



NORTH CAROLINA LAW REVIEW

Volume 58 | Number 5

Article 8

6-1-1980

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Recommended Citation

Peter W. Schneider, *The Implied Warranty of Habitability in North Carolina Revisited*, 58 N.C. L. REV. 1055 (1980).

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The Implied Warranty of Habitability in North Carolina Revisited

In 1974, the North Carolina Supreme Court heralded an end to the archaic application of the doctrine of *caveat emptor*¹ and recognized an implied warranty of habitability² in the sale of new homes by builder-vendors.³ The decision signaled North Carolina's adoption of what has become the majority viewpoint,⁴ and subsequent opinions by the North Carolina courts have demonstrated a commitment to that rule.⁵ The North Carolina warranty, however, is still in only its most basic formulation. While other jurisdictions have confronted many of the complex ancillary issues that inevitably surface in an application of the warranty,⁶ North Carolina has considered only a few.⁷ An examination of the historical development of the warranty in the United States, recent North Carolina decisions, and the developing trend in other jurisdictions demonstrates the need for a revised formulation of the warranty designed to enhance the protection currently afforded new and used home buyers in North Carolina.

The doctrine of *caveat emptor* dominated sales of real property in the United States and England well into the twentieth century. As late as 1931, no court had repudiated the *caveat emptor* protection of the seller of realty.⁸ The doctrine was premised on the supposed arm's length negotiation and equal bargaining position between vendor and

1. "Let the buyer beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

2. The implied warranty of habitability is simply a warranty, by operation of law, that a home has been built with workmanlike construction. See *Hartley v. Ballou*, 286 N.C. 51, 61, 209 S.E.2d 776, 784 (1974).

3. *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776 (1974).

4. Thirty-five states have accepted the warranty by case law. The overwhelming trend has been to discard *caveat emptor* principles in favor of some protection for the purchaser. Annot., 25 A.L.R.3d 383 (1969 & Supp. 1978). See Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. URB. L. 533, 549 (1971).

5. *Griffin v. Wheller-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976) (water in crawl-space); *Earls v. Link, Inc.*, 38 N.C. App. 204, 247 S.E.2d 617 (1978) (defective fireplace and chimney); *Lyon v. Ward*, 28 N.C. App. 446, 221 S.E.2d 727 (1976) (adequate and usable water from well). See also *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975) (implied warranty for restrictive covenant); *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978) (implied warranty does not require one to be in privacy); *Dawson Indus. v. Godley Constr. Co.*, 29 N.C. App. 270, 224 S.E.2d 266, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976) (implied warranty does not extend to commercial structures).

6. See Annot., 25 A.L.R.3d 383 (1969 & Supp. 1978).

7. See notes 46-59 and accompanying text *infra*.

8. Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 542-43 (1961). See also Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Annot., 25 A.L.R.3d 383, 391 (1969); Annot., 78 A.L.R.2d 440 (1959).

purchaser.⁹ The assumption was that the purchaser had both the resources to adequately inspect a dwelling for defects¹⁰ and the ability to obtain an express warranty from the seller for whatever further protection he desired.¹¹ Such reasoning, however, came under heavy criticism during the post-World War II building boom that gave rise to the now common practice of mass producing homes, with the lot and house then sold in a package deal. The former notion of the builder as an artisan, amenable to supervision by the individual who owned the homesite, was outmoded by the onslaught of heavy machinery and pre-fabricated development houses.¹²

The changes initiated by the modern approach to production made greater protection for the buyer a necessity. No longer could one assume the existence of a sophisticated purchaser with a bargaining position equal to that of the vendor. Today's buyer is most likely purchasing a home for the first time and, in making what is probably the most important transaction of his or her lifetime, generally relies on the skill of the builder.¹³ As a result of the inequities surrounding the continued application of the rule of *caveat emptor* to modern realty practices, the implied warranty of habitability was developed.¹⁴

The warranty was first recognized, in an embryonic state, in the English case of *Miller v. Cannon Hill Estates, Ltd.*¹⁵ Confronting the

9. Bixby, *supra* note 4, at 549.

10. When the doctrine developed, the typical purchaser was a middle class buyer who employed an architect to design a house for his previously acquired lot. The architect was able to supervise the construction. Further control was assured by the practice of making progress payments only for work completed satisfactorily. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967).

11. See Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 642 (1965).

12. Roberts, *supra* note 10, at 542.

13. In *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 325-26 (N.J. 1965), the New Jersey Supreme Court stated:

When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional advisor of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder-vendor is negligible Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.

14. In *Bethlahmy v. Bechtel*, 91 Idaho 55, 69, 415 P.2d 698, 710 (1966), the court stated: "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 houses, is manifestly a denial of justice."

15. [1931] 2 K.B. 113.

unique question whether an unfinished house was subject to the rigid rule of *caveat emptor*, the *Miller* court recognized that, in the purchase of a house under construction, the builder impliedly warranted that the house would be built in an efficient and workmanlike manner, of proper material, and would be fit for habitation when finished.¹⁶ The court reasoned that in the purchase of an unfinished house the builder was obviously aware that his buyer intended to live in the house and, therefore, impliedly warranted that it would be suitable for that purpose.¹⁷ In addition, since the contract was signed before the dwelling was completed, the buyer must have relied on the skill of the builder, having no personal opportunity to inspect for defects.¹⁸ The 1957 decision in *Vanderschrier v. Aaron*¹⁹ marked the first application of the *Miller* rule in the United States. In *Vanderschrier*, a decision dealing with the purchase of a house under construction, the Ohio Court of Appeals recognized an implied warranty of habitability but declared its continued adherence to *caveat emptor* when a completed home was involved.²⁰

The distinction drawn by the *Miller* and *Vanderschrier* courts between a finished and unfinished house was vigorously challenged.²¹ Those cases had turned on the assumption that a purchaser of a completed house has the ability to inspect for defects. Such a distinction, however, was regarded by many as artificial because very few purchasers possess either the competence to inspect a house themselves or the means to hire a skilled inspector. It was also pointed out that when a home is completed it becomes more difficult to inspect for certain defects such as those hidden in the foundation.²² In 1964, the Colorado Supreme Court responded to these criticisms in *Carpenter v. Donohoe*²³ and held that an implied warranty extended to a completed house.²⁴

16. *Id.* at 113 (dictum).

17. *Id.*

18. The rationale of *Miller* was later extended by the English courts to the sale of a substantially completed house. *Perry v. Sharon Dev. Co.*, [1937] 4 All E.R. 769 (Q.B.).

19. 103 Ohio App. 340, 140 N.E.2d 819 (1957).

20. *Id.* at 343, 140 N.E.2d at 821. The *Vanderschrier* decision was cited with approval as numerous other jurisdictions recognized a limited warranty of habitability. *See, e.g.*, *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963); *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Loraso v. Custom Built Homes, Inc.*, 144 So. 2d 459 (La. 1962); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958).

21. *See, e.g.*, *Bixby*, *supra* note 4, at 556; *Bearman*, *supra* note 8.

22. *Bearman*, *supra* note 8, at 545.

23. 154 Colo. 78, 388 P.2d 399 (1964).

24. *Id.* at 79, 388 P.2d at 400. In *Carpenter*, the purchasers sought damages for fraud and for

The *Carpenter* decision led other jurisdictions to reject the *Miller* rule and recognize an implied warranty regardless of the stage of a houses's construction.²⁵

North Carolina's adoption of the implied warranty of habitability was the product of a gradual recognition of a distinction between land sales and home sales and acknowledgment of the buyer's inability to adequately inspect for defects in the latter.²⁶ The early cases in which purchasers alleged breach of an implied warranty generally involved sales of land, and the courts rigidly adhered to *caveat emptor* concepts in the absence of fraud.²⁷ Typical of those cases is *Etheridge v. Vernoy*,²⁸ a decision involving an alleged deficiency between the number of acres of land actually conveyed in a sale and the number supposedly purchased under the deed.²⁹ The North Carolina Supreme Court held:

The maxim of *caveat emptor* is a rule of the common law, and applies as well to contracts of purchase of real as personal property, and is adhered to in courts of equity as well as of law, in the absence of

breach of warranty, express or implied, in the sale of a completed house. Within months of its occupation by the purchasers, the walls of the house began to crack and had to be reinforced with heavy lumber. Although the court decided for the purchaser on a fraud theory, it discussed the distinctions previously made in warranty cases between completed homes and homes under construction and reached the following conclusion:

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 for it.

Id. at 83, 388 P.2d at 402.

25. *E.g.*, *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App. 1969); *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); *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969).

26. Note, *Real Property—Implied Warranty of Habitability in North Carolina*, 11 WAKE FOREST L. REV. 155, 156 (1975).

27. See *Walsh v. Hall*, 66 N.C. 233, 235 (1872). See also *Smathers v. Gilmer*, 126 N.C. 757, 36 S.E. 153 (1900); *Credle v. Swindell*, 63 N.C. 305 (1869); *Lytle v. Bird*, 48 N.C. 222 (1855); *Saunders v. Hatterman*, 24 N.C. 32 (1841); *Fagan v. Newson*, 12 N.C. 20 (1826).

As late as 1967, North Carolina courts continued strict application of *caveat emptor* in realty sales. For example, in *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967), the purchaser refused to conclude a sale because of a dispute regarding boundaries and access to the land. The court reiterated its commitment to *caveat emptor* in the sale of real property and denied relief absent a showing of fraud.

In *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975), however, a decision unique to the entire country, the court retreated from its previous rigidity and held that a landowner selling realty encumbered by a restrictive covenant impliedly warrants that it will be useable for the purpose to which it is specifically limited by the covenant. For a discussion of the *Hinson* case, see Note, *Real Property—Implied Warranty: Seller of Land Limited by Restrictive Covenants Implicitly Warrants That the Land was Usable for the Restricted Purpose*, 54 N.C.L. REV. 1097 (1976).

28. 70 N.C. 713 (1874).

29. *Id.* at 724.

fraud. The purchaser's only right of relief is to be found in the covenants in his deed where there is no fraud.³⁰

Application of *caveat emptor* to the sale of land, in which any defect is usually apparent upon routine inspection, is generally reasonable. When home sales are involved, however, latent defects often make inspections meaningless.³¹ Recognition of this distinction laid the foundation for the North Carolina Supreme Court's decision in *Hartley v. Ballou*³² to adopt an implied warranty in home sales.

The 1974 *Hartley* decision involved the purchase of a lot and newly finished home for use as a residence. Within weeks after occupation, the basement of the house flooded due to defects in the foundation.³³ The builder's efforts at repair brought temporary relief, but eighteen months later the basement flooded during a hurricane and again one month later after a heavy rain.³⁴ The owner brought an action to recover damages.³⁵ The trial court entered a judgement for the owner on an implied warranty theory and its decision was upheld by the North Carolina Court of Appeals.³⁶ The supreme court reversed on other grounds but sustained the holding of the court of appeals with

30. *Id.*

31. Note, *supra* note 26, at 158.

32. 286 N.C. 51, 209 S.E.2d 776 (1974). The North Carolina Supreme Court's decisions in *Moss v. Best Knitting Mills*, 190 N.C. 644, 130 S.E. 635 (1925) and *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 160 S.E.2d 476 (1968) paved the way for *Hartley*. In *Moss*, plaintiff-contractor sued for the balance due on a contract to construct an addition to defendant's mill. Defendant counterclaimed for damages, alleging that faulty construction of the roof permitted leakage that damaged defendant's equipment. The court affirmed the trial court's finding for plaintiff because of defendant's active role in site selection and his opportunity to observe the construction. In so doing, however, the court articulated the builder's duty:

It is the duty of the builder to perform his work in a proper and workmanlike manner. This means that the work shall be done in an ordinarily skillful manner, as a skilled workman should do it. There is an implied agreement such skill as is customary will be used. In order to meet this requirement the law exacts ordinary care and skill only. Manner of best builders are not required in absence of specifications.

190 N.C. at 648, 130 S.E. at 637 (citations omitted).

In *Cantrell*, the purchaser of a home contended that the builder failed to construct his house in a workmanlike manner, specifically alleging defects in landscape work and subflooring. The court dismissed the allegations regarding the landscape work, reasoning that the purchasers had accepted the property and all defects discoverable by inspection. The problem with the subflooring, however, was held to be a latent defect and the court intimated that the contractor was liable for any defect not discoverable through reasonable inspection. The court stated that "[i]t is the duty of every contractor or builder to perform his work in a proper and workmanlike manner, and he impliedly represents that he possesses the skill necessary to do the job he has undertaken." 273 N.C. at 497, 160 S.E.2d at 481.

33. 286 N.C. at 55-57, 209 S.E.2d at 778-80.

34. *Id.*

35. *Id.*

36. 20 N.C. App. 493, 201 S.E.2d 712 (1974).

respect to the implied warranty issue.³⁷

As recognized in *Hartley*, an implied warranty will be found only if the structure in question is a house, the house is new,³⁸ and the sale is by a vendor in the business of building such dwellings.³⁹ If applicable, the warranty (1) provides a guarantee of workmanlike construction,⁴⁰ covering major structural defects of the dwelling and its fixtures;⁴¹ (2) applies only to the initial vendee;⁴² (3) begins to run when the deed is passed to the buyer or the buyer takes possession, whichever occurs first;⁴³ (4) is not extinguished by the doctrine of merger by deed;⁴⁴ and (5) does not extend to defects that are visible or reasonably should be visible to a person making an inspection of the dwelling.⁴⁵

Since *Hartley*, North Carolina appellate courts have considered five applications of the implied warranty.⁴⁶ Although these decisions

37. 286 N.C. at 66, 209 S.E.2d at 785.

38. The status of the house relative to completion is irrelevant. *Id.* at 62, 209 S.E.2d at 783. See also notes 116-20 and accompanying text *supra*.

39. *Id.* This individual is referred to as a "builder-vendor." In the usual case, a builder-vendor is a builder who both builds and sells a house that he owns. The term has been used, however, in various ways to attach liability to a seller who is within the spirit of the definition of builder-vendor. It appears that liability will attach when an individual acts in either of two capacities: (1) As a vendor, when he either built the home or owns the home but hired another to construct it; or (2) As a builder, when he either sells the home himself or hires another to sell it for him. Thus, the requirement of a builder-vendor cannot be circumvented merely by a separation of the builder and vendor functions when, in fact, the same individual controls each role. A real estate broker is not within the definition of builder-vendor and is not liable under the implied warranty. *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 992 (1970); *Bethlamy v. Bechel*, 91 Idaho 55, 415 P.2d 698 (1966); *Elmore v. Blume*, 31 Ill. App. 3d 643, 334 N.E.2d 431 (1975); *Elederkin v. Gaster*, 447 Pa. 118, 288 A.2d 711 (1972); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). The North Carolina courts have not confronted a specific builder-vendor problem. The *Hartley* court, however, held that liability for a warranty breach will attach to any vendor "in the business of building . . . dwellings." 286 N.C. at 62, 209 S.E.2d at 783.

40. Various terms have been used in other jurisdictions to define this aspect of the warranty. See, e.g., *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964) (workmanlike manner of construction); *Gable v. Silver*, 264 So. 2d 418 (Fla. 1972) (fitness and merchantability); *Bethlamy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (habitability); *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972) (fitness for habitation). The differences in phraseology have not led to any substantive differences in the disposition of a case, and it seems fair to regard the terms as interchangeable.

41. 286 N.C. at 62, 209 S.E.2d at 783.

42. *Id.*

43. *Id.*

44. *Id.* The *Hartley* court rejected the doctrine of merger, which operates to incorporate a contract of sale into a deed, leaving the deed as the only controlling instrument, in the context of an action for breach of the implied warranty of habitability. Thus, the delivery of the deed will not prohibit action on unfulfilled promises in the contract. For a discussion of the merger doctrine in this context, see *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

45. 286 N.C. at 62, 209 S.E.2d at 783.

46. *Earls v. Link, Inc.* 38 N.C. App. 204, 247 S.E.2d 617 (1978); *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978); *Dawson Indus. v. Godley Constr. Co.*, 29 N.C. App. 270, 224 S.E.2d 266, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976); *Lyon v. Ward*, 28 N.C. App. 446, 221 S.E.2d 727 (1976); *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976).

have not significantly altered the warranty as originally defined, they indicate the willingness of the North Carolina courts to strengthen the rule and apply it with flexibility.⁴⁷

In *Lyon v. Ward*,⁴⁸ the court of appeals held that a builder-vendor impliedly warranted to the initial vendee that a well, constructed on the property and sold as an integral part of the house, would provide an adequate, usable water supply. In so doing the court recognized that a fixture that is integrally related to a dwelling does not have to be physically part of the house to benefit from the warranty. The holding demonstrated the court's recognition of a contract for the purchase of a home as a kind of "housing package", inclusive of all structures that enable a homeowner to gain maximum benefit from his living area. The court in a subsequent case, *Earls v. Link, Inc.*,⁴⁹ adopted this reasoning and held a defective chimney to be within the warranty protection of the *Hartley* rule.

The *Earls* court was also faced with the problem of determining the statute of limitations period applicable to a latent defect in the sale of a new home, an issue left open by the *Hartley* decision.⁵⁰ The homeowner in *Earls* had purchased his residence in June 1971 but did not use his fireplace until early 1974, at which time a defect was discovered. The builder-vendor contended that the owner's action, filed in November of 1976, was barred by a three-year statute of limitations covering general obligations derived from a contract,⁵¹ while the homeowner suggested that a six-year statute of limitations dealing with improvements to real property was applicable.⁵² The court, however, rejected both arguments and held that under G.S. 1-15(b)⁵³ an action on an

47. Two of the five cases are only peripherally relevant to this discussion because they do not deal with the sale of a home. In *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975), the court recognized an implied warranty for lands covered by restrictive covenants. Regarded as an extension of *Hartley v. Ballou* concepts, this case of first impression is without precedent in any other jurisdiction. See Note, note 27 *supra*.

In *Dawson Indus. v. Godley Constr. Co.*, 29 N.C. App. 270, 244 S.E.2d 266, *cert. denied*, 290 N.C. 551, 226 S.E.2d 509 (1976), the court refused to extend the implied warranty to work on a commercial structure.

48. 28 N.C. App. 446, 221 S.E.2d 727 (1976).

49. 38 N.C. App. 204, 247 S.E.2d 617 (1978).

50. *Id.* at 207-08, 247 S.E.2d at 619.

51. See N.C. GEN. STAT. § 1-52 (1) (Cum. Supp. 1979).

52. See *id.* § 1-50 (5) (1969).

53. Law of July 21, 1971, ch. 1157, 1971 N.C. Sess. Laws 1706 (previously codified as amended at N.C. GEN. STAT. § 1-15(b) (Cum. Supp. 1976) (repealed 1979)) provided:

Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance of or failure to perform professional services, having as an essential element bodily injury to the person

implied warranty of habitability does not accrue until the defect is discovered or reasonably should have been discovered, assuming the suit is filed within ten years from the last act giving rise to a claim for relief.⁵⁴ The decision broadened the reach of the warranty by recognizing that the inherent difficulty in discovering certain defects during the early life of a new house should not act as an arbitrary constraint on an action by the purchaser.⁵⁵

Perhaps the most far-reaching application of implied warranty concepts by a North Carolina court is found in *Griffin v. Wheeler-Leonard & Co.*⁵⁶ Plaintiff-purchasers alleged that poor waterproofing allowed standing water in a crawlspace and that defects in the foundation resulted in puddling beneath the house.⁵⁷ The supreme court held that the trial court erred in refusing to present the breach of implied warranty claim to the jury, stressing that damages were recoverable for defective workmanship even though the house itself was "livable."⁵⁸ This holding is especially significant in light of recent rulings in other jurisdictions that require a home to be unlivable for recovery of damages.⁵⁹

Although the decisions by North Carolina appellate courts subsequent to the recognition of an implied warranty in *Hartley* demonstrate commitment to broad application of the rule, the elements of the war-

or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

The new § 1-52(16), creating a three-year limitations period, contains nearly identical language. N.C. GEN. STAT. § 1-52(16) (Cum. Supp. 1979).

54. 38 N.C. App. at 208, 247 S.E.2d at 619.

55. This liberal approach should be contrasted with suggestions by several commentators that a fixed limitations period should be imposed. See Bearman, *supra* note 8, at 576-78 (one year statute of limitations proposed); Haskell, *supra* note 11, at 652 (five years). See also Matulunas v. Baker, 569 S.W.2d 791 (Mo. 1978); Sedlmajer v. Jones, 275 N.W.2d 631 (S.D. 1979); Williams, *Developments in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses*, 10 TULSA L.J. 445, 448 (1975) (reasonableness).

56. 290 N.C. 185, 225 S.E.2d 557 (1976).

57. *Id.* at 191, 225 S.E.2d at 562.

58. *Id.* at 201, 225 S.E.2d at 567.

Thus, the jury could find the house was neither free from major structural defects nor constructed in a workmanlike manner and that therefore it did not meet the prevailing standard of workmanlike quality. Failure to meet this standard would constitute a breach of the implied warranty regardless of whether the house could be deemed "livable."

Id.

59. *E.g.*, Goggin v. Fox Valley Constr. Corp., 8 Ill. Dec. 271, 274, 365 N.E.2d 509, 511 (1977) (implied warranty in sale of new home does not extend beyond the concept of habitability).

ranty in North Carolina remain resentially unchanged. Adherence to these original elements⁶⁰ unduly restricts the scope of the implied warranty; if the judiciary is to take an active role in ensuring habitable housing, warranty protection must be extended to subsequent purchasers and disclaimers of the warranty prohibited.⁶¹

Expansion of the warranty of habitability to provide for these safeguards can equitably be accomplished by adoption of the following three-tier protection package. First, under *Hartley* and its progeny, the first purchaser of a home currently receives an implied warranty from the builder-vendor⁶² lasting not more than ten years⁶³ that his home and its integrally related fixtures have been built with workmanlike construction. Second, any buyer who subsequently purchases the home within the ten-year period should receive a similar guarantee from the builder-vendor for the time remaining on the original ten-year warranty period, though not less than one year.⁶⁴ Thus, regardless of the number of times a home is resold, each vendee who purchases the home within its first ten years of use would be protected against undisclosed defects of construction by the builder-vendor for either the time remaining in the ten year period or one year, whichever is longer. Third, after expiration of the ten-year period a home should be classified as a "used" home. The purchaser of a used home would receive a one-year warranty of habitability from the owner-vendor⁶⁵ of the home for latent, undisclosed defects.⁶⁶ Finally, a disclaimer of the warranty should not be permitted unless it is clearly part of the bargain of sale in both form and substance.⁶⁷

60. See notes 38-45 and accompanying text *supra*.

61. See text accompanying note 110 *infra*.

62. See note 39 and accompanying text *supra*. For purposes of this discussion, a builder-vendor includes a builder who sells, or hires another to sell, a home he constructed, and any vendor who sells a home he had built for resale. This definition includes the professional sellers, such as tract developers, but not mere brokers or real estate agents. The major consideration is that liability be placed only on those who are in a position to control construction. Both the builder and the vendor who has a home constructed for resale are in such a position. The purchaser should be able to rely on their skill and depend on their guarantee of workmanlike construction.

63. See notes 51-55 and accompanying text *supra*.

64. See notes 68-94 and accompanying text *infra*. The one-year minimum gives the purchaser time to live in the home long enough to detect defects, even if less time is left in the original ten-year warranty period.

65. Note that in the sale of a "used" home the original builder-vendor's liability has been released. Instead, liability attaches to the owner of the home who is selling the structure. Thus, the used home seller will be referred to as an "owner-vendor."

66. See notes 96-108 and accompanying text *infra*.

67. See notes 109-113 and accompanying text *infra*.

North Carolina limits the implied warranty on new homes to "initial vendees,"⁶⁸ as does the case law in many other jurisdictions.⁶⁹ This position, however, is not the product of a reasoned analysis and is probably based on the hesitancy of courts to initiate changes in an area that has been long dormant. Because many structural defects are only apparent with age or with a change in seasons,⁷⁰ the warranty should run with the land. A subsequent purchaser should not be denied warranty coverage merely because he happened to purchase the home one week or one year later than the original buyer. Nor should a builder-vendor who constructs a defective home escape liability simply because of the subsequent sale of that home by the initial vendee. With the increasing mobility of the American public, it is reasonable to assume that a builder-vendor has knowledge that his house might be resold within a relatively short period of time. Given this assumption, a builder-vendor should be expected to warrant his work beyond the first purchase.

The argument in favor of extending the warranty to subsequent purchasers is supported by case law and model statutory provisions. In *Schipper v. Levitt & Sons Inc.*,⁷¹ a case decided by the New Jersey Supreme Court, the purchasers of a mass-produced home sued the builder-vendor for injuries sustained by their child when a faucet dispensed excessively hot water due to a latent defect in the mixing valve. The parents were lessees of the original owner and recovered from the builder despite lack of privity.⁷² The *Schipper* decision was cited with approval by the California Supreme Court in *Kriegler v. Eichler Homes, Inc.*,⁷³ an action by subsequent purchasers to recover damages for the failure of a heating system. Although the *Kriegler* court did not reach the issue of the warranty running with the sale of the home, it intimated that the status of plaintiffs as subsequent purchasers would not bar

68. See 286 N.C. at 62, 209 S.E.2d at 783.

69. See, e.g., *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972); *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974); *House v. Thornton*, 76 Wis. 2d 428, 457 P.2d 199 (1969).

70. Note, *Real Property—Implied Warranty of Workmanlike Quality in New Housing Sales: New Protection for the North Carolina Homebuyer*, 53 N.C. L. REV. 1090, 1093 (1975).

71. 44 N.J. 70, 207 A.2d 314 (1965).

72. *Schipper* is unique in that the case proceeded on a strict liability theory predicated on a breach of an implied warranty. Unlike the typical implied warranty case, which deals with breach of contract in the sale of a home and recovery for economic loss resulting from that breach, *Schipper* sounded in tort and permitted recovery for a personal injury caused by breach of an implied warranty.

73. 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

their action.⁷⁴

Most clearly on point is *Barnes v. Mac Brown & Co.*,⁷⁵ a case involving subsequent purchasers who discovered a leaking basement and cracked walls after buying the house from the original owners. The court extended the builder-vendor's implied warranty of habitability⁷⁶ to second or subsequent purchasers of the dwelling pointing out that "the traditional requirement of privity between a builder-vendor and a purchaser is an outmoded one."⁷⁷ The court sought to protect the builder-vendor from unwarranted liability by stressing the need for latency of the defect and by making the home's age, maintenance and prior use factors for consideration.⁷⁸

The proposal to extend the warranty to subsequent purchasers also finds support in the recently adopted Uniform Land Transactions Act (ULTA).⁷⁹ The ULTA includes an implied warranty of habitability, defined in section 2-309.⁸⁰ According to section 2-312, which states that

74. 269 Cal. App. 2d at 225-26, 74 Cal. Rptr. at 752. The court acknowledged the continued hesitation of other courts to extend warranty but, nevertheless, seemed prepared to make that step themselves: "The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times."

75. 264 Ind. 227, 342 N.E.2d 619 (Ind. 1976).

76. The *Barnes* court referred to the warranty as a requirement of "fitness for habitation." *Id.* at 232, 342 N.E.2d at 622.

77. *Id.* at 229, 342 N.E.2d at 620.

78. *Id.* at 232, 342 N.E.2d at 622.

In addition to the case law cited in the text, a Florida court considered the inclusion of subsequent purchases, declaring:

The instant case deals with the first purchasers of condominium homes. We ponder, but do not decide, what result would occur if more remote purchasers were involved. We recognize that liability must have an end but question the creation of any artificial limits of either time or remoteness to the original purchaser.

Gable v. Silver, 258 So. 2d 11, 18 (Fla. Dist. Ct. App. 1972).

79. The Uniform Land Transactions Act, adopted by the National Conference of Commissioners on Uniform State Laws on August 7, 1975, is found in 13 UNIFORM LAWS ANNOTATED 46 (Supp. 1980). For a discussion of the ULTA and its warranty provisions, see Note, *Real Property—Warranties in the Uniform Land Transactions Act of 1975—Progression or Retrogression for Pennsylvania?* 49 TEMPLE L. REV. 162 (1975).

80. ULTA § 2-309 provides, in pertinent part:

[IMPLIED WARRANTY OF QUALITY]

(a) Subject to the provisions on risk of loss (Section 2-406), a seller warrants that the real estate will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was on the date the contract was made, reasonable wear and tear excepted.

(b) A seller, other than a lessor, in the business of selling real estate impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any

a subsequent purchase carries with it an assignment of the seller's⁸¹ warranty rights to the buyer,⁸² the ULTA implied warranty is designed to run with the land.⁸³ Transfer of the warranty rights occurs notwithstanding an agreement that only the immediate buyer has the benefits of the warranties or that warranties received from a prior seller do not

improvements made or contracted for by him and completed no earlier than 2 years before the date the contract to convey is made will be:

- (1) free from defective materials; and
- (2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

Subsection 2-309(b) of the ULTA imposes two warranties: one requiring that the structure be constructed in accordance with accepted practices—a warranty of quality construction, and another requiring that the property be suitable for ordinary uses of real estate of its type. Although both warranties arise under § 2-309(b) of the Act, they are intended to apply to different types of real estate. The warranty of quality construction guarantees that real estate is free from defective materials and constructed in a workmanlike manner. It is intended to apply only to construction made or contracted for by one who is "in the business of selling real estate," and applies only to "new" construction, defined as improvements completed not earlier than two years before the contract to convey was made.

The warranty of suitability is narrower than the warranty of construction, and imposes liability for defects that would be deemed more serious than simply defective construction. For example, the warranty applies broadly to all defects that render real estate unsuitable for its intended use and, therefore, is similar to the warranty of habitability recognized in most jurisdictions. See ULTA § 2-309(1), Commissioners' Comment 1.

There are significant differences, however, between the ULTA warranty of suitability and North Carolina's warranty of habitability. First, the warranty of suitability applies to all real estate, not merely residential housing. Thus, buildings sold for commercial use are covered under § 2-309(b) while they clearly are not covered by the warranty of habitability in North Carolina. *Dawson Indus. v. Godley Constr. Co.*, 29 N.C. App. 270, 224 S.E.2d 266, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976). Second, the warranty of suitability arises in the case of used, as well as new, homes. See notes 96-108 and accompanying text *infra*. Third, the ULTA warranty applies to improvements on existing real estate, a point that remains unsettled in North Carolina.

It should be noted, however, that a warranty of suitability seems to have been adopted by the North Carolina Supreme Court decision in *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975), a case holding that land sold with a restrictive covenant be usable for the purpose to which it was specifically limited by the covenant. See note 24 *supra*. Also note that both ULTA warranties arise only against a person in the business of selling real estate, the nonprofessional seller being liable only for express warranties made by him.

81. ULTA § 2-103(4) defines a seller as "a person who for value conveys or contracts to convey real estate. A broker or an agent acting for disclosed person and not for his own account is not a seller."

82. *Id.* § 2-103(2) defines a buyer as "a person who for value purchases or contracts to purchase real estate. A broker or agent, acting for a disclosed person and not for his own account, is not a buyer."

83. *Id.* § 2-312 provides, in pertinent part:

Section 2-312. (Third Party Beneficiaries and Assignment of Warranty)

- (a) A seller's warranty of title extends to the buyer's successors in title.
- (b) Notwithstanding any agreement that only the immediate buyer has the benefit of warranties of quality with respect to the real estate, or that warranties received from a prior seller do not pass to the buyer, a conveyance of real estate transfers to the buyer all warranties of quality made by prior sellers. However, any rights the seller has against a prior seller for loss incurred before the conveyance may be reserved by the seller expressly or by implication from the circumstances.

pass to the buyer.⁸⁴

The ULTA does not, however, clearly state who should be considered the guarantor of the home when a subsequent purchaser brings a warranty action. The implied warranty provided for by subsection 2-309(b) of the Act operates only against a seller who is "in the business of selling real estate."⁸⁵ It is unclear if this limitation applies to subsequent transactions. The "run with the land" provision—section 2-312—does not state specifically that the "seller" must be a person "in the business."⁸⁶ Instead, every sale carries with it an assignment of the seller's warranty rights against "prior parties."⁸⁷ Whether "prior parties" must be "in the business of selling real estate" is ambiguous; but if they do not, conceivably any seller of a home becomes a guarantor with the sale. It seems, however, that in a subsequent sale the implied warranty should run only from the original seller who was "in the business" of selling homes and should not extend warranty liability to homeowners or real estate brokers who are subsequent sellers. It is unlikely that the Act would be read as imposing broader liability in a subsequent purchase.⁸⁸

If North Carolina were to extend new home warranty protection to subsequent purchasers, it could follow the lead of the ULTA, but, it is to be hoped, with less confusion. Either the judiciary or the legislature could extend the *Hartley* warranty to all subsequent sales of a home within the maximum statute of limitations period, which, pursuant to the decision in *Earls v. Link, Inc.*, is presently set at ten years.⁸⁹ During this period, any undisclosed latent defects that are found to constitute breach of the warranty would give rise to a cause of action regardless of how often the home previously changed hands. The guarantor of the

84. *Id.*

85. *See id.* § 2-309(b), *quoted in note 80 supra.*

86. *See id.* § 2-312(b), *quoted in note 83 supra.*

87. *Id.; id.* § 2-312, Commissioners' Comment 2.

88. Also note that, although the comments to § 2-309 do not attempt to state specific rules for determining whether a particular seller is "in the business of sell real estate," the following general guidelines are offered:

At the extremes the rules are clear: a homeowner selling his own home does not, by reason of that sale, become a person in the business of selling real estate, but a tract developer is clearly in the business. A real estate broker acting for another is not a seller and does not, therefore, make the warranties imposed by this section. A seller who employs a broker or agent to make the sale or seeks buyers does not thereby become a person in the business. Of course, if the seller would be a person in the business if he were making the sale himself, he cannot avoid that result by selling through agents.

Id. § 2-309, Commissioners' Comment 1.

89. *See notes 51-54 and accompanying text, supra.*

home during its first ten years would be the original builder-vendor,⁹⁰ with homeowners, brokers, and other nonbuilder-vendors who are subsequent sellers excluded from liability.

As in *Barnes*, the builder-vendor could be protected by requiring a finding of a latent defect and by consideration of such factors as the age and prior use of the home.⁹¹ Thus, for example, the cracking of paint in an eight-year-old beach home may not be considered a breach of warranty because one can reasonably expect such wear and tear in light of the effect of salty air on paint, while severe flaws in the foundation would not be expected and, therefore, should be covered by the warranty. In addition, purchaser-caused defects could be excluded from the builder-vendor's liability, as is the case in the sale of consumer goods.⁹² Also, the statute of limitations effectively prevents endless liability for the seller. In fact, a builder-vendor would be exposed to no more liability if his home was resold nine times during a ten-year period than if the original purchaser resided in the house for ten years. Finally, it is unreasonable to suggest that more defects, and thus more litigation, would surface simply because more than one owner is granted protection during the warranty period.⁹³

While the extension of the warranty would not be unreasonably harmful to the builder-vendor, its rewards to the homeowner are obvious, and furtherance of implied warranty objectives mandates its consideration. Because the purpose of an implied warranty is to protect a purchasers' expectations by holding builder-vendors accountable for their work, protecting all home purchasers who buy during the warranty period seems preferable to arbitrarily limiting protection to the initial vendee.⁹⁴

90. For a definition of builder-vendor, see note 39 *supra*.

91. See text accompanying note 78 *supra*.

92. U.C.C. § 2-314, comment 13.

93. Cf. *Duncan v. Schuster-Graham Homes, Inc.*, 578 P.2d 637 (Colo. 1978) (court refused to allow original builder to escape liability to subsequent purchasers by buying and reselling a home he had constructed; no evidence of defects being caused by intervening purchases).

94. Further support for the extension of the warranty to subsequent purchasers can, surprisingly enough, be found among builders themselves. The Home Owners Warranty Corporation, a national builders association, has formulated a ten-year warranty-insurance plan that transfers to subsequent purchasers within the ten-year period. See Note, *Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute*, 54 WASH. L. REV. 185, 201 (1968). Law review writers have also been consistent in their support of an extension of warranty protection. See e.g., Comment, *Real Property—Implied Warranties—Sale of House by Builder-Vendor Creates an Implied Warranty of Fitness and Habitability*, 24 ALA. L. REV. 332, 337-38 (1972); Note, note 70 *supra*, at 1093; Note, *Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute*, 54 WASH. L. REV. 185, 201 (1978).

Under the proposed three-tier protection package, a home would no longer be considered "new" for warranty purposes after the ten-year warranty period ends, and the builder-vendor's liability would terminate at that time. "Used" home purchasers, however, need protection similar to that afforded those who purchase a home during the first ten years of its life. Unfortunately, support for an expansion of the implied warranty doctrine in this area can be found only in the ULTA⁹⁵ and among academicians.⁹⁶

Several courts that have rejected the extension to used housing have focused on the factors that led to the initial recognition of the warranty. These courts have found that, while a purchaser in the sale of a new home relies on the skill of the builder-vendor, in the resale of used housing this consideration is lacking because the vendor usually has no greater skill than the buyer in determining the quality of a house.⁹⁷

This reasoning, however, ignores many other more important considerations. First, although an "owner-vendor"⁹⁸ may not possess greater skill than the buyer in assessing a home's quality, he has no less skill either. The significant difference between the two parties is that the owner-vendor is in a superior position to be aware of defects. With the initial formation of the implied warranty, courts essentially considered the relative positions of the builder-vendor and the purchaser and placed the risk of defects on the builder-vendor, the party in the best position to prevent or discover them. The same analysis can be applied in the sale of a used home by a owner-vendor. Between the owner-vendor living in the house⁹⁹ and the purchaser inspecting the home, the burden of a loss should not fall on the buyer, the party least likely to discover a defect before the sale.¹⁰⁰

Second, a purchaser of a used home still expects reasonable qual-

95. ULTA § 2-309, Commissioners' Comment 1.

96. Haskell, *supra* note 11, at 652.

97. *See e.g.*, Sousa v. Albino, 338 A.2d 804 805 (R.I. 1978); Annot., 25 A.L.R. 3d 383, 413-19 (1969).

98. *See* note 65 *supra* for the definition of "owner-vendor."

99. A "professional" used home seller could be treated differently than the normal homeowner seeking to sell his or her home. The distinction might be made along the lines of the merchant/nonmerchant dichotomy used in U.S.C. § 2-314 (implied warranty in the sale of goods). For example, a nonprofessional seller's liability might be limited to cases in which actual fraud or, at least, seller's knowledge of the defect could be proven, but a "professional" seller's liability would be based on the usual implied warranty.

100. *See* Haskell, *supra* note 11, at 651.

ity and a structure free from major defects in workmanship.¹⁰¹ Although a used home buyer does not expect his structure to be in the same condition as a new home, he, nevertheless, expects it to be suitable for use as a residence. Moreover, with the sharp appreciation of home values, a purchaser of a ten-year old residence usually pays more for that home than did its original owner. As with extension of the new home warranty to subsequent purchasers, wear and tear should be relevant in the finding of a breach.¹⁰² For example, a leaking roof may constitute a breach in the sale of an eleven-year-old house but not in one that is twenty-five-years old. Also, even the seller of an eleven-year-old house should be held responsible only if the defect is latent and undisclosed.

Finally, public policy considerations are present. If habitable housing is to be assured, it is inconsistent to ignore defects that render a home unlivable simply because a home is more than ten years old.

In addition to the reluctance of courts to recognize the need for a used home warranty, there is the difficulty of identifying the guarantor of such a warranty. Clearly, the remoteness of the builder-vendor precludes his liability.¹⁰³ The sale is often negotiated by a broker, but it would be unreasonable to hold him liable because he has no control over the construction or maintenance of the home. This leaves the owner of the home, most likely the person closest to the transaction, as the only reasonable guarantor.¹⁰⁴

The owner-vendor, by entering into a sale, certainly recognizes that the purchase price reflects an expectation that the home is habitable. He is, as previously discussed, in a superior position to be aware of any defects and should not have a license to pass them on to an unsuspecting buyer. Under the proposed warranties for initial and subsequent purchasers, the homeowner would have up to ten years and no less than one year to seek recourse against the builder-vendor for defective construction.¹⁰⁵ If he fails to take advantage of these warranty privileges, he should not be permitted to avoid the loss resulting from a defect by passing it on to an unsuspecting third party after the new home warranty period has expired.

Placing liability for the sale of a defective used home on the own-

101. *Id.* at 649-50.

102. *See* text accompanying 74 *supra*.

103. *See* *Corburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977).

104. *See* *Weber v. Mathews*, 367 So. 2d 1326, 1328 (La. Ct. App. 1979).

105. *See* notes 50-51 and accompanying text *supra*.

er-vendor is obviously a tremendous expansion of the implied warranty of habitability as it presently exists in North Carolina. One author has suggested that if there is some hesitation about placing the entire loss on a used home seller, who may have been innocent in the transaction, the damages could be split by permitting the purchaser only one-half of his normal award.¹⁰⁶ Although unconventional, the proposal appears a rational means of settling a dispute between innocent parties, so long as courts do not become bogged down in assessing culpability.

Finally, there is the problem of determining limits to the action. As previously noted, the scope of the warranty can be limited to non-disclosed, latent defects and the loss can be divided among the parties. In addition, a short statute of limitations could be applied to permit the owner-vendor repose from litigation. Since the housing is "used" and the major protection offered by the ten-year "new" home warranty has already been exhausted, a statute of limitations of one year should be sufficient. This would give the purchaser time to discover latent defects, without overburdening the seller of a used home.

With the addition of a used home implied warranty, every sale of a house would carry with it some protection. With the first sale, the initial vendee already has an implied warranty guaranteed by the builder-vendor that the home is free from defective workmanship for a period of up to ten years. Any sale made by the initial vendee or subsequent purchasers during this ten-year period would carry with it the warranty guaranteed by the builder-vendor for the time remaining in the period or one year, whichever is greater.¹⁰⁷ After the ten-year period has been exhausted, the home would be considered a used dwelling, with the owner-vendor impliedly warranting for one year that the home is suitable for use as a residence.¹⁰⁸ This extension of implied warranty concepts provides across-the-board protection for homeowners and ensures habitable housing. At the same time, strict limitations on the application of the warranty would permit the seller reasonable protection of his interests in the transaction. Although the protection of homebuyers is clearly diminished by permitting the disclaimer of warranties, a majority of courts addressing the question have concluded that the implied warranty of habitability may be disclaimed.¹⁰⁹ In *Griffin v. Wheeler-*

106. Haskell, *supra* note 11, at 653.

107. See notes 62-63 & 68-94 and accompanying text *supra*.

108. See notes 96-106 and accompanying text *supra*.

109. See, e.g., *Belt v. Spencer*, 585 P.2d 922, 925 (Colo. Ct. App. 1978); *Crowder v. Vanderdeale*, 564 S.W.2d 879, 881 (Mo. 1978). See generally Haskell, *supra* note 11, at 653-54.

Leonard & Co.,¹¹⁰ for example, the North Carolina Supreme Court stated:

The implied warranty here under consideration, applicable to a dwelling sold by a builder, arises by operation of law, not by a specific factual agreement between the parties. Without question, however, a builder-vendor and a purchaser could enter into a binding agreement that such implied warranty would not apply to their particular transaction.

...

... Such an exclusion, if desired by the parties to a contract for the purchase of a residence, should be accomplished by clear, unambiguous language, reflecting the fact that the parties fully intended such result.¹¹¹

This position ignores substantial policy considerations.¹¹² The decline of *caveat emptor* was partially due to a recognition that the vendor and vendee were not possessed of equal bargaining power. This inequality is no less a concern when a disclaimer clause is inserted in a contract for the sale of a home. The policy of providing habitable housing regardless of the status of the purchaser is frustrated by contracts that permit a builder to shift the burden for economic loss resulting from latent defects to the purchaser. It is incongruous to permit public policy to be emasculated by often unconscionable private contracts. As Professor Haskell states,

A forceful argument can also be made for the supposition that any disclaimer of fitness for habitation in the sale of *new* construction is unconscionable and against public policy. Should a merchant be permitted to build and receive money for a structure which appears to be a house—and avoid liability in the event the structure has a material defect?¹¹³

To protect these concerns, North Carolina should be more restrictive in its disclaimer policy. If disclaimers of warranties in new housing are to be permitted at all, a purchaser should be protected by more than the *Griffin* safeguard of clearly expressed intention. As further protection, the North Carolina courts should require that the implied warranty of habitability be specifically disclaimed rather than included in a general disclaimer of warranties and that such a disclaimer be reflected in the purchase price.¹¹⁴ This would prevent builders from using their

110. 290 N.C. 185, 225 S.E.2d 557 (1976).

111. *Id.* at 202, 225 S.E.2d at 567-68.

112. See Note, *Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute*, 54 WASH. L. REV. 185, 214-16 (1978).

113. Haskell, *supra* note 11, at 654.

114. An analogy can be made to the North Carolina law regarding equity of redemption waiv-

superior bargaining position to the detriment of an ignorant purchaser, and the policy of providing habitable housing at a price insulated from latent defects would be maintained. The same considerations do not exist with regard to used housing, and a disclaimer in that area would be less objectionable. A clear disclaimer in the sale of a used home would most likely reflect both parties' expectations rather than discrepancies in bargaining position.

With the *Hartley* court's recognition of an implied warranty of habitability in the sale of new homes, North Carolina significantly improved the outmoded concepts that dominated the sale of real estate and motivated an adherence to the doctrine of *caveat emptor*. That recognition, however, should only be a starting point. In order to further the policy considerations of habitability and workmanlike construction promulgated in *Hartley*, the North Carolina courts must go further than simply construing implied warranty concepts liberally. Instead, the fundamental policies could better be implemented by extension of new home warranty protection to subsequent purchasers, recognition of a warranty in the sale of used housing and a restrictive policy discouraging the operation of disclaimer clauses. Through these changes, the ghost of *caveat emptor* can be forever exorcised, and enlightened policy considerations can begin to ensure adequate protection for all the homeowners of North Carolina.

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ers. Such a waiver by the mortgagor to the mortgagee is presumed fraudulent; however, the mortgagee may rebut this presumption by proving that:

- (1) the mortgagor transferred the equity of redemption at his own initiative;
- (2) the transfer was for new and adequate consideration; and,
- (3) the mortgagee did not use its power or position to drive an unfair bargain.

See Alford v. Moore, 161 N.C. 382, 386, 77 S.E. 343, 344 (1913).

