

ATLANTA

BUILDING NEWS

A photograph of a man and a woman smiling and embracing each other in front of a house. The man is on the left, wearing a dark green shirt, and the woman is on the right, wearing a red top. The background shows a house with a grey roof and greenery.

**PROMOTING SUSTAINABILITY
WHILE KEEPING
HOMES AFFORDABLE**

PG. 36

**GEN Z VERSUS MILLENNIALS: WHAT EACH
GENERATION LOOKS FOR IN A NEW HOME**

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A LOOK AT WAIVERS, INDEMNITIES AND RELEASES

by Tyler Dunn

The term “waiver” generally refers to an upfront, contract-stage provision in which a party relinquishes a right. In a builder context, a waiver is typically set forth in a sale agreement, construction agreement or warranty agreement. An example of a waiver is: “Buyer agrees that Builder has no obligations beyond those set forth in the one-year builder warranty.” This is a partial waiver because it purports to relinquish buyer claims other than as permitted by the warranty, such as negligence claims.

Waiver provisions are generally enforceable. However, Georgia law will not enforce those portions of waivers in favor of builders that would have the effect of excusing them for their own:

- (1) Intentionally wrongful acts (such as fraud or vandalism);
- (2) Gross negligence (the failure to use even the minimal care that almost any builder would exercise);
- (3) Violations of codes; or
- (4) Ordinary negligence where the builder is solely responsible for the negligence.

Even a valid waiver only applies to claims by the homebuyer(s) who signed the waiver. It does not apply to claims against a builder by subsequent buyers of a house (within the applicable statute of limitation) since that buyer did not agree to be bound by the contract or warranty waiver.

An “indemnity” typically refers to an agreement by one party, the indemnitor, to protect another party, the indemnitee, from

liability for claims by a third party against the indemnitee. For example, a builder might enter into a subcontract in which the subcontractor, the indemnitor, agrees to protect the builder, the indemnitee, from liability for claims against the builder by a homebuyer arising out of work performed by the subcontractor.

Indemnities are subject to the same four basic exceptions to enforceability listed above for waivers. The fourth exception (ordinary negligence where the builder is solely responsible for the negligence) does not apply, however, if the indemnity also requires the indemnitor, the subcontractor in our example, to obtain insurance to cover its indemnification obligations.

The term “release” usually refers to a formal relinquishment of claims after they have arisen. If, for example, a homebuyer asserts a claim against a builder for various construction defects, the builder might obtain a release of all claims in exchange for the payment

of money, the performance of certain repairs or other consideration.

Because a release is signed after claims have arisen, and therefore after the releasing party is aware of at least some claims, releases are not subject to the four exceptions enumerated previously. Georgia public policy favors the resolution of disputes. Consequently, homebuyers can release all claims against a builder, even unasserted and unknown claims. Releases are therefore generally very broad and cover every imaginable type of claim based on any acts, events, transactions or occurrences that happened prior to the execution of the release. Parties can, of course, agree to more limited releases or to releases with certain exceptions. If the consideration for a release is the performance of certain repairs by the builder, claims relating to the performance of those repairs would naturally not be released.

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