to comply with building codes will be presumed). Virtually all new homes built in Texas are subject to such codes, which prescribe express construction standards.

Further, in 1989, the Legislature enacted the Residential Construction Liability Act ("RCLA"). Tex Prop Code Ann. § 27.001 et seq. (Vernon Supp. 2000). The RCLA is a "notice and offer" statute, which provides a procedural and remedial overlay to any construction defect claim, whether it is pleaded as a breach of contract, breach of warranty or DTPA violation. The RCLA mandates pre-suit negotiation, and in many cases mandatory mediation, between the

claimant and the builder and **provides various incentives for the builder to make a reasonable offer of settlement**, including an offer to repair any construction defect. The contractor can also make a monetary settlement offer. Tex. Prop. Code §§ 27.004, 27.0041. These provisions are intended to facilitate and encourage reasonable dispute resolution between contractors and homeowners. In addition, the RCLA allows a person who prevails in a construction defect lawsuit to recover damages including (i) reasonable repair costs, (ii) temporary housing costs, (iii) reduction in market value of a home caused by structural failure, and (iv) attorneys' fees, in a total amount up to the purchase price of the home or the fair market value of the home absent the defect, whichever is greater. Tex. Prop. Code § 27.004(f).

### CONCLUSION

The court of appeals' opinion conflicts with the law as stated by this Court's opinion in *Robichaux*, on which the residential construction industry has reasonably relied. In addition, the result reached by the court of appeals will negatively impact the home building industry, the economic development that industry generates and the availability of affordable housing in Texas. For the reasons stated in the Petition for Review and this brief, the undersigned amici urge this Court to grant Centex's Petition for Review, reverse the judgment of the court of appeals, and affirm the trial court's order granting Centex's special exception.