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BUYER PROTECTION IN THE SALE OF NEW HOUSING IN ILLINOIS: THE IMPLIED WARRANTY OF HABITABILITY

Petersen v. Hubschman Construction Co.

76 Ill. 2d 31, 389 N.E.2d 1154 (1979)

Until recently, one of the most ironic and unjustified discrepancies in the law of property has been the difference in protection afforded to a purchaser of personalty over a purchaser of realty.¹ The consumer who purchases the smallest and least expensive item across a merchant's counter is protected against poor quality and defective workmanship by the implied warranties of merchantability and fitness for a particular purpose.² In contrast, the same consumer who purchases a new home runs the risk of finding himself without a remedy if he subsequently should discover a cracked foundation³ or a leaking roof.⁴ Traditionally, no warranty of merchantability attached to the sale of real estate and the ancient common law defenses of caveat

1. See generally Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961) [hereinafter referred to as Bearman]; Nielsen, *Caveat Emptor in Sales of Real Property—Time for Reappraisal*, 10 ARIZ. L. REV. 484 (1968) [hereinafter referred to as Nielsen].

2. The Uniform Commercial Code § 2-314 defines the implied warranty of merchantability as follows:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to the goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any.

U.C.C. § 2-315 defines the implied warranty of fitness for a particular purpose as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [2-316] an implied warranty that the goods shall be fit for such purpose.

3. See, e.g., *Allen v. Wilkinson*, 250 Md. 395, 243 A.2d 515 (1968) (poor construction of basement walls); *Eastman v. Britton*, 175 App. Div. 476, 162 N.Y.S. 587 (1916) (no implied warranty of foundation wall).

4. See, e.g., *Goggin v. Fox Valley Constr. Corp.*, 48 Ill. App. 3d 103, 365 N.E.2d 509 (1977); *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

emtor⁵ and merger⁶ have barred any other action by an aggrieved home buyer.

The courts now seem to be establishing a doctrine which eliminates some of the differences which previously existed between purchasers of personalty and purchasers of realty. The national trend is toward adopting an implied warranty of habitability.⁷ Since this warranty runs with the sale of the house and survives the conveyance of the deed at closing, it avoids the historical problems of caveat emptor and merger. The purpose of the warranty is to enable the home buyer to bring an action against the builder-vendor for latent defects of workmanship which appear subsequent to the buyer taking possession of the house. To date, thirty-four states⁸ have accepted some form of the implied warranty theory.⁹

5. The rule is that, in the absence of express agreement, the vendor of land is not liable to his vendee for the condition of the land existing at the time of the transfer. Annot., 25 A.L.R.3d 383, 390 n.12 (1969); see also text accompanying notes 18-20 *infra*.

6. The general rule is that a contract is merged into a deed and that the buyer's acceptance of the deed extinguishes any prior obligations of the seller. Annot., 38 A.L.R.2d 1310, 1312 (1954); see also text accompanying notes 42-49 *infra*.

7. This article will not address the implied warranty of habitability which exists in regard to rental housing in Illinois. This implied warranty imposes a duty upon the landlord of a residential unit to substantially comply with applicable municipal building code health and safety provisions. *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972). See generally Fusco, Collins & Birnbaum, *Damages for Breach of the Implied Warranty of Habitability in Illinois—A Realistic Approach*, 55 CHI.-KENT L. REV. 337 (1979).

8. The following jurisdictions have accepted some form of the implied warranty theory: *Cochran v. Keeton*, 287 Ala. 439, 252 So. 2d 313 (1971); *Nordin Constr. Co. v. City of Nome*, 489 P.2d 455 (Alaska 1971); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 684 (1974); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (1970); *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979); *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. 1969); *Weeks v. Slavik Builders, Inc.*, 384 Mich. 257, 181 N.W.2d 271 (1970); *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974); *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972); *Norton v. Burleaud*, 115 N.H. 435, 342 A.2d 629 (1975); *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); *Staff v. Lido Dunes, Inc.*, 47 Misc. 2d 322, 262 N.Y.S.2d 544 (1965); *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776 (1974); *Dobler v. Malloy*, 214 N.W.2d 510 (N.D. 1973); *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972); *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A.2d 529 (1973); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Tibbitts v. Openshaw*, 18 Utah 2d 442, 425 P.2d 160 (1967); *Rothberg v. Olenik*, 128 Vt. 295, 262 A.2d 461 (1970); *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975); LA. CIV. CODE ANN. art. 2475 (West 1966); MD. REAL PROP. CODE ANN. § 10-203 (1974 & Supp. 1979); MINN. STAT. ANN. § 327A.01-.07 (West Supp. 1979).

9. The courts have not been uniform in their use of labels. While generally agreeing that the purpose of an implied warranty is to guarantee a home as reasonably fit for habitation, the courts have differed on the terms they have used. The implied warranty has been designated one of "habitability," see, e.g., *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979); "fitness," see, e.g., *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); "workmanlike

In Illinois, the implied warranty of habitability has travelled a tortuous path toward adoption. After an early acceptance on the appellate level in 1962 in *Weck v. A:M Sunrise Construction Co.*,¹⁰ the theory suffered several setbacks,¹¹ with some courts refusing to apply the warranty because of caveat emptor or merger. Eventually, there developed a split in Illinois appellate districts between those courts which accepted the warranty¹² and those which did not.¹³ The disagreement over the warranty reached an absurd level when, at one point, the Illinois Appellate Court for the Third District had cases both accepting and rejecting the warranty.¹⁴ The resultant confusion in Illinois was finally addressed by the Illinois Supreme Court in *Petersen v. Hubschman Construction Co.*¹⁵ which held that an implied warranty of habitability in the sale of new housing does exist in Illinois.¹⁶

After presenting the factual background of *Petersen*, this case comment will examine the common law defenses of caveat emptor and merger and discuss the reasons most states have adopted some form of implied warranty in the sale of new housing. Next, the comment will review the conflicting case law in Illinois prior to the *Petersen v. Hubschman Construction Co.* decision. Finally, the problems presented by *Petersen* and the merits of the decision will be evaluated.

FACTUAL BACKGROUND OF *PETERSEN*

In April 1972, Raymond and Delores Petersen entered into a

manner," see, e.g., *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); and "quality," see, e.g., *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 685 (1974). However, not all of these terms are interchangeable. For an example of the differences which might result from implying one warranty rather than another, see text accompanying notes 72-73 *infra*.

10. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962).

11. See, e.g., *Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (3d Dist. 1963), *aff'd*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964); *Narup v. Higgins*, 51 Ill. App. 2d 102, 200 N.E.2d 922 (5th Dist. 1964).

12. Generally, the First and Fourth Districts were in favor of the warranty, *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962); *Conyers v. Molloy*, 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977).

13. The Third and Fifth Districts were not in favor of the warranty. *Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (3d Dist. 1963), *aff'd*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964); *Narup v. Higgins*, 51 Ill. App. 2d 102, 200 N.E.2d 922 (5th Dist. 1964).

14. *Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (3d Dist. 1963), ruled against an implied warranty and *Hanavan v. Dye*, 4 Ill. App. 3d 576, 281 N.E.2d 398 (3d Dist. 1972), ruled in favor of the implied warranty. See text accompanying notes 105-07 *infra*.

15. 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

16. *Id.* at 42, 389 N.E.2d at 1159. For an excellent discussion of the history of the implied warranty of habitability in Illinois prior to *Petersen v. Hubschman*, see Roeser, *The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois*, 1978 S.I.U. L.J. 178 [hereinafter referred to as Roeser].

\$71,000 contract with the Hubschman Construction Co. for the purchase of a piece of land and for the construction of a new home on that land. The Petersens paid \$10,000 to the construction company as earnest money. However, in the fall of 1972, the Petersens became dissatisfied with Hubschman's performance because they observed numerous defects in the construction of the home: a basement floor pitched in the wrong direction away from the drain, siding was improperly installed, a bay window and the front door were defective, and there was deterioration of the drywall inside as well as nails "popping" loose throughout the house.

Initially, Hubschman agreed to repair these items, but he failed to carry out this agreement satisfactorily. The Petersens then refused to accept the home and no closing of the transaction occurred; the balance of the purchase price was not paid and no deed was delivered. Invoking the forfeiture provision of the contract, Hubschman notified the Petersens that they had forfeited both the \$10,000 deposit and approximately \$9,000 worth of labor and materials which had been supplied by Petersen.

In a suit to recover the \$19,000, the Petersens alleged that Hubschman Construction Co. had failed substantially to perform its duties under the contract, thereby excusing the Petersens' obligation to pay. Hubschman, on the other hand, argued that it had constructed a home which provided shelter from the elements and was a safe place to live. Hubschman contended that this constituted substantial performance of the contract because it fulfilled an implied warranty of habitability which, according to Hubschman, only required the builder to erect a structure which was a reasonably safe place to live. The appellate court,¹⁷ however, dismissed the defendant's warranty claim and ruled solely upon the substantial performance issue. Ultimately, the Petersens won both at the trial and appellate levels, where it was held that they were entitled to recover both the earnest money and the value of the labor and materials supplied by them.

The Illinois Supreme Court granted leave to appeal in order to consider the issue of the implied warranty of habitability. The essential question before the court was whether a house which was not substantially completed by the builder should be termed "habitable" merely because the buyer could live in it. To answer this question, the court felt compelled to review the traditional arguments against implying a

17. *Petersen v. Hubschman Constr. Co.*, 53 Ill. App. 3d 626, 368 N.E.2d 1044 (2d Dist. 1977).

warranty of habitability in the sale of new housing: the doctrines of caveat emptor and merger.

COMMON LAW DEFENSES TO VENDEE RECOVERY

Caveat Emptor

The most powerful and deeply-entrenched barrier to a buyer who is seeking recovery for faulty construction in a new house has been the doctrine of caveat emptor.¹⁸ While caveat emptor usually has been associated with the sale of chattels, the principle has been applied equally to the sale of realty. Caveat emptor literally means "let the buyer beware" and summarizes the rule that a purchaser takes upon himself the risk of quality or condition unless he protects himself by obtaining an express warranty from the vendor or unless there has been a false representation by the vendor.¹⁹ In other words, the law places upon the buyer the duty to inspect before he buys. Failure to discover a flaw in the property is at the buyer's own risk.²⁰

However, while the doctrine of caveat emptor has all but disappeared in the sale of personalty, largely because of the adoption of the Uniform Commercial Code,²¹ it still has had a tenacious hold on the sale of realty. Thus, it has been held that if a purchaser of a new home signs a contract and then discovers after closing that the sewerline is broken,²² the foundation walls are cracked,²³ the basement floods,²⁴ or there is a defective roof²⁵ which even collapses,²⁶ it is the purchaser's loss.

Beginning in the 1960's, courts began to recognize the injustice and anachronism of a sixteenth century rule²⁷ being applied blindly to a modern home buying situation. In contrast to rural England of the middle ages, or even America before the housing boom which followed World War II, today's construction and sales techniques are part of mass development projects where there is little opportunity for individ-

18. See note 1 *supra*.

19. BLACK'S LAW DICTIONARY 202 (5th ed. 1979). For further discussion of the caveat emptor doctrine, see 7 S. WILLISTON, CONTRACTS 779-818 (3d ed. 1963).

20. See generally Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965) [hereinafter referred to as Haskell].

21. See text of U.C.C. §§ 2-314 and 2-315 at note 2 *supra*.

22. *Levy v. Young Constr. Co.*, 46 N.J. Super. 293, 134 A.2d 717 (1957).

23. *Steiber v. Palumbo*, 219 Or. 479, 347 P.2d 978 (1959).

24. *Allen v. Wilkinson*, 250 Md. 395, 243 A.2d 515 (1968).

25. *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

26. *Welding Products v. Kuniansky*, 125 Ga. App. 537, 188 S.E.2d 278 (1972).

27. For an excellent history of the doctrine of caveat emptor, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

ualized attention. The average home buyer of today is neither experienced enough in the techniques of construction to inspect a new dwelling adequately nor sophisticated enough in sales to insist upon an express warranty of quality from the seller.²⁸ Failure to accomplish either leaves the home buyer unprotected in the event a problem in construction is discovered after purchase. Recognizing the injustice of the situation, the Idaho Supreme Court in *Bethlahmy v. Bechtel*²⁹ remarked:

The old rule . . . does not satisfy the demands of justice The purchase of a home is not an everyday transaction for the ordinary family, and in most instances is the most important transaction of a lifetime. To apply the rule of caveat emptor to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling homes, is manifestly a denial of justice.³⁰

In the early 1960's, courts began to circumvent the rule. For example, some courts found contractors liable for latent defects in a new house under the theory of strict liability in tort by using an analogy between a defect in a new house and a defect in a manufactured chattel.³¹ In *Schipper v. Levitt & Sons*,³² the Supreme Court of New Jersey held a mass producer of new housing liable for the injuries caused to a child of the purchaser's tenant who was injured by scalding hot water from an improperly insulated faucet valve.

One difficulty with avoiding the consequences of caveat emptor, however, has been the custom of conveying land and the contracting for a new house in one document, instead of using separate documents for each. To mitigate the force of caveat emptor, some courts³³ have treated the contract of sale as equivalent to two separate and distinct agreements, one to convey the land and one by which the builder agrees to construct a new house.³⁴

The first case to utilize this approach was *Miller v. Cannon Hill Estates, Ltd.*,³⁵ where an English court drew a distinction between a completed and uncompleted structure. The purchaser contracted with

28. Bearman, *supra* note 1, at 575.

29. 91 Idaho 55, 415 P.2d 698 (1966). Bechtel built a residence over a water ditch but failed to indicate as much to the vendee. The foundation leaked during the irrigation season, a condition most prospective buyers would not have noticed.

30. *Id.* at 67, 415 P.2d at 710.

31. See Nielsen, *supra* note 1, at 486.

32. 44 N.J. 70, 207 A.2d 314 (1965).

33. See, e.g., *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962); *Lipson v. Southgate Park Corp.*, 345 Mass. 621, 189 N.E.2d 191 (1963); *Caparrelli v. Rolling Greens, Inc.*, 39 N.J. 585, 190 A.2d 369 (1963).

34. See Annot., 25 A.L.R.3d 383, 432 (1969).

35. [1931] 2 K.B. 113. For further discussion of *Miller*, see Bearman, *supra* note 1, at 543-47.

the builder-vendor of a housing development to buy a home which was not yet completed when the contract was signed. In a suit by the purchaser for structural defects caused by faulty workmanship, the court held the builder liable on the basis of an implied warranty. Caveat emptor did not apply, the court reasoned, because the purchaser did not have the opportunity to inspect for flaws when the house was not yet completed at the time of contracting. In effect, the court concluded that an executory duty of constructing the house in a workmanlike manner existed which was separate from the duty to convey the land.³⁶

The *Miller* exception stands for the principle that caveat emptor should not be applied where the vendee's opportunity to inspect is limited, such as in the sale of an unfinished structure. However, where the structure is completed at the time of sale and inspection is possible, caveat emptor still applies. The *Miller* exception was cited with approval in both England³⁷ and the United States.³⁸

In 1964, in *Carpenter v. Donohoe*,³⁹ Colorado became the first state to expressly repudiate the doctrine of caveat emptor as applied to the sale of new houses. To do so, however, the supreme court had to abolish the *Miller* distinction between completed and uncompleted structures which a previous Colorado court had followed.⁴⁰ In *Carpenter*, only four months after the purchase of an already completed house, the walls began to crack and the foundation had to be shored with heavy timber to prevent the basement walls from collapsing. In extending an implied warranty to the purchasers of the completed house, the Colorado Supreme Court noted that no rational basis existed for the distinction between completed and uncompleted structures:

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis.⁴¹

The *Carpenter* court recognized the practical reality that, when the average buyer is unskilled in detecting building defects, there is little or no difference between his inspection of a completed or uncompleted

36. 2 K.B. at 123-24.

37. *Jennings v. Tavener*, [1955] 2 All E.R. 769 (Q.B.).

38. *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963); *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958).

39. 154 Colo. 78, 388 P.2d 399 (1964).

40. *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963).

41. 154 Colo. at 83, 388 P.2d at 402.

house. The case marked the first time liability arose from the sale of a finished structure.

Merger

In addition to caveat emptor, the doctrine of merger was another obstacle which could prevent relief to an aggrieved purchaser of a new house. The standard rule of merger is that all rights, duties, or promises under prior contracts become merged in the deed.⁴² In effect, once the purchaser takes receipt of the deed, he is left without a remedy for any construction defects which are discovered after he takes possession. The document of title becomes the final memorialized agreement between the parties. Hence, although many real estate form contracts contain a clause⁴³ providing for "workmanlike" construction of the house, this clause becomes merged in the deed and is extinguished once the purchaser accepts the deed.⁴⁴

Like most rules of law, however, the general rule of merger has been subject to qualification.⁴⁵ Delivery of the deed effects a merger only to "the extent it is contemplated that the deed shall constitute a full performance of the contract."⁴⁶ Thus, an exception sometimes exists where an additional or collateral agreement exists which is not inconsistent with the deed. Such a collateral, continuing promise is said to survive the deed and can be enforced after the deed is given. For example, in an early Illinois case, *Shelby v. Chicago & E.I.R.*,⁴⁷ the owner of land agreed to sell his land to the railroad and, as an inducement to the making of the contract, also agreed to maintain two dams located on the land. Although the latter promise was not mentioned in the deed, the court ruled that it was nonetheless a collateral right se-

42. See, e.g., *Weber v. Aluminum Ore Co.*, 304 Ill. 273, 136 N.E. 685 (1922) (all prior understandings become merged in the deed and constitute the only binding contract); *Ely v. Ely*, 80 Ill. 532 (1875); *Snyder v. Griswold*, 37 Ill. 216 (1865).

43. See, e.g., *Sales Contract for Construction of Family Dwelling Similar to Model Home*, § 7810 MODERN LEGAL FORMS 333, ¶ 23 (1969) which reads in pertinent part: "[A]cceptance of the deed of conveyance by the Purchasers at the time of closing of title hereunder shall be deemed to constitute full compliance by Seller. . . . None of the terms of the contract shall survive such delivery and acceptance except those terms which contract expressly states shall survive."

44. See *Cox v. Wilson*, 109 Ga. App. 652, 137 S.E.2d 47 (1964) (acceptance of the deed extinguished vendor's oral promise to repair any defects in workmanship); *Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), *aff'd*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964) (no implied warranty of fitness exists in sale of land because acceptance of deed cuts off rights against the builder).

45. The exceptions to the general rule of merger can be found in I.L.P. CONVEYANCES 99-100 (West 1955).

46. *Blake-McFall Co. v. Wilson*, 98 Or. 626, 642, 193 P. 902, 907 (1920).

47. 143 Ill. 385, 32 N.E. 438 (1892).

cured by contract and, not being covered by deed, was not affected by it.⁴⁸

Generally, however, this exception to the merger rule is not available to the average purchaser of a new house. The practical realities of the modern mass housing market are such that the seller does not need to make collateral promises or side agreements to induce a sale. In addition, most contracts are prepared by the sellers and include provisions for the merger of the contract and deed at closing.⁴⁹ In today's market, there is very little individualized or custom building of houses designed to meet the personal satisfaction of individual buyers. Consequently, changes in the contract by the buyer are not encouraged and the pressures of the contracting situation usually do not permit negotiating for separate, continuing promises.

IMPLIED WARRANTY

An Exception to Common Law Defenses

As discussed earlier, the jurisdictions which have attempted to afford the purchaser some degree of protection in the sale of new housing have had to contend with the two chief impediments of caveat emptor and merger. Unwilling to abandon either doctrine completely, the courts have chosen to carve out general exceptions to the two rules which allow some form of an implied warranty to be applied. As seen earlier, the English rule of *Miller v. Cannon Hill Estates, Ltd.*,⁵⁰ which distinguished a completed house from an uncompleted house, allowed courts to suspend the application of caveat emptor and impose a constructive or implied warranty of workmanship on the builder-vendor. The *Miller* court further concluded that this warranty amounted to a collateral undertaking which had the effect of surviving the deed and thus avoiding the problem of merger.⁵¹

The first American case to recognize an implied warranty was *Glisan v. Smolenske*.⁵² Following the *Miller* rule, the Colorado Supreme Court in this case held a builder liable for constructing a house on an unsubstantial soil base which had caused cracks in the foundation. The case fell within the *Miller* exception because the house was bought during construction so that a proper inspection had

48. *Id.* at 398, 32 N.E. at 443.

49. See note 43 *supra*.

50. [1931] 2 K.B. 113.

51. *Id.*

52. 153 Colo. 274, 387 P.2d 260 (1963).

been impractical. The court ruled that the builder's liability was based upon a breach of an implied warranty of workmanship.

A year later, the Colorado Supreme Court extended its holding in *Glisan* even further. In *Carpenter v. Donohoe*,⁵³ the Colorado court eliminated the distinction between completed and uncompleted structures. The court held the builder liable on the basis of an implied warranty of workmanship for an already completed house whose foundation walls were collapsing.⁵⁴

After *Carpenter*, other jurisdictions were soon to follow in judicially adopting the theory of an implied warranty in the sale of new housing. In *Waggoner v. Midwestern Development, Inc.*,⁵⁵ the Supreme Court of South Dakota concluded that "when in the sale of a new house the vendor is also a builder of houses for sale, there is an implied warranty of reasonable workmanship and habitability surviving the delivery of the deed."⁵⁶ In *Humber v. Morton*,⁵⁷ the Supreme Court of Texas held that a builder-vendor impliedly warrants that the house is constructed in a workmanlike manner and is suitable for human habitation. The purchaser in *Humber* had alleged that defects in the fireplace and chimney had caused part of the house to burn. The court ruled that the fact that the fireplace had been constructed by an independent contractor did not remove the builder-vendor's liability under the implied warranty.

With the exception of a distinct minority,⁵⁸ most jurisdictions in the United States have adopted some form of an implied warranty of habitability in order to provide the purchaser with a remedy against a builder-vendor.⁵⁹ There are many reasons⁶⁰ given for holding the builder liable for breach of an implied warranty. First, the builder is

53. 154 Colo. 78, 388 P.2d 399 (1964).

54. For further discussion, see text accompanying notes 39-40 *supra*.

55. 83 S.D. 57, 154 N.W.2d 803 (1967).

56. *Id.* at 68, 154 N.W.2d at 809.

57. 426 S.W.2d 554 (Tex. 1968).

58. See, e.g., *Voight v. Ott*, 86 Ariz. 128, 341 P.2d 923 (1959); *Walton v. Petty*, 107 Ga. App. 753, 131 S.E.2d 655 (1963); *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966). An example of the reasoning used in these jurisdictions to reject an implied warranty theory is reflected in *Mitchem*, where the Ohio Supreme Court stated:

[T]he doctrine of *caveat emptor* is so engrained in our customary real estate transactions that few, if any, attempts have been made to pierce the shield of protection from specious claims of defect which it affords to vendors It may also indicate that real estate buyers generally experience little difficulty in securing express warranties or guarantees if they are insistent

7 Ohio St. 2d at 70, 218 N.E.2d at 598.

59. See note 8 *supra*.

60. See, e.g., Note, *Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute*, 54 WASH. L. REV. 185, 190 (1978). See also Bearman *supra* note 1.

responsible for the defect and is in a position to detect and repair it.⁶¹ Second, the builder holds himself out as an expert in the skills necessary to construct a house.⁶² Finally, the builder is generally in a better position than the buyer to spread out the cost of repairs over the costs of future houses.⁶³

However, in contrast to the sale of chattels where the implied warranty of merchantability⁶⁴ attaches at sale by statute, the implied warranty of habitability in the sale of realty generally arises only by judicial construction.⁶⁵ As a result, a great deal of uncertainty remains as to the definition and scope of the warranty.

In general, however, the implied warranty of habitability is intended to protect home buyers from losses when a latent defect in the construction of the house is discovered sometime after the buyer takes possession. The courts usually look for several elements before implying a warranty. The house or structure⁶⁶ must be new. Second, the purchaser must be the initial occupant or owner of the structure.⁶⁷ Third, the builder-vendor is ordinarily required to be a person regularly engaged in the business of construction and selling of houses; in other words, the sale must be of a commercial nature.⁶⁸ Fourth, the builder will be liable only for those defects of which the buyer was unaware and which could not have been visible to a reasonably prudent person.⁶⁹

Similarly, the builder is not obligated to construct a perfect house for his vendee. A standard of reasonableness is read into the warranty

61. *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967).

62. *Conyers v. Molloy*, 50 Ill. App. 3d 17, 19, 364 N.E.2d 986, 988 (1977).

63. *Id.*

64. *See note 2 supra.*

65. Louisiana, a civil law state, imposes an implied warranty through statute. LA. CIV. CODE ANN. art. 2475 (West 1966). Other states which have statutes governing implied warranties are: Maryland, MD. REAL PROP. CODE ANN. § 10-203 (1974 & Supp. 1980), Minnesota, MINN. STAT. ANN. § 327A.02 (West Supp. 1980), and New Jersey, N.J. STAT. ANN. § 46:3B-3 (West Supp. 1980).

66. Two cases which have extended warranty coverage beyond houses are: *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 684 (1974) (warranty covers "new construction" and applies to an apartment building) and *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972) (implied warranty covers condominiums).

67. *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974) (the implied warranty extends only to the person buying from the builder—subsequent purchasers are excluded). *Accord*, *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972). *Contra*, *Barne v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976) (warranty was extended to subsequent purchaser in an action against the builder).

68. The house must be built for the purpose of sale and the builder must be a merchant usually engaged in the business of building and selling houses. *See, e.g.*, *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975); *Klos v. Gockel*, 87 Wash. 2d 567, 554 P.2d 1349 (1976).

69. *Griffin v. Wheeler-Leonard & Co., Inc.*, 290 N.C. 185, 225 S.E.2d 557 (1976); *Hartley v. Ballou*, 286 N.C. 51, 61, 209 S.E.2d 776, 782 (1974).

by the courts.⁷⁰ Under this theory, the builder-vendor is impliedly warranting that the house is free of structural defects and the construction has been performed in a workmanlike manner. For example, in regards to foundation, the builder merely warrants that the basement is waterproof under normal conditions; the warranty is not an absolute guarantee against all leaks from extraordinary weather conditions.

However, some confusion can arise over the type of warranty implied by a court.⁷¹ For example, the implied warranties of habitability and of workmanlike quality are not identical.⁷² While the two warranties are frequently implied together, surprising results can sometimes occur when the two warranties are considered separately. For example, in *Goggin v. Fox Valley Construction Co.*,⁷³ the plaintiff alleged that the builder had breached an implied warranty of workmanlike construction because the roof leaked and cracks appeared in the foundation and walls. The court, however, chose to rule on an implied warranty of habitability instead, holding that the defects in the house did not render the structure uninhabitable.

The *Goggin* decision points out the problem with the word "habitable." Should the word mean that as long as the house is fit for human habitation, regardless of substantial defects in construction, the house is "habitable?" The result of such an interpretation, however, would be to undercut the whole purpose of an implied warranty in the sale of new housing—to protect the purchaser from latent defects in faulty construction.

One solution to the problem created by the indefiniteness of the term "habitability" has been to compare the warranty with the U.C.C. implied warranty of merchantability.⁷⁴ Analogizing to the U.C.C. warranty, at least one court has reasoned that the term "habitable" would

70. See, e.g., *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966). The Idaho Supreme Court stated the standard as follows:

The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission. But major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution.

Id. at 68, 415 P.2d at 711.

71. See note 9 *supra*.

72. A house can be uninhabitable yet built in a workmanlike manner. For example, a house which is built in a workmanlike manner, in that it conforms to specifications, might nonetheless become uninhabitable because it has been built on an unstable land base which will cause the foundation to crack. Conversely, whereas an unworkmanlike installation of floor tiles might breach the warranty of workmanlike quality, it would not affect the habitability of the house.

73. 48 Ill. App. 3d 103, 365 N.E.2d 509 (1977).

74. See note 2 *supra*.

characterize a house which would be fit for the ordinary purpose of living and which would pass without objection in the building trade.⁷⁵ In other words, the house does not have to be absolutely unfit for human habitation before an action can be brought against the builder for defects in its construction. The added advantage of this interpretation is that the two warranties of habitability and workmanlike quality become merged under the concept of merchantability.

Two other problems which have arisen with the implied warranty of habitability relate to its scope and duration. So far, only one court has been willing to extend the warranty beyond the initial purchaser of a home.⁷⁶ The buyer of the used home is generally without a remedy for defects caused by the builder-vendor because of a lack of privity between himself and the builder.⁷⁷ It has also been held that the first purchaser may not even assign his cause of action to a subsequent purchaser.⁷⁸

In regard to duration, there is some question as to how long the warranty should be enforceable. The problem of whether a builder should be held liable for one year, ten years, or twenty years has troubled many commentators.⁷⁹ The proper time limit should probably depend upon many factors including the nature and seriousness of the defect. While there is some statutory enactment in this area,⁸⁰ most courts have been forced to adopt a case-by-case analysis in approaching the duration of warranty problem and apply a test of reasonableness.⁸¹

Insurance may become another solution to the problem presented by the non-transferability of the implied warranty of habitability and

75. *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 42, 389 N.E.2d 1154, 1159 (1979).

76. In *Barnes v. Mac Brown & Co.*, 342 N.E.2d 619 (Ind. 1976), the first purchasers sold the defective house to the second purchasers four years after the initial purchase. The court declared privity requirements to be outmoded. *Id.* at 620.

77. *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974).

78. *Litwin v. Timbercrest Estates, Inc.*, 37 Ill. App. 3d 956, 347 N.E.2d 378 (1976) (the defect must already manifest itself to the original purchaser).

79. Professors Bearman and Haskell have recommended fixed one-year and five-year warranty periods. Bearman, *supra* note 1, at 576 and Haskell, *supra* note 20, at 651-52. Yet another commentator feels that the duration of the warranty should be more flexible and left to an ad hoc determination because of the varied types of defects which can appear in a house. Williams, *Development in Actions for Breach of Implied Warranties of Habitabilities in the Sale of New Houses*, 10 TULSA L.J. 445, 448 (1975).

80. MD. REAL PROP. CODE ANN. § 10-204 (1974 & Supp. 1979) (one-year warranty period); MINN. STAT. ANN. § 327A.02 (West Supp. 1980) (varying one-to-ten year warranty period against major structural defects); N.J. STAT. ANN. § 46:3B-1 (West Supp. 1980) (varying one-to-ten year warranty period against major structural defects, applicable to subsequent purchasers).

81. The South Dakota Supreme Court adopted this standard in *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967).

its indefinite duration. The Home Owners' Warranty Program is a potentially industry-wide sponsored mechanism which provides a ten-year warranty and insurance package.⁸² Participating builders who enroll in the HOW program contract with home buyers to cover faulty workmanship and defective materials as well as major construction defects during the first year.⁸³ Additionally, during the first two years, the plumbing, heating, and electrical systems are guaranteed. During the third through tenth years of the warranty, the house is protected against major construction defects.⁸⁴ Another advantage to the program is that a one-time fee of \$2 per \$1,000 of the closing price is paid by the builder and the warranty coverage is then incorporated into the building itself so that upon sale of the house the warranty transfers to subsequent purchasers.⁸⁵

However, until such time as insurance coverage like the HOW program is widespread, new home buyers will have to rely upon the statutory and judicial remedies supplied through an implied warranty of habitability. Generally, as in most warranty cases, the measure of damages for defects which can be remedied without impairing a building as a whole is the reasonable cost of remedying the defects.⁸⁶ But where the defects are so major as to render the house unfit for habitation, the buyer's remedy should be rescission and restitution for any work done in an attempt to repair the defects.⁸⁷ However, a problem arises once again regarding the definition of "habitable." Where the builder has substantially performed but has failed to correct certain minor defects, the builder sometimes claims that the buyer, by accepting the house and continuing to live in it, has waived his right to any remedy.⁸⁸ This argument has generally not been accepted. However, in *Hartley v. Ballou*,⁸⁹ an interesting twist to the damages problem occurred. The builder agreed to remedy certain defects in the plumbing, but the builder's repairs later failed. The North Carolina Supreme Court held that the buyer had to accept the house anyway because, by

82. The Home Owners' Warranty Program is hereinafter referred to as HOW. See Note, *The Home Owners Warranty Program: An Initial Analysis*, 28 STAN L. REV. 357 (1976).

83. A "major construction defect" is defined under HOW as "actual damage to the load-bearing portion of your home which affects . . . the use of your home for residential purposes." Information Brochures from the Home Owners Warranty Corporation of Greater Chicago, 1010 Jorie Blvd., Suite 112, Oakbrook, Illinois 60521. Accordingly, defects in plastering, flooring, drains, and wet rot in window frames and doors would probably be excluded from this coverage.

84. *Id.*

85. *Id.*

86. *Rogowicz v. Taylor & Gray, Inc.*, 498 S.W.2d 352 (Tex. Ct. of Civ. App. 1973).

87. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966).

88. *Brewer v. Custom Builders Corp.*, 42 Ill. App. 3d 668, 356 N.E.2d 565 (5th Dist. 1976).

89. 286 N.C. 51, 209 S.E.2d 776 (1974).

electing to accept the repairs, the buyer had accepted the house.⁹⁰

The History of the Implied Warranty of Habitability in Illinois

Weck v. A:M Sunrise Construction Co.,⁹¹ decided by the Illinois Appellate Court for the First District, was the first case in Illinois to deal with the conflicting issues of caveat emptor, merger, and implied warranties in new housing. The builder-vendor was held liable for numerous defects in the house such as leaky bathroom plumbing, basement leakage, and unsatisfactory kitchen cabinets. Much of the evidence and argument at the trial level concerned the state of completion of the house at the time of purchase. Plaintiffs alleged the house was approximately seventy-five percent complete, whereas defendants claimed the house was substantially completed. The exact status of the house's completion bore an important relationship to the outcome of the case. Since the existence of an implied warranty of habitability was an issue of first impression in Illinois, plaintiff's counsel apparently attempted to fit the facts of the case within the English precedent of *Miller v. Cannon Hill Estates, Ltd.*⁹² If the house were substantially completed, as defendants claimed, caveat emptor might bar recovery because the opportunity for the vendee to inspect would have been available. However, the jury found that the house had not been completed and the court proceeded on that basis, placing the case within the *Miller* exception to caveat emptor.

Quoting at length from the *Miller* opinion, the Illinois Appellate Court for the First District disposed of the builder's merger defense by declaring that the delivery of a "deed is not necessarily a complete execution of a contract of sale."⁹³ The court decided that the facts of the case fit within the exception to the merger rule and that an implied warranty binding the builder to deliver a "house fit for habitation" survived delivery of the deed.⁹⁴

In *Coutrakon v. Adams*,⁹⁵ the next case to deal with an implied warranty, the Illinois Appellate Court for the Third District reached a contrary result. In *Coutrakon*, a vendee sustained damage to his home from two fires allegedly caused by faulty installation of the heating

90. *Id.* at 65, 209 S.E.2d at 785.

91. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962).

92. [1931] 2 K.B. 113. For further discussion, see text accompanying notes 35-36 *supra*.

93. 36 Ill. App. 2d at 392, 184 N.E.2d at 733.

94. *Id.* at 396, 184 N.E.2d at 734.

95. 39 Ill. App. 2d 290, 188 N.E.2d 780 (3d Dist. 1963), *aff'd*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964).

unit. The home was uncompleted when purchased. The contract of sale even provided that certain construction items would be performed after general completion of the house and the defendant "impliedly warranted" that the house would be constructed in a workmanlike manner and "would be free from fire hazards."⁹⁶ Nevertheless, the court refused to alter the traditional rule denying any implied warranty in the sale of realty.

The court distinguished its ruling from the *Weck* decision by concluding that *Weck* seemed to hinge on the fact that the purchaser had been shown plans or specifications of the new house as it was to be constructed. The *Coutrakon* court reasoned that this fact brought the case within the narrow exception to the traditional rule of merger. In effect, the *Coutrakon* court found that the builder's act of showing the purchaser plans of the house in *Weck* amounted to a continuing promise to perform, even after delivery of the deed.⁹⁷ The *Coutrakon* court, however, stated that it was not "constrained" to follow the majority's decision in *Weck*, and cited Justice Burke's dissent in *Weck* as stating the proper view.⁹⁸

The conflicting views represented by the *Weck* and *Coutrakon* decisions afforded the supreme court with an excellent opportunity to resolve the debate. The Illinois Supreme Court granted leave to appeal the *Coutrakon* decision in 1964; however, the court's decision was disappointing in that it decided the case on evidentiary grounds.⁹⁹ The court passed over any discussion of the issue of implied warranty but noted that it was an "interesting problem."¹⁰⁰

The issue would not return to the Illinois Supreme Court for another fifteen years.¹⁰¹ During this period, the appellate courts, following the lead of *Weck* and *Coutrakon*, continued to vacillate on the subject. In *Narup v. Higgins*,¹⁰² decided by the Illinois Appellate Court

96. 39 Ill. App. 2d at 291-92, 188 N.E.2d at 782. In his dissenting opinion in *Weck*, Justice Burke argued that the contract at issue was a contract for sale of real estate, not a contract to construct a building. Since there was no reference in the contract to the state of completion of the building, there was no duty on the part of the defendant to do any additional work. Justice Burke also distinguished the case from *Miller* by reasoning that in *Miller* the parties had expressly contracted for the construction of a building. In *Weck*, however, the parties entered into a simple real estate contract without insisting on language going to the completion of a building. 36 Ill. App. 2d at 790-91, 184 N.E.2d at 735-36.

97. 39 Ill. App. 2d at 302, 188 N.E.2d at 786.

98. *Id.*

99. *Coutrakon v. Adams*, 31 Ill. 2d 189, 191, 201 N.E.2d 100, 101 (1964) (the court found no evidence to support the claim of defective installation of a heating unit).

100. *Id.* at 190, 201 N.E.2d at 101.

101. *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

102. 51 Ill. App. 2d 102, 200 N.E.2d 922 (5th Dist. 1964).

for the Fifth District, the court ruled that an implied warranty of condition or quality did not exist in the sale of a new house regardless of whether the house was completed or uncompleted at the time of sale. However, in two subsequent cases, *Brownell v. Quinn*,¹⁰³ decided by the First District, and *Ehard v. Pistakee Builders Inc.*,¹⁰⁴ decided by the Second District, the courts seemed willing to rule in favor of an implied warranty theory but instead held for the vendees on the basis of unfulfilled executory provisions found in the contract which fell within the exception to the merger rule.

The Illinois Appellate Court for the Third District, which had decided *Coutrakon* eleven years before, had occasion to re-examine the warranty issue in *Hanavan v. Dye*.¹⁰⁵ This time the court took a completely opposite view of the implied warranty issue. The vendees brought suit against the builder for poor installation of drain tile which caused the lower level of the house to flood. Even though the house had been completed at the time it was purchased, the court ruled that the doctrine of caveat emptor should be relaxed and that a warranty of habitability is implied in the sale of new housing.

Following *Hanavan v. Dye*, the Third District was left with the curious situation of having two cases, *Coutrakon* and *Hanavan*, going different ways on the implied warranty issue. Much of the confusion was dispelled in the next case to decide the warranty problem, *Garcia v. Hynes & Howes Real Estate, Inc.*¹⁰⁶ *Garcia* dealt with a flooding problem caused by a construction defect. The court in *Garcia* explained that, in the time between *Coutrakon* and *Hanavan*, the Third District had been redrawn to include Rock Island County. Since the *Hanavan* case originated in Rock Island County, it was not therefore controlled by *Coutrakon*. Similarly, since the *Garcia* case also came from Rock Island County, the *Hanavan* decision, not the *Coutrakon* decision, should be binding. The result of this geographical disposition is that the Third District came to recognize an implied warranty.¹⁰⁷

While the trend¹⁰⁸ in Illinois seemed to have turned decisively in

103. 47 Ill. App. 2d 206, 197 N.E.2d 721 (1st Dist. 1964) (the court found that delivery of the deed did not fulfill the contract provision to install a driveway properly).

104. 111 Ill. App. 2d 227, 250 N.E.2d 1 (2d Dist. 1969) (the court found that provisions in the contract required the builder to remedy defects in a radiant heating system after plaintiffs took possession of the house).

105. 4 Ill. App. 3d 576, 281 N.E.2d 398 (3d Dist. 1972).

106. 29 Ill. App. 3d 479, 331 N.E.2d 634 (3d Dist. 1975).

107. *Id.* at 482, 331 N.E.2d at 637.

108. Two more cases which followed the *Hanavan* decision also implied a warranty of habitability in the sale of new housing. *Conyers v. Molloy*, 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977) (builder's disclaimer of implied warranties held invalid); *Elmore v. Blume*, 31 Ill. App. 3d

the direction of implying a warranty of habitability in new housing, the exact scope of the warranty was yet to be defined. In *Goggin v. Fox Valley Construction Corp.*,¹⁰⁹ the Illinois Appellate Court for the First District addressed itself to this problem and, in so doing, dealt the implied warranty of habitability a serious blow. In that case, the plaintiffs alleged breach of an implied warranty of workmanlike construction because, among other things, there were cracks in the foundation walls and the roof leaked. The defendants argued on appeal that it was the implied warranty of habitability, and not the implied warranty of workmanship, which Illinois law recognized. Defendants contended that despite the defects mentioned the structure was still "habitable" in the ordinary sense of the word.¹¹⁰

The court agreed with this definition, stating that habitability meant only that a home should be "structurally sound" and a "reasonably safe place to live;" it did not have to be aesthetically pleasing in all respects.¹¹¹ The court concluded that, in order to recover for defects, the plaintiff actually had to allege uninhabitability in his complaint. While a leaky roof would seem to make a house uninhabitable, the court ignored this fact in its opinion.

The effect of the *Goggin* decision was that it undermined the very purpose of an implied warranty which functions as a judicial protection to unwary home buyers. In broadly defining "habitability," the court essentially narrowed the grounds upon which a vendee might hold a builder liable. Under *Goggin*, only defects which were so substantial as to make the house uninhabitable could become actionable. The result of such reasoning turned the implied warranty of habitability from a consumer's protection into a builder's defense. After *Goggin*, builder-vendors could use the implied warranty of habitability to defeat a vendee's complaints about shoddy workmanship. This is exactly the problem the Illinois Supreme Court faced in *Petersen v. Hubschman Construction Co.*¹¹²

PETERSEN V. HUBSCHMAN CONSTRUCTION CO.

The Court's Reasoning

The main concern facing the Illinois Supreme Court in *Petersen*

643, 334 N.E.2d 431 (3d Dist. 1975) (builder held liable for faulty installation of drain tile in basement which caused flooding). See generally Roeser *supra* note 16.

109. 48 Ill. App. 3d 103, 365 N.E.2d 509 (1st Dist. 1977).

110. *Id.* at 104-05, 365 N.E.2d at 511.

111. *Id.* at 106, 365 N.E.2d 511.

112. 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

was not whether an implied warranty of habitability should exist, but rather what form it should take. In addressing this issue, the court considered many of the same problems which had plagued the Illinois appellate courts: namely, the common law defenses of caveat emptor and merger,¹¹³ the distinction between completed and uncompleted structures,¹¹⁴ the definition of "habitability,"¹¹⁵ and the problem of disclaiming the warranty.¹¹⁶

The Illinois Supreme Court noted that the doctrines of caveat emptor and merger were principles of real estate law which derived their validity more from "reasons founded in antiquity" than from present-day concerns born of the modern housing market.¹¹⁷ The rationale supporting the application of caveat emptor has been the assumption that the buyer and seller stand on equal footing with one another and that the buyer can always demand inspection of the realty or goods he is purchasing if he is unsure of their quality. The court observed, however, that in today's housing market the buyer often purchases from a model home or pre-drawn plans—a situation which permits little opportunity for inspection of the actual home sold. Moreover, the average home buyer today is not knowledgeable in construction practices and, to a substantial degree, must rely upon the integrity and skill of the builder-vendor who is in the business of building and selling homes. Thus, the court concluded that only by relaxing the harshness of the rule of caveat emptor and by implying a warranty of habitability could the vendee be afforded some measure of protection.¹¹⁸

In a similar manner, the court addressed the problem of merger. The doctrine of merger would prevent relief to an aggrieved vendee after receipt of the deed, since all terms and provisions of the contract of sale would become merged in the deed at closing. To eliminate this effect, the court held that the implied warranty of habitability exists as an "independent undertaking, collateral to the covenant to convey" and survives delivery of the deed.¹¹⁹ As a matter of public policy, the implied warranty is to be construed as a "separate covenant" between the builder-vendor and his vendee because of the unusual dependent

113. See, e.g., *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962).

114. *Id.*

115. *Goggin v. Fox Valley Constr. Co.*, 48 Ill. App. 3d 103, 365 N.E.2d 509 (1st Dist. 1977).

116. *Conyers v. Molloy*, 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977).

117. 76 Ill. 2d at 38, 389 N.E.2d at 1157.

118. *Id.*

119. *Id.* at 41, 389 N.E.2d at 1158.

relationship between the two.¹²⁰

Next, the court turned its attention to the distinction between completed and uncompleted structures which was at the heart of the *Weck v. A:M Sunrise Construction Co.*¹²¹ decision. The majority in *Weck* espoused the idea that a vendee should only be protected from defects in the construction of a house if he has contracted with the builder-vendor before the house has been completed. The reasoning was that the vendee would not have the opportunity to inspect at the time of contracting if the house had not yet been finished. The Illinois Supreme Court disagreed with this reasoning, stating that in most instances the latent defects which typically appear only sometime after a vendee takes possession of the house would not be discovered by a vendee whether the house was complete or incomplete at the time the contract was entered into. The court concluded that the "same reliance must be placed on the integrity and skill of the builder-vendor in the purchase of a completed house as in the purchase of an uncompleted house."¹²² The vendee should be permitted to recover for latent defects in either case.

The most important aspect of the court's holding was its expansion or liberalizing of the term "habitability" from the narrow construction used by the Illinois Appellate Court for the First District in *Goggin v. Fox Valley Construction Co.*¹²³ The defendant builder in *Petersen* relied on the *Goggin* court's definition of "habitability" as characterizing any structure which was structurally sound or reasonably safe to live in. The Illinois Supreme Court held that the mere fact that a house is capable of being inhabited does not satisfy the requirements of an implied warranty of habitability. The court likened the warranty to the implied warranty of merchantability of the U.C.C. which requires products which are sold to be of "fair average quality" and which would "pass without objection in the building trade."¹²⁴ Defining the term "habitability" in terms of the U.C.C.'s "merchantability," the court felt that a standard of reasonableness could also be read into the implied warranty so that a vendee could expect a house to be reasonably suited for its intended purpose.¹²⁵

Lastly, the court dealt with the problem of disclaimers. Stating that a "knowing disclaimer" of an implied warranty was not against

120. *Id.*

121. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962).

122. 76 Ill. 2d at 40, 289 N.E.2d at 1158.

123. 48 Ill. App. 3d 103, 365 N.E.2d 509 (1st Dist. 1977).

124. 76 Ill. 2d at 42, 389 N.E.2d at 1159.

125. *Id.*

public policy, the court cautioned that any disclaimer would be strictly construed against the builder-vendor.¹²⁶ A knowing waiver will not be readily implied, but rather the builder-vendor must show that the buyer relinquished the protection afforded him by public policy.

ANALYSIS

The Illinois Supreme Court's decision must be measured against the background of cases preceding the *Petersen* case. Although a recent trend¹²⁷ had developed in favor of adopting an implied warranty in the sale of new housing, the law was unsettled in Illinois and needed a state supreme court pronouncement to resolve the issue. Moreover, the *Goggin* decision had dealt the implied warranty theory a serious blow when it broadly defined the term "habitability" to include any structure which was merely habitable. The effect of *Goggin* was to allow the builder to defend successfully against complaints about defects which did not make the dwelling "structurally unsound" or "unreasonably dangerous."¹²⁸ The *Goggin* definition of "habitability" effectively diluted the strength of the implied warranty as a protection to home buyers. Whether a weakening of this concept should be allowed to stand was essentially the issue which the Illinois Supreme Court faced in *Petersen*.

The court was forced at least to respond to this problem because Hubschman relied upon the *Goggin* decision as a defense.¹²⁹ Hubschman contended that none of the defects Petersen alleged were present would make the house uninhabitable according to *Goggin*, and thus Petersen should either be made to accept the house or to forfeit his deposit. Apparently fearing a ruling similar to *Goggin*, the Petersens argued against the application of an implied warranty of habitability because title to the property had not yet passed to them.

The court disagreed with both Petersen's and Hubschman's positions. First of all, the court ruled that the passing of the warranty from the vendor to the vendee was not contingent upon taking of the deed. Rather, the implied warranty came into being at the time of contract of sale and continued past delivery of the deed.¹³⁰ Second, the court corrected the *Goggin* court's definition of habitability by stating that the term applied to a house which was reasonably suited for its intended

126. *Id.* at 43, 389 N.E.2d at 1159.

127. See text accompanying note 108 *supra*.

128. 48 Ill. App. 3d at 106, 365 N.E.2d at 511.

129. 76 Ill. 2d at 41, 389 N.E.2d at 1158.

130. *Id.*

use, "not merely habitable."¹³¹

While there can be no dispute that a ruling by the Illinois Supreme Court was needed on the issue of the implied warranty of habitability, the court's choice of this case to make its pronouncement seems ironic to some degree. The circumstances in *Petersen* do not fit the typical fact pattern usually involved in breach of implied warranty cases.¹³² In the latter, the vendee often knows little about construction techniques and purchases his home from a model house or pre-drawn plans. The typical home buyer has little input into the construction process or in assisting in the drawing up of specifications. In addition, it is usually sometime after the vendee takes delivery of the deed and possession of the house that he discovers some latent defect in the construction. In *Petersen*, however, the plaintiffs had repudiated the contract for the sale of the house on the basis of *patently* observable defects: nails were "popping" loose, the basement floor was slanted in the wrong direction from the drain, and the siding was improperly installed. The Petersens never accepted the house and never took possession. In addition, there is some evidence in the case that Mr. Petersen was knowledgeable in construction techniques. He came by on several occasions to observe the defendant's work, he supplied some of the materials to be used, and he even agreed with the builders to provide some of the labor himself in exchange for an offset on the selling price. In sum, the Petersens hardly matched the profile of the "average home buyers" which the court described in its opinion.¹³³

Nonetheless, the fact that the Illinois Supreme Court chose the *Petersen* case, despite its atypical set of facts, to speak out on the implied warranty of habitability indicates something of the urgency which the court felt toward its subject. The Illinois appellate courts had created a problem begging for a resolution. Purchasers of defective houses in the first appellate district could rely on *Weck* and, to a lesser extent, on *Goggin* for relief, but purchasers in the fifth and possibly the second appellate districts were left without a remedy. The Illinois Supreme Court could not allow such disparities and inequities across state appellate boundaries to exist for very long. It was imperative that the court settle the issues underlying the implied warranty of habitability as soon as possible.

131. *Id.* at 42, 389 N.E.2d at 1159.

132. *See, e.g.,* Conyers v. Molloy, 50 Ill. App. 3d 17, 364 N.E.2d 986 (1977); Elmore v. Blume, 31 Ill. App. 3d 643, 334 N.E.2d 431 (1975); Hanavan v. Dye, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972).

133. *See* text accompanying notes 117-18 *supra*.

However, because the *Petersen* case was decided on an atypical fact pattern for breach of an implied warranty, many of the problems which attend the imposition of an implied warranty were not addressed. The court never addressed the issue of damages. Presumably, this was because the plaintiffs in *Petersen* were asking for a rescission of the contract since the defects had been discovered before, not after, the deed had been delivered. For guidance on the issue of damages, lower courts should follow the lead of other appellate courts both in Illinois and in other jurisdictions in awarding the cost of remedying the defect or, at the buyer's option, the difference in value between the house as constructed and as contracted for.¹³⁴

Another issue the court did not address was how long the implied warranty should run. This is a problem which has disturbed a number of commentators and probably is the most difficult element of the implied warranty of habitability to determine. While some commentators¹³⁵ and at least one statute¹³⁶ have called for a warranty period of one year on all major structural defects, this is clearly not long enough. Defects such as cracks in foundation walls and settling of soil bases often show up only after several years. On the other hand, implying a standard of reasonable time is not adequate either. The builder-vendor should not be exposed to an indefinite period of potential liability. In the absence of legislative enactment on this issue, however, courts will have to decide on a defect-by-defect basis the length of time the warranty should extend with respect to various aspects of the house's structure.

Perhaps the most important aspect of the court's holding,¹³⁷ however, is in its definition of the scope of the implied warranty of habitability. In comparing the warranty to the U.C.C. implied warranty of merchantability, the Illinois Supreme Court has given lower courts a standard by which to judge breaches of the warranty. This standard is that of the house which would be of "fair average quality" or which "would pass without objection in the building trade."¹³⁸ This defini-

134. For further discussion of damages for breach of an implied warranty of habitability, see text accompanying notes 86-88 *supra*.

135. See note 79 *supra*.

136. See note 80 *supra*.

137. In *Posner v. Davis*, 76 Ill. App. 3d 638, 395 N.E.2d 133 (1st Dist. 1979), the Illinois Appellate Court for the First District credited the *Petersen* decision with helping it to further erode the rule of caveat emptor by holding an owner of a used house liable to a subsequent purchaser for hidden defects: "We are of the opinion, in view of our supreme court's amelioration of the doctrine of *caveat emptor* in *Petersen*, that this should also be the law in Illinois with reference to the sale of used homes." *Id.* at 644, 395 N.E.2d at 137.

138. 76 Ill. 2d at 42, 389 N.E.2d at 1159. The advantage of choosing a flexible standard,

tion of habitability should suit the expectations and needs of both the builder-vendor and the vendee. The builder knows that he must guarantee a house which complies with the industry standard of construction and the vendee knows that he will be getting a house which is reasonably suited for the use for which he bought it.

CONCLUSION

As in other jurisdictions, in Illinois the ancient defenses of caveat emptor and merger have barred vendees' recovery for faulty construction in the sale of new houses. While the implied warranty of habitability has been one device courts have used to relax the harsh effects of caveat emptor and merger, there has never been a universal acceptance of the theory in Illinois. After once failing to resolve the issue, the Illinois Supreme Court finally established the implied warranty of habitability as law in Illinois in *Petersen v. Hubschman Construction Co.*

The Illinois Supreme Court held that the implied warranty attaches at the time of sale and constitutes a collateral agreement which survives delivery of the deed. This ruling relaxed the strict application of the merger rule. Second, the court refused to draw any distinction between uncompleted and completed houses. Regardless of the opportunity to inspect, the implied warranty arises at the contract of sale. Finally, the court characterized the lack of "habitability" as not limited to situations where defects in the construction of the house were so grievous as to render the house uninhabitable. A house which, as constructed, was not reasonably suited for its intended purpose could also be considered a breach of the implied warranty of habitability.

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analogous to the U.C.C.'s definition of merchantability, is that lower courts will not be constrained to decide that only houses which have major structural defects are uninhabitable. A broad range of minor defects from improperly installed siding to malfunctioning kitchen cabinets might be adjudged defects which "would [not] pass without objection in the building trade" and thus would be considered a breach of the builder's obligations under the implied warranty of habitability. *Id.*