

## Homebuyer Tips & Traps: Understanding Representations & Warranties

By

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**Generally.** There is a crucial difference between a *representation* and a *warranty*. Generally, in residential sales transactions, a seller representation is a statement about the present condition or legal status of the home. Most such representations are limited to the seller's actual knowledge, such as the statement: "To the best of my knowledge, this home has no material structural defects." Such a statement is only based upon the seller's "best knowledge" or belief, and does not rise to the level of a "promise," "warranty," or "guarantee"<sup>1</sup> that, *in fact*, there are no material structural defects in the home.

A warranty normally goes much farther than a representation, since it actually makes a statement of fact about the condition or status of the home. For example, a statement that "This property is free of all material structural defects" is the equivalent of a warranty that there are no such defects. The fact that certain magic words such as "promise," "warranty," or "guarantee" are not included in the statement is irrelevant to whether it rises to the level of a contractual warranty and may be relied upon by the buyer as such. Generally, saying something is so is the legal equivalent of guarantying it is so.

Sellers' representations and warranties made in residential sale transactions become important when the condition or legal status of the home is not what the buyer expected. While representations are worthy of being relied upon by home buyers, in order to recover against a seller for a misrepresentation about the home, they must generally establish that the seller knew his/her representation was false at the time it was made.

In Oregon, the seller of residential property cannot be held liable to the buyer for a simple negligent misrepresentation made about the condition of the home. The only major exception to this rule is transactions in which the seller has a "special relationship" with the buyer - for example, where the seller is actually the buyer's real estate agent, lawyer, or other professional in whom the buyer places special trust and confidence.

But if a seller makes a warranty to the buyer about the condition of the home, the seller's actual knowledge is irrelevant. For example, if the seller warrants that the property is free of any material structural defects, and such defects are discovered by the buyer shortly after closing, the seller will likely have to pay to correct those defects, even though the seller truly believed the home was free of such defects.

***TIP – In the standard OREF<sup>2</sup> residential real estate sale agreement forms used in Oregon, sellers make several representations regarding the condition of the property.***

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<sup>1</sup> For our purposes, all three terms are essentially the same, and I will refer to them collectively as "warranties" or a "warranty."

<sup>2</sup> Oregon Real Estate Forms, LLC, the statewide forms provider to Realtors® in Oregon.

***However, these representations are almost always “best knowledge” representations, and not actual warranties. It is for this reason, among many, that buyers should always obtain independent verification of a home’s condition through the use of their own professional inspectors and other experts.***

***Seller Representations.*** Generally, seller’s representations regarding the condition of a home are found in two primary documents: (1) The Seller’s Property Disclosure Statement given to the buyer at the inception of the transaction, and (2) The Residential Real Estate Sale Agreement itself.

***TIP – If a buyer feels that the seller misrepresented the condition of the home, an examination should also be made of any promotional literature (including the listing agreement) used during the marketing of the home. Interestingly, one source I have found with some frequency is neighbors. For example, when the seller represents that there has been no flooding, especially in the basement, but a neighbor claims the seller often complained about flooding, you have a fairly reliable and objective resource to establish that the seller’s representation was false when made – and the seller knew it.***

***The Seller’s Property Disclosure Form.*** Subject to certain exceptions, sellers of most owner-occupied 1-to-4 family homes are required to give the buyer a completed form which addresses several questions about the property being sold. The statutes may be found at [ORS 105.462 – 105.490](#).

The contents of the seller’s property disclosure form are dictated by statute. For that reason, most such forms do not vary a great deal.<sup>3</sup> The form expressly provides that the information is based upon the seller’s actual knowledge and that the disclosure statement is “not a warranty.” The representations found in the seller’s property disclosure form cover the following items: Condition of the title; Condition of the water; Condition of the sewage system; Type of insulation; Structural issues; Mechanical systems and fixtures; Homeowner associations and assessments; General matters such as soil, flood and slide zones; and Environmental hazards.

***TIP – Sellers should be aware that the statewide OREF Sale Agreement form provides that if, prior to closing, they receive notice of changed conditions which might render any material information previously disclosed substantially misleading or incorrect, they must promptly notify the buyer of the new information.***

Buyers have a right to rely upon the information disclosed in the Seller’s Property Disclosure Statement. However, they should not do so to the exclusion of having their own thorough professional inspection. However, similar to the statewide OREF Sale Agreement form, the seller’s statements are “best knowledge” representations, and not warranties. For example, if the seller answers “No” to the question: “Are you aware of any encroachments, boundary agreements, boundary disputes or recent

<sup>3</sup> OREF has made minor non-substantive changes to the form, and one major correction. Inexplicably, the error in the statute remains to this day. [There is a five business day right of revocation to buyers, beginning after the date of delivery of the form. The statutory form incorrectly says “five days” in one place, and correctly says “five business days” elsewhere.]

boundary changes?" this does not mean there are no boundary problems, but simply that the seller is not aware of any. For this reason, buyers must be attentive to any problems, defects, or issues they discover through their professional inspections.

***The Statewide Sale Agreement Form.*** Most Oregon residential sales transactions are written up using a statewide OREF Residential Real Estate Sale Agreement form. As mentioned above, it contains several printed representations about the condition of the property. These representations address hazardous substances, material defects, the condition of all mechanical systems and equipment, liens, government violations, and where applicable, the condition of the private well water.

However, these standard form representations are statements of the present condition of the property - they make no future warranty about how the home will fare one, two or three years following closing of the purchase. Second, these representations are based upon the seller's actual knowledge, without necessarily having conducted any prior investigation. Third, except for the representations contained in the Seller's Property Disclosure Statement and those in the Sale Agreement itself, buyers are warned in the Sale Agreement that they are purchasing the property in its AS-IS condition with no warranties, express or implied.

***TIP – Oregon case law provides that if a seller is aware of any material defect in the property it must be disclosed to the buyer even though the sale documents expressly state that the property is being sold AS-IS. In other words, selling a home AS-IS will not protect a seller who commits fraud, intentional misrepresentation or concealment.***

***Seller Warranties.*** The warranties home buyers receive from their sellers are created in three ways: (1) By statute; (2) By Oregon appellate court rulings, known as "precedent"; and (3) By contractual agreement between the seller and buyer.

***Statutory Warranties (New Residential Condominiums).*** Oregon statutes provide that condominium developers must expressly warrant all new construction against any defects in the plumbing, electrical, mechanical, structural systems and all other components of the units and common elements. The warranty on the unit and limited common elements must be for at least one year from delivery of possession of the unit to the first owner. With certain minor exceptions, the warranty on the general common elements must be for at least one year from the initial conveyance of title to the new owner. The warranty does not extend to consumer products that may have been sold along with the unit, such as the kitchen appliances.<sup>4</sup>

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<sup>4</sup> Note that although the Oregon condominium law requires express statutory warranties to buyers, the planned community laws [*i.e. those governing townhomes and communities with common areas and a homeowner's association*] do not. In such cases, the original purchasers have contractual relationships with the developer of the homes, and the contract of sale would likely address the existence of any express warranties. However, to the extent there are express warranties made to the buyer, the contract would likely disclaim all implied warranties imposed by Oregon case law for new construction [*See discussion at Sec. 2, "Warranties Developed Through Oregon Appellate Law."*]

**Statutory Warranties (New Non-Condo Residential Construction).** [ORS 701.320](#) provides that when a contractor enters into a contract to construct or sell a new residential structure built by that contractor, he/she shall make a written offer to the purchaser of a warranty against defects in materials and workmanship for the dwelling. The purchaser may accept or refuse<sup>5</sup> the offer of a warranty by the contractor. If the contractor makes the written offer of a warranty before both sign the written construction contract and the purchaser refuses the offered warranty, the contractor may withdraw the offer to construct the home.<sup>6</sup>

**Warranties Developed Through Oregon Appellate Law.** Over the years, Oregon appellate courts have developed a body of case law, known as *precedent*, which imposes certain *implied warranties* regarding new home sales. An implied warranty is one that the courts unilaterally impose as a part of the transaction, even though it was not expressly written into the contract between the parties.

In Oregon, the general rule is that the builder of a new home "impliedly" warrants that the home was professionally constructed and is suitable for habitation. This is known as the *implied warranty of habitability*. However, there are several limitations on this implied warranty: (a) It only applies to newly constructed homes - not used homes; (b) It is only between the builder and first purchaser; (c) It does not extend to raw land; and, (d) It does not extend to newly built custom homes, i.e. homes that purchasers have had designed and built especially for themselves.

**TIP – Implied warranties may be contractually disclaimed by the builder if done so prominently in writing. Usually, this disclaimer of implied warranties is part of a larger provision whereby the builder offers certain express limited warranties in lieu of all implied warranties. For this reason, purchasers of new homes should read the contract with their builder/seller closely to determine exactly what warranties are provided.**

**Contractual Warranties.** It is not unusual for residential construction companies to give their buyers a contractual warranty against structural defects that may arise within one year from the date of occupancy. However, to be enforceable, these warranties must be expressly set forth in the written building contract. If they are not a part of a written document, it will be difficult, if not impossible, for a new home buyer to prove that their builder made any express warranties about the quality of construction.

**TIP – New home construction warranties can differ from one another. There is no standard form and coverage can vary dramatically. Buyers should read the terms and conditions closely, paying particular attention to: (a) What is included; (b) What is excluded; (c) How long the warranty lasts; and (d) The process for making a claim.**

<sup>5</sup> The reason for refusal could be that the buyer felt it was too limited, or did not last long enough.

<sup>6</sup> Note that the Oregon Construction Contractor's Board, the body responsible for licensing and regulating contractors, permits homeowners to file complaints against their contractor. This right, which generally exists for one year from the completion of construction, exists regardless of whether the contractor provided any express warranties on the construction.

***Finally, regardless of warranties, express or implied, purchasers of new homes should nevertheless secure a professional home inspection. While the professional inspection does not generally confirm whether the home was built to code (that's the responsibility of the local building code officials) there may be some visible construction issues that the inspector may identify.***

In summary, new home buyers have certain seller warranty protections provided by Oregon statutory and appellate law as well as by the terms of the builder's own contract of sale. Purchasers of existing homes, however, generally have no warranty protection whatsoever, except to the extent that they may be found in the sale agreement between the parties.<sup>7</sup> As discussed below, homebuyers may opt to secure some limited protection through home warranty programs.

***Warranties in Deeds.*** In a [Statutory General Warranty Deed](#) and [Statutory Special Warranty Deed](#), sellers make several express warranties regarding the quality – i.e. the “marketability” of title being conveyed.<sup>8</sup> If title to a property is not marketable, say due to unpaid tax liens, free and clear title cannot be transferred. Deed warranties have nothing to do with the physical structure of the home or the quality of construction.

And remember, warranties are binding, like guarantees. When a seller signs a deed that contains a warranty that there are no objectionable encumbrances on the property, it makes no difference that the seller truly believed there were no such encumbrances on the property

In order of protection, the Statutory General Warranty Deed generally provides the broadest title protection to buyers. The second best in the Statutory Special Warranty Deed. The [Statutory Bargain and Sale Deed](#) gives no warranty of title protection whatsoever. The [Statutory Quitclaim Deed](#) is very similar to the Statutory Bargain and Sale Deed, with only a technical difference – but one important to title companies.<sup>9</sup> All four forms of these deeds will serve to convey the seller's title to a buyer. While warranty protection is important for homebuyers, it should not be regarded as a substitute for an owner's policy of title insurance.

***TIP – In Oregon, it is customary that the seller transfers title by a General Warranty Deed and pays for the buyer's policy of title insurance. For this reason, the statewide OREF Residential Real Estate Sale Agreement form, which is used in most Oregon residential transactions, commits the seller to both of these obligations. If a home***

<sup>7</sup> As noted above, the OREF Residential Real Estate Sale Agreement contains several seller representations. They are only based upon the seller's best knowledge, and are not binding as warranties or guarantees. [To put a fine point on the distinction, a seller is not liability for being wrong about a representation, as long as he/she was telling the truth. However, state of mind makes no difference for a warranty to become legally enforceable – it's a contractual “guarantee” about the legal or physical condition of the property.

<sup>8</sup> Although I am referring to “statutory” deeds, sellers may convey title using deed forms that do not call themselves “statutory.” The main difference is that the warranties are actually set out in the non-statutory deeds, whereas, the statutory deeds do not spell them out, because the statute does. [See, ORS 93.870](#)

<sup>9</sup> A discussion of this distinction is beyond the scope of this article. But for the pathologically curious, suffice it to say that the bargain and sale deed conveys “after-acquired title” while the quitclaim deed does not.

***seller intends to do anything less, he or she should specifically negotiate an amendment to those portions of the printed form before signing.***

**Home Warranty Programs.** Separate and distinct from representations and warranties made by sellers to buyers in residential transactions, are home warranty programs offered by independent companies. These programs are very popular with buyers since they provide an element of assurance that if, after closing, a problem develops with any of the covered systems, the item will either be repaired or replaced. However, home warranty programs are not to be confused with insurance policies, which provide coverage due to accidents or natural events. For example, a home warranty program would not repair or replace damage to flooring cause by flood; however, if covered, it might repair or replace a defective sump pump that caused the water damage. The cost of home warranty programs can vary based upon the items covered and the program, but generally basic coverage ranges between \$300 and \$500 for one year's coverage.

- ◆ *Questions to Ask when Shopping For a Home Warranty Program.* Is there a deductible and how frequently is it applied? What is the amount of coverage and is there a dollar cap on specified items? Are the caps realistic? How long is the coverage period? What limitations are there on service calls? Who selects the contractor doing the repair work, the homeowner or the company? What is covered and what is excluded? Generally, all of the major mechanical systems should be covered such as electrical, heating, plumbing, and air conditioning. Coverage is generally available for most standard home appliances, such as dishwasher, washer/dryer and garbage disposal. If the home is not on municipal sewer and water, is there coverage for septic systems and well pumps?

***TIP - Some home warranty programs are financially stronger than others. Buyers may want to find out how long a company has been in business, whether it is financially strong,<sup>10</sup> and learn from other customers how claims were handled. The best source for some of this information may be the Internet, but it should be taken with a 'grain of salt.' Does the company have its own insurance in the event it is unable to continue servicing claims? Is the company licensed in Oregon? Have there been any complaints to State or Federal regulatory agencies such as the Oregon Insurance Commissioner, the Federal Trade Commission or the Better Business Bureau? If a Realtor® is involved in the transaction they will be of assistance to the buyer in providing the names of companies with whom they have worked in the past.***

- ◆ *Benefits of Home Warranty Programs.* The benefits of having a good home warranty program are several: First, they can provide peace of mind to the buyer that if the covered item fails due to normal usage, it will be promptly repaired or replaced. Secondly, the seller receives the assurance that once the home passes the independent inspection required by the program, they will have less legal exposure for unknown defects in the systems which may arise after closing.

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<sup>10</sup> Several years ago one or two home warranty programs financially failed. A quick review of them online reveals some are more solvent and honest than others.

***TIP - Sellers offering to provide and pay for a home warranty program to their buyer have a distinct marketing advantage over sellers that do not. While buyers may purchase their own policy, it is certainly an item to first negotiate with the seller.***

***Statutes of Limitations.*** A “statute of limitations” is a period of time the law allows parties to file a claim for personal injury or property damages. There are many different statutes of limitations, depending upon the nature of the claim. If a homeowner believes they have a claim that cannot be resolved with their seller or builder, legal counsel should be consulted to determine how long they have to file a claim under the applicable statute of limitations. Some types of claims are much shorter than the six year period for breach of contract or breach of warranty claims. For example, claims before the Construction Contractor's Board must be filed within one year from completion of construction. Claims for negligence, fraud and misrepresentation generally must be filed within two years of when the buyer knew or should have known of the claim. Claims under Oregon’s Unlawful Trade Practices Act have a one-year statute of limitations.

***Conclusion.*** Here is the take-away for home buyers:

- ◆ For pre-owned homes, homes, and condos, read the Seller’s Property Disclosure Statement closely. Also read the Residential Real Estate Sale Agreement. Then have a thorough professional home inspection and review the report closely. These three documents are likely the only ones you can rely upon regarding the condition of the home. Consider negotiating a home warranty program into the deal.
- ◆ For purchasers of new condos, the developer is exempted from providing the buyer with a Seller Property Disclosure Statement. However, Oregon statutes mandate the scope of the developer’s warranties, which are fairly extensive. Nevertheless, I would secure a professional inspection, even though it is unlikely to reveal very much. It’s just added insurance.
- ◆ For purchasers of new homes and townhomes, the builder is exempted from providing the buyer with a Seller Property Disclosure Statement. Read the builder’s contractual warranties and disclaimers closely. Consider negotiating a new home warranty program on top of the builder’s warranties. Obtain a professional inspection – again, even though it may reveal very little.
- ◆ For purchasers of custom homes, the builder is exempted from providing the buyer with a Seller Property Disclosure Statement. Also, as pointed out above, custom home transactions are *not* covered by any warranties implied by Oregon case law. Read the terms of the construction contract closely, including any express warranties. Consider obtaining a professional inspection and securing a new home warranty program from the builder.
- ◆ For all statutory warranties applicable to new condo buyers and new home buyers, pay attention to the length of the statutory or contractual warranty. Make notes of potential defects or deficiencies and be sure to give timely notice to the builder before expiration of the

applicable time period. This also applies to timely filing claims under any applicable home warranty program.

- ◆ For purchasers of pre-owned homes, make sure that you timely exercise your legal rights. Even though the contract period is [six years](#), the lapse of time makes claims stale, even though they are filed within the applicable period. This also applies to timely filing claims under any applicable home warranty program.

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