

Journal of Civil Rights and Economic Development

Volume 4
Issue 2 *Volume 4, 1989, Issue 2*

Article 6

March 1989

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Recommended Citation

Burlingame, Nancy B. (1989) "New York State Warranties on Sales of New Homes Act: From Caveat Emptor to Statutory Warranty Protection," *Journal of Civil Rights and Economic Development*. Vol. 4 : Iss. 2 , Article 6.

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NEW YORK STATE WARRANTIES ON SALES OF NEW HOMES ACT: FROM CAVEAT EMPTOR TO STATUTORY WARRANTY PROTECTION

Recently, the New York State Legislature enacted the Warranties on Sales of New Homes Act (the Act).¹ Aimed at enhancing the rights of the new home buyer,² the law provides for implied warranties of workmanlike construction and habitability which survive conveyance of title.³ This Note will examine significant case law which led to the proposal of the statute, discuss its legislative history, and provide a critical analysis of the Act's capacity to achieve the legislative objective.

Despite a variety of protections afforded consumers in most sales transactions,⁴ consumer safeguards in the area of real estate

¹ N.Y. GEN. BUS. LAW § 777 (McKinney Supp. 1989). The Act was signed into law Sept. 6, 1988 and took effect March 1, 1989. Ch. 709, § 1 [1988] N.Y. LAWS 2211.

² N.Y. GEN. BUS. LAW § 777 (5). "New Home" is defined as "any single family house or for-sale unit in a multi-unit residential structure of five stories or less in which title to the individual units is transferred to owners under a condominium or cooperative regime." *Id.* "Such terms do not include dwellings constructed solely for lease, mobile homes . . . or any house or unit in which the builder has resided or leased continuously for three years or more following the date of completion of construction, as evidenced by a certificate of occupancy." *Id.*

³ *Id.* § 777-a (1). The Act states that "notwithstanding section 251 of the Real Property Law, a Housing Merchant Implied Warranty is implied in the contract or agreement for the sale of a new home and shall survive the passage of title." *Id.* Section 251 of the Real Property Law provides that "a covenant is not implied in a conveyance of real property, . . ." N.Y. REAL PROP. LAW § 251 (McKinney 1989).

⁴ See U.C.C. §§ 2-314 - 15, 2-318 (1977). Article 2 of the Uniform Commercial Code, applicable only to contracts for the sale of goods, extends statutory warranty protections that include implied warranties of merchantability and fitness for a particular purpose. *Id.* See also *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 370, 161 A.2d 69, 76 (1960) ("[i]f the buyer, expressly or by implication, makes known to the seller the particular purpose for which the Article is required and it appears that he has relied on the seller's skill or judgment, an implied warranty arises of reasonable fitness for that purpose"); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389-91, 111 N.E. 1050, 1053 (1916) (allowing recovery for personal injury arising out of use of any product which has been negligently manufactured irrespective of lack of privity); *Thomas v. Winchester*, 6 N.Y. 396, 410-11 (1852) (manufacturer has duty to prevent negligent mislabeling of inherently dangerous product). See generally Lawrence & Minan, *The Effect of Abrogating the Holder-in-Due-Course*

sales have not been coextensive.⁵ The return of servicemen after World War II and their desire to become homeowners led to the mass production of homes across the United States.⁶ This phenomenon, in turn, gave rise to claims of shoddy workmanship and hidden defects necessitating judicial intervention and an examination of the doctrine of caveat emptor.⁷

New York courts, realizing that caveat emptor was harsh and obsolete, gradually began to recognize exceptions to this doctrine by applying theories of negligence⁸ and the contract principles of

Doctrine on the Commercialization of Innovative Consumer Products, 64 B.U.L. REV. 325, 330-31 (1984) ("erosion of the doctrine of caveat emptor . . . and extension of product warranty liability" was result of consumer demands that commercial entrepreneurs' assume greater responsibility for costs created by their market activities).

⁵ See, e.g., *Perin v. Mardine Realty Co.*, 5 App. Div. 2d 685, 685, 168 N.Y.S.2d 647, 647 (2d Dep't 1957) (no action lies for failure to disclose material defect); *Eastman v. Britton*, 175 App. Div. 476, 477, 162 N.Y.S. 587, 588 (4th Dept. 1916) (no implied warranty in building contracts); *Staff v. Lido Dunes, Inc.* 47 Misc. 2d 322, 331-32, 262 N.Y.S.2d 544, 553-54 (Sup. Ct. Nassau County 1965) (doctrine of caveat emptor applies to sale of completed house whether newly built or previously occupied); see also *Gallegos v. Graff*, 32 Colo. Ct. App. 213, 214, 508 P.2d 798, 799 (1973) (implied warranty protections of U.C.C. does not apply to real estate transactions); *Vernali v. Centrella*, 28 Conn. Supp. 476, 481, 266 A.2d 200, 203 (1970) (same). See generally Bearman, *Caveat Emptor in Sales of Realty - Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 542 (1961) ("doctrine of caveat emptor . . . clings tenaciously to the black letter law of sales of realty"); Note, *When the Walls Come Tumbling Down - Theories of Recovery for Defective Housing*, 56 ST. JOHN'S L. REV. 670, 685 (1988). (Merger doctrine extinguishes all warranties of fitness and quality not specifically recited in the deed).

⁶ See K. HOLTZSCHUE, PURCHASE AND SALE OF REAL PROPERTY § 40.01[1] at 40-1 (1987) (housing industry witnessed swift development subsequent to World War II); Bearman, *supra* note 5, at 550-55 (return of United States servicemen in part helped bring about changes in the protection given purchasers of new homes); Note, *Reed v. King: Fraudulent Nondisclosure of a Multiple Murder in a Real Estate Transaction*, 45 U. PITT. L. REV. 877, 881-82 (1984) (end of Second World War saw boom in housing industry which in turn led to increased claims against builder-vendors because of defective construction).

⁷ See Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. URB. L. 533, 556 (1971) (since mid-1950's, courts have held builders accountable for quality of their work); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108, 110 (1953) (analogizing World War II housing boom with 19th century mass production of goods); Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL EST. L.J. 291, 291-92 (1980) (mass production of homes after World War II was believed to be factor in decline of quality in new home construction); Note, *supra* note 6, at 881-82 (complaints of shoddy workmanship in new home construction increased after World War II). See also Note, *Protecting the Virginia Homebuyer: A Duty to Disclose Defects*, 73 VA. L. REV. 459, 465 (1987) ("[t]he trend over the past thirty years has been away from a strict application of caveat emptor in the sale of real property"). See generally Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967) (discussing evolution of decisions safeguarding new home purchasers from builders vis-a-vis various theories of liability).

⁸ See *Inman v. Binghamton Hous. Auth.*, 3 N.Y.2d 137, 144, 143 N.E.2d 895, 899, 164

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collateral agreement, the merger doctrine and implied warranty.⁹ While the New York courts unanimously agreed that recovery for patent or obvious defects was barred once title had passed,¹⁰ it was unclear whether there existed an implied warranty of habitability or workmanship in the contract of sale. Some courts held that new home construction contracts were separate and collateral to the deed, and thus survived transfer of title¹¹ while others found that covenants contained within construction agreements merged

N.Y.S.2d 699, 703 (1957) (in extending negligence doctrine to real property transactions, court noted that "no logical basis" exists for a distinction between buildings and chattels) *accord* Leigh v. Wadsworth, 361 P.2d 849, 851-52 (Okla. 1961). *See generally* Bearman, *supra* note 5, at 566-70 (tracing courts' usage of *MacPherson* doctrine to hold vendors liable for negligence in constructing defective home).

⁹ *See infra* notes 11 - 14 and accompanying text.

¹⁰ *See* Whitman v. Lakeside Builders & Developers, Inc., 99 App. Div. 2d 679, 679-80, 472 N.Y.S.2d 51, 52-53 (4th Dep't 1984) (court erred in permitting recovery for patent defects where defendant had notice at time of transfer); Dolezel v. Fialkoff, 2 App. Div. 2d 642, 642, 151 N.Y.S.2d 734, 735-36 (3d Dep't 1956) (court reversed judgment for purchaser on implied warranty claim because buyer was on notice of obvious defect prior to sale of house). *See also* Abney, *Determining Damages for Breach of Implied Warranties in Construction Defect Cases*, 16 REAL EST. L.J. 210, 211-12 (1988) (discussing judicial consensus that patent defects which were discoverable upon reasonable inspection by prospective homeowner will bar subsequent recovery for damages).

¹¹ *See* Davis v. Weg, 104 App. Div. 2d 617, 619, 479 N.Y.S.2d 553, 555 (2d Dep't 1984) (collateral contract providing that premises would be delivered free of defects survived delivery of deed to vendee); Town of Ogden v. Howarth & Sons, Inc., 58 Misc. 2d 213, 217, 294 N.Y.S.2d 430, 434 (Sup. Ct. Monroe County 1968) (merger clause fails when agreement to construct new home is separate and thereby collateral to conveyance of land); Cohen v. Polera & Sons Constr. Corp., N.Y.L.J., Sept. 30, 1958, at 14, col. 4. The county court looked upon the construction of a new home as "collateral" to sale of the land to the purchaser. *Id.* at 14, col. 5. Accordingly, the court held that a claim pertaining to the workmanship and construction of a newly completed home was not foreclosed by the transfer of title. *Id.* at 14, col. 6. *See also* Zaphir v. Bonnie Meadows, Inc., 127 N.Y.S.2d 269, 271 (Sup. Ct. Westchester County. 1953) (parties' specific collateral agreement for creation of escrow account survived closing of title). *See generally* G. PINDAR, AMERICAN REAL ESTATE LAW § 19-145 n.5 (1976) (recognition by courts that where delivery of deed represents only part performance of contractual obligation, other outstanding obligations are not merged in deed); Dunham, *Merger by Deed - Was it Ever Automatic*, 10 GA. L. REV. 419, 443 (1976) ("since . . . purpose of conveyance is to convey title, any promises not connected with the title is not merged in the deed. . ."); Bearman, *supra* note 5, at 548 (warranties not within deed and not involved with conveyance of property are "by their nature collateral to main purpose of deed and so survive"); Note, *supra* note 5, at 686-87. Independent or collateral agreements exception has been used most effectively to "distinguish as collateral the contractual agreement to construct the dwelling house from the agreement to convey the land," thereby permitting "an implied warranty of workman like construction . . . based upon accepted construction contract precedents." *Id.*; Comment, *Merger of Land Contract in Deed*, 25 ALB. L. REV. 122, 122-29 (1961) (discussing dilemma faced by courts in determining whether parties' actions in one area of agreement merged rest of contract in deed).

with the deed and became extinguished pursuant to section 251 of the Real Property Law.¹² The issue was further compounded by judicial concern over the unequal bargaining positions of the builder-vendor and purchaser¹³ and the relief available to the buyer under a theory of implied warranty.¹⁴ Thus, the courts had

¹² N.Y. REAL PROP. LAW § 251 (McKinney 1988). The statute states that "a covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not." *Id.* See *Carter v. Cain*, 112 App. Div. 2d 2, 3, 490 N.Y.S.2d 472, 472 (4th Dept. 1985) (in granting defendant's motion for summary judgment, court held Real Property Law § 251 barred recovery for construction defects under implied warranty theory); *Spano v. Perry*, 59 Misc. 2d 1062, 1063-64 (Sup. Ct. Tompkins County 1969) (in foreclosure action, court rejected defendant's counterclaim of breach of implied warranty of habitability and fitness for completed home as excluded by Real Property Law § 251); *Staff v. Lido Dunes, Inc.*, 47 Misc. 2d 322, 329, 262 N.Y.S.2d 544, 551 (Sup. Ct. Nassau County 1965) ("it seems clear that there is no implied warranty in the sale of a completed house . . ."). See generally 3 AMERICAN LAW OF PROPERTY § 11.65 at 165 (1974) (absent material mistake, acceptance of deed usually merges covenants found in contract of sale into deed); R. CUNNINGHAM, W. STOEUBUCK & D. WHITMAN, THE LAW OF PROPERTY § 10.12 at 696-97 (1984) (courts will determine if there has been a merger of covenants into deed by considering parties' intent the contract itself and surrounding circumstances).

¹³ *DeRoche v. Dame*, 75 App. Div. 2d 384, 387, 430 N.Y.S.2d 390, 392 (court recognized unequal bargaining dilemma faced by purchasers who of necessity rely on builders' capabilities to satisfactorily construct home), *appeal dismissed*, 51 N.Y.2d 821, 413 N.E.2d 366, 433 N.Y.S.2d 427 (1980); *Rowe v. Great A. & P. Tea Co.*, 46 N.Y.2d 62, 68, 385 N.E.2d 566, 569, 412 N.Y.S.2d 827, 830 (1978) ("the law has developed the concept of unconscionability so as to prevent the unjust enforcement of onerous contractual terms which one party is able to impose under the other because of a significant disparity in bargaining power"); *State of New York v. Wolowitz*, 96 App. Div. 2d 47, 67, 468 N.Y.S.2d 131, 145 (2d Dep't 1983) ("inequality of bargaining power . . . and an imbalance in the understanding and acumen of the parties" are examples of procedural unconscionability).

The equitable concept of unconscionability is an established doctrine of contract law which has allowed courts to police agreements against unfair "overreaching by a commercial party or by one in a strong and knowledgeable bargaining position, against a consumer person in a weaker, more vulnerable position." H. HUNTER, MODERN LAW OF CONTRACTS ¶12.06[1] at 12-68 (1986). This common law concept has been extended by statute to transactions in goods. U.C.C. § 2-302 (1977). The New York legislature codified the doctrine of conscionability in the landlord-tenant area with the enactment of § 235-c of the Real Property Law. N.Y. REAL PROP. LAW § 235-c (McKinney 1988).

¹⁴ See, e.g., *Lutz v. Bayberry Huntington, Inc.*, 148 N.Y.S.2d 762, 768 (Sup. Ct. Nassau County 1956). The *Lutz* court found an implied term in the construction agreement that the house would be constructed in a good and workmanlike manner in addition to the express covenants that the work and materials would comply with local requirements jurisdiction and those of the lending institution. *Id.* at 767-68. The court stated in dictum that "[i]f the house did not meet such standards [as provided by the implied term] then, in the absence of other contract provisions barring relief to the purchaser, he would have an actionable claim for breach of contract." *Id.* at 768. (emphasis added); *Centrella v. Holland Constr. Corp.*, 82 Misc. 2d 537, 539, 370 N.Y.S.2d 832, 834 (Dist. Ct. Suffolk County 1975) (following trend of New York case law, court maintained that purchase of newly completed home from builder-vendor implies warranty that all work was performed in "workmanlike manner"). See *Moskovitz, The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444, 1447 (1974) (recommends implied warranty of

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essentially made their determinations on a contract-by-contract basis.

The ambivalence of the state courts toward a uniform recognition of an implied warranty of habitability and workmanlike construction in new homes was mirrored in the New York State Legislature. In 1967, the New York State Legislature's Law Revision Commission authorized an exhaustive study of the issue.¹⁵ Despite the Commission's recommendation and support of two Senate bills designed to amend the real property law by placing liability on "housing merchants" for personal injuries and breach of warranty,¹⁶ the bill was not enacted.¹⁷

habitability should be imposed on residential homes); Bixby, *supra* note 7, at 534 ("development of implied warranty of habitability in sales of homes, at the expense of the seller-oriented maxim *caveat emptor*, will benefit everyone who purchases a home"); Haskell, *supra* note 6, at 633-38 (1965) (examining theory of implied warranty of merchantability in real property transactions).

Other New York courts have applied the implied warranty provision only in certain circumstances, most commonly for homes under construction when the breach occurred. *See, e.g., Spano v. Perry*, 59 Misc. 2d 1062, 1063, 301 N.Y.S.2d 836, 838 (Sup. Ct. Tompkins County 1969) (court found no basis in either statutory or decisional law which provided implied warranty of fitness for purpose upon purchase of completed home); *Lido Dunes, Inc.*, 47 Misc. 2d at 329, 262 N.Y.S.2d at 551 (dictum) (implied warranties might be available to homes under construction). Some commentators believe that there is no valid reason to distinguish between finished and unfinished homes. *See Young, Quære: Caveat Emptor or Caveat Venditor?* 24 ARK. L. REV. 245, 250-52 (1971) (criticizes early courts' decisions of granting implied warranties of fitness for habitation and good workmanship only to homes under construction at time of sale); Bearman, *supra* note 5, at 545-46. (noting paradox that purchaser of unfinished home received implied warranty that home would be structurally sound, while no implied warranties would prevail if that same house was purchased day after its completion).

¹⁵ *See* New York Law Revision Commission Implied Warranty Doctrine as Applied to the Sale of New Housing, [1967] N.Y. Law Rev. Comm'n Rep. 37-74. In 1967, the New York Law Revision Commission authorized Professor Ernest F. Roberts, Jr. to study the modern trend in the United States towards consumer protection of new homeowners. *Id.* When the study directed its attention to New York, it found that the state courts were ambivalent towards utilizing implied warranties on homes under construction, much less newly built homes. *Id.* at 75. Additionally, most real property actions were brought under a breach of contract claim and the cases often turned upon the applicability of the merger clause to the situation. *Id.*

¹⁶ *Id.* at 32-35, 47-48. Exhaustive in its research, the Commission's study concluded that a mass developer of housing was in essence, a "manufacturer" and therefore should fall within the warranty provisions established under Article 2 of the Uniform Commercial Code. *Id.* The study closed with the suggestion that since the legislature has enacted regulations designed to protect consumers from inadequately and poorly made goods, that "the new commodity market in housing deserves similar attention." *Id.* at 74. The Law Revision Commission recommended and supported two proposed Senate bills designed to amend the real property law by placing liability on "housing merchants" for personal injuries and breach of warranty. N.Y.S. 4219 and N.Y.S. 4222, 190th Sess. (1967). *See* Recommenda-

I. THE *CACECI* DECISION: A CATALYST FOR CHANGE

Recently, in *Caceci v. DiCanio Construction Corp.*,¹⁸ the New York Court of Appeals examined the issue of whether an implied warranty should be imposed on the contract between a vendor and a purchaser of a new home. Mr. and Mrs. Caceci had contracted with the defendant construction corporation for the purchase of land upon which the defendant agreed to build a single family house.¹⁹ In the contract of sale, the defendant expressly guaranteed the building's systems for one year but limited this protection to the repair or replacement of defects arising from poor workmanship.²⁰

Four years after the closing of title, structural defects began to surface.²¹ In an attempt to discover the cause of the problem, the

tion of the Law Revision Commission to the Legislature Relating to the Liability of Housing Merchants For Personal Injuries and Breach of Warranty, [1967] N.Y. Law Rev. Comm'n Rep. 7, 8. It was in these proposed amendments that the term "housing merchant" was used to denote "any person building one or more dwellings or causing one or more dwellings to be built for the purpose of the sale thereof." *Id.* at 3. The Law Revision Commission's recommendation to the New York Legislature was two-fold. The Commission first recommended legislation that imposed absolute liability on the housing merchant whenever substandard construction of a new home caused personal injury or death. *Id.* at 7. Second, the Commission further believed that newly completed homes deserved the same warranty protection, both expressed and implied, normally applicable in sale of goods transactions found under Article 2 of the Uniform Commercial Code. *Id.* The Commission further advocated that a housing merchant be required to provide a bond upon the transfer of the deed to the purchaser, in the event that the housing merchant failed to "satisfy [his] liability arising [therein]." *Id.* at 8 n.12.

¹⁷ See Recommendation of the Law Revision Commission to the Legislature Relating to the Liability of Housing Merchants For Personal Injuries and Breach of Warranty, [1967] N.Y. Law Rev. Comm'n Rep. apps. I(A)(1) & (2). Though the New York State legislature implemented most of the Law Revision Commission's recommendations, the bill never made it beyond the Judiciary Committee in the Senate and the Mortgage Committee in the Assembly.

Indeed, it appears that the legislature did not attempt to enact another such home warranty statute for the next twelve years. See N.Y.A. 4399-D, 202th Sess. (1979); N.Y.A. 4448, 205th Sess. (1982); N.Y.A. 3501, 206th Sess. (1983); N.Y.A. 3509, 208th Sess. (1985).

¹⁸ *Caceci v. DiCanio Constr. Corp.*, 72 N.Y.2d 52, 526 N.E.2d 266, 530 N.Y.S.2d 771 (1988).

¹⁹ *Id.* at 55, 526 N.E.2d at 266, 530 N.Y.S.2d at 771.

²⁰ *Id.* The guarantee protected against problems with plumbing, heating, electrical work, and roof and basement seepage arising from defective workmanship. *Id.* at 55, 526 N.E.2d at 267, 530 N.Y.S.2d at 771-72. These provisions also specified that the house would be built according to the local building codes. *Id.*

²¹ *Id.* at 55-56, 526 N.E.2d at 267, 530 N.Y.S.2d at 772. In 1981, defendant was notified of a dip in the kitchen floor and repair was attempted. *Id.* Defendant's work did not solve the problem and the next year defendant again attempted to cure. *Id.* at 56-57, 526 N.E.2d

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Cacecis hired a construction engineering firm who examined the ground beneath the home's foundation.²² The examination revealed that the problem was due to a sinking foundation caused by the home's construction on poor soil.²³ Subsequent work to correct the problem took seven months.²⁴

The plaintiffs subsequently brought suit, and the trial court sustained claims of negligent construction and breach of an implied warranty of workmanlike construction.²⁵ The Appellate Division affirmed, basing its opinion exclusively on the implied warranty theory.²⁶ On appeal, the defendant-builder challenged the courts' movement away from the *laissez-faire* doctrine of *caveat emptor*.²⁷

As an issue of first impression for the New York Court of Appeals,²⁸ the court rejected the judicially instituted precept of ca-

at 267, 530 N.Y.S.2d at 772. These repairs failed to solve the problem which worsened over time. *Id.* at 55-56, 526 N.E.2d at 267, 530 N.Y.S.2d at 772.

²² *Caceci*, 72 NY2d at 56, 526 N.E.2d at 267, 530 N.Y.S.2d at 772.

²³ *Id.* The soil was composed of deteriorating tree trunks, wood, and other biodegradable material. *Id.*

²⁴ *Id.*

²⁵ *Id.* Following a nonjury trial, but before close of proof, the court dismissed three causes of action alleging fraud and negligent repair. *Id.* Of the three remaining causes of action, the court rejected plaintiff's claim of breach of contract while upholding the other two. *Id.* The trial court entered judgment of \$57,466 for plaintiffs. *Id.* The court stated the judgment represented the reasonable cost of "correcting defendant's slipshod performance," plus costs and interest from December 1981, the date that the initial problem was discovered. *Id.*

²⁶ *Caceci v. DiCanio Constr. Corp.*, 132 App. Div. 2d 591, 592, 517 N.Y.S.2d 753, 754 (2d Dep't 1987). On appeal, the defendant argued that plaintiffs failed to establish a *prima facie* case for breach of implied warranty of workmanlike construction because they had not shown that defendant knowingly built on inadequate soil. *Id.* After the appellate division reviewed the record, it found sufficient evidence had been presented for the trier of fact to infer that the defendant knowingly constructed the home on infirmed soil. *Id.*

²⁷ *Caceci*, 72 N.Y.2d at 57, 526 N.E.2d at 267-68, 530 N.Y.S.2d at 772-73 (1988). In support of its argument, defendant stressed that "far-reaching policy considerations" would result in the movement away from *caveat emptor* and that such drastic alterations were better left for legislative determination. *Id.* at 59, 526 N.E.2d at 269, 530 N.Y.S.2d at 774.

²⁸ *Id.* at 58, 526 N.E.2d at 268, 530 N.Y.S.2d at 773. Some fifteen years ago, the Supreme Court of the State of Washington decided a case almost identical to the facts of *Caceci*. See *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969). In *Thornton*, cracks began to appear on the home's exterior walls within three months after purchase. *Id.* at 430, 457 P.2d at 201. During the next two years cracks began to appear on interior walls; the chimney separated from the structure; and the floors began to shift and sink. *Id.* at 430-31, 457 P.2d at 201. Although plaintiffs cause of action was based on deceit and misrepresentation, the court based its holding on neither, stating: "[w]e apprehend it to be the rule that when a vendor-builder sells a new house to its intended occupant, he impliedly warrants that the foundations supporting it are firm and secure and that the house

veat emptor as a residual relic from the nineteenth century industrial revolution era.²⁹ Judge Bellacosa, writing for the court, noted that the shift away from caveat emptor which led to the buyers' protection against latent defects in the sale of goods was equally applicable to the area of realty, especially in light of the mass production of homes after World War II.³⁰

Affirming the decision below,³¹ the *Caceci* court held that there existed a "Housing Merchant" warranty which imposes by legal implication a contractual obligation on a builder-vendor to construct a home in a skillful manner free of material defects.³² The court agreed with plaintiffs' contention that they were entitled to expect a new home to be both habitable and built in a skillful manner, and the law should respect and enforce those expectations.³³

The court of appeals holding was heralded as a landmark which judicially extended implied warranty protection to newly built homes.³⁴ Although considered a "lemon law" for new

is safe for the buyer's intended purpose of living in it." *Id.* at 436, 457 P.2d at 204.

²⁹ *Caceci v. DiCanio Constr. Corp.* 72 N.Y.2d at 57, 526 N.E.2d at 268, 530 N.Y.S.2d at 771. The court's examination of New York case law involving the sale of new homes revealed that for the last thirty years, the lower courts had followed a growing proclivity towards the recognition of implied warranty of quality and skillful construction by the builder. *Id.* at 58, 526 N.E.2d at 268-69, 530 N.Y.S.2d at 773.

³⁰ *Id.* at 58, 526 N.E.2d 268-69, 530 N.Y.S.2d at 773. The court opined that the need for such warranty protection was based on the superior bargaining position of the seller, the potential for latent defects due to faulty workmanship of the builder and the purchaser's inability to inspect the dwelling for hidden defects. *Id.* at 59, 526 N.E.2d at 269, 530 N.Y.S.2d at 774. "Thus, the purchaser has no meaningful choice but to rely on the builder-vendor to deliver what was bargained for - a house reasonably fit for the purpose for which it was intended." *Id.* Therefore, public policy dictates that liability be "placed on the party best able to prevent the loss" - the seller. *Id.*

³¹ *Id.* at 56, 526 N.E.2d at 267, 530 N.Y.S.2d at 772. Although the Court of Appeals upheld the Appellate Division's decision, it expressly disagreed with their holding that defendant's knowledge of a defect is a prerequisite to the determination that a cause of action exists under the implied warranty doctrine. *Id.*

³² *Caceci*, 72 N.Y.2d at 55, 526 N.E.2d at 266, 530 N.Y.S.2d at 771. In refuting defendant's claim that implied warranties regarding latent defects merged with the title at closing, the court held that to allow the act of title closing itself to bar future actions precipitated by latent, undetectable defects would be "self-contradictory, illusory and against [the current] public policy." *Id.* at 56-57, 526 N.E.2d at 267, 530 N.Y.S.2d at 772.

³³ *Id.* at 60-61, 526 N.E.2d at 270, 530 N.Y.S.2d at 775.

³⁴ See Browne, *Implied Warranty in Home Building Upheld*, N.Y.L.J., July 1, 1988, at 1, col. 3. The writer indicated the *Caceci* decision represented a new era in "consumer law" reversing the common law doctrine of *caveat emptor*. *Id.*

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homebuyers,³⁵ *Caceci* still leaves several questions unanswered. The court failed to explain the term "housing merchant warranty," and to supply a standard as to what constituted skillful performance. Thus, it appeared inevitable that the lower courts would have the burden of interpreting these undefined terms on a case-by-case basis,³⁶ absent subsequent interpretation by the court of appeals or legislative intervention codifying these warranty rights. Fortunately for New York, the latter quickly occurred.³⁷

II. LEGISLATIVE RESPONSES TO CAVEAT EMPTOR IN NEW HOUSING SALES

A. *Warranties on Sales of New Homes Act: The New York Response*

During the 1987-88 legislative session, a resurgence in the area of consumer protection in new home sales materialized.³⁸ As a result, a bill calling for an amendment to the General Business Law providing for warranty protection for new home buyers was intro-

³⁵ *Let's Have a Lemon Law for Homebuyers*, *Newsday*, July 5, 1988, at 48 (editorial), col. 2. The commentary favorably compared the court of appeals decision in *Caceci* to the protection given car buyers under the "Lemon Law" statute. *Id.* The author stressed the time is ripe for the New York State legislature to take appropriate action to statutorily compel compliance by builders to construct dwellings "free from material defects." *Id.*

³⁶ See Memorandum of the New York State Builders Association, Inc. [1988] (memorandum discussed the necessity for a warranty on new homes statute because of the courts slow "case by case basis for interpretation"). See, e.g., *Vento v. Honeybee Homes, Inc.*, 141 Misc. 2d 997, 535 N.Y.S.2d 344 (N.Y.C. Civ. Ct. Richmond County 1988). Brought in Small Claims Court, plaintiff sought damages based upon breach of an implied housing merchant warranty by defendant. *Id.* For a period of six years after the purchase of their home from defendant-builder, plaintiffs alleged that the roof of their home had continuously leaked. *Id.* Defendant argued that because plaintiffs cause of action was commenced more than six years after transfer of title, their action was time barred by the contract's warranty period. *Id.* Holding that the defendant erred in its judgment that the contract time limitation applied, the court looked to *Caceci* to guide its decision. *Id.* at 998, 535 N.Y.S.2d at 345. Applying *Caceci* to the facts before it, the court "assume[d] that the statute of limitations for the implied housing merchant warranty . . . is for a period equal to what a reasonable expectation would be that a house constructed in a workmanlike manner would be free of material defects." *Id.* Thus the court held that plaintiffs action was not time barred. *Id.*

³⁷ See N.Y. GEN. BUS. LAW §§ 777, 777-a (McKinney 1989). This new law provides that a housing merchant implied warranty shall be implied in every contract or agreement for the sale of a new home. *Id.* Although the law was approved on Sept. 6, 1988, it was not effective until six months later, on March 1, 1989. *Id.* at § 777-b, § 3.

³⁸ See *infra* notes 40-43.

duced on the floor of the state legislature.³⁹ Two months later,⁴⁰ the Warranties on Sales of New Homes Act was signed into law.⁴¹

This Act is comprised of three categories. The first defined such terms as "building code,"⁴² "constructed in a skillful manner,"⁴³ "material defect,"⁴⁴ "owner"⁴⁵ and "warranty date."⁴⁶ The second discussed the scope of protection new home buyers would receive under the implied warranty; and the third detailed how a seller of a new home may exclude or modify any of the warranties provided therein.⁴⁷ Further, the Act amended section 213(2) of the Civil Practice Law and Rules to exempt the housing merchant implied warranty from the six year statute of limitations⁴⁸ and substituted various limitations for the commencement

³⁹ See N.Y.S. 5395-A, N.Y.A. 770-B, 211th Sess. (1988). Co-sponsored by Senator Kehoe and Assemblyman Serrano, the bill called for the amendment of the General Business Law with the addition of a new article, Article 36-B: Warranties on Sales of New Homes. *Id.*

⁴⁰ See State of New York Legislative Digest, Bill Summary § 318-19 (details legislative time frame on Warranty on Sales of New Homes Act).

⁴¹ See N.Y. GEN. BUS. LAW §§ 777, 777-b (McKinney 1989).

⁴² See N.Y. GEN. BUS. LAW § 777 (2) (McKinney 1989). The phrase "building code" now signifies:

[t]he uniform fire prevention and building code council promulgated under section three hundred seventy-seven of the executive law, local building code standards approved by the uniform fire prevention and building code council under section three hundred seventy-nine of the executive law, and the building code of the city of New York, as defined in title twenty-seven of the administrative code of the city of New York.

Id.

⁴³ *Id.* at § 777 (3). The phrase "constructed in a skillful manner" requires that: workmanship and materials meet or exceed the specific standards of the applicable building code. When the applicable building code does not provide a relevant specific standard, such term means that workmanship and materials meet or exceed the standards of locally accepted building practices. *Id.*

⁴⁴ *Id.* at § 777 (4). A "material defect" includes:

actual physical damage to the following load-bearing portions of the home caused by failure of such load-bearing portions which affects their load-bearing functions to the extent that the home becomes unsafe, unsanitary or otherwise unliveable: foundation systems and footings, beams, girders, lintels, columns, walls and partitions, floor systems, and roof framing systems.

Id.

⁴⁵ N.Y. GEN. BUS. LAW at § 777 (6). The statute defines "owner" to be not only the individual to whom the newly built house was sold, but also includes each successive owner during an unexpired warranty period. *Id.*

⁴⁶ *Id.* at § 777 (8). The "warranty date" is triggered by the earlier of either the transfer of title to the first owner prior to occupancy, or the date of first occupancy. *Id.* These warranty provisions are limited to any single family home, or a transfer of a condominium or cooperative in a residential structure of five stories or less. *Id.* at § 777 (5).

⁴⁷ *Id.* at § 777-b.

⁴⁸ *Id.* at § 777-b (2).

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of claims.⁴⁹

Under the Housing Merchant Implied Warranty Statute, three different types of warranties survive the passage of title.⁵⁰ The first implied warranty provides that the home will be free from defects due to failure to construct it in a skillful manner for one year after commencement of the warranty date.⁵¹ The second implied warranty provides that the electrical, heating, cooling and ventilation systems of the home will be free from defects caused by failing to install these systems in a skillful manner for two years following the warranty date.⁵² The final implied warranty provides that the home will be free from material defects for six years after the warranty date.⁵³

The statutory protections discussed above are limited to some extent.⁵⁴ There is no warranty protection for defects not caused by the builder's defective workmanship, his use of defective materials, or the use of a defective design where the design professional was not exclusively retained by the builder unless otherwise agreed.⁵⁵ Obvious defects which are or should have been discoverable upon inspection prior to acceptance of the home or transfer of title are also excluded under this statute.⁵⁶ Additionally, these implied warranty provisions do not include household appliances sold with the new home except as to faulty installation.⁵⁷

To bring a warranty claim under this statute, the owner must give the builder written notice that a breach has occurred no later than thirty days following the expiration of the applicable war-

⁴⁹ See N.Y. GEN. BUS. LAW at § 777-a.

⁵⁰ *Id.* at § 777-a (1)(a)-(c); see *infra* notes 51-53 and accompanying text. The statutory safeguards are consistent with Judge Bellacosa's belief that a contract's "standard merger clause is of no legal effect in th[ose] circumstances of an implied warranty with respect to latent defects." *Caceci v. DiCano Constr. Corp.*, 72 N.Y.2d 52, 56, 526 N.E.2d 266, 266, 530 N.Y.S.2d 771, 772 (1988) (emphasis added). This statute, together with the court of appeals decision changes the now antiquated common law doctrine of caveat emptor. *Id.*

⁵¹ *Id.* at § 777-a (1)(a).

⁵² N.Y. GEN. BUS. LAW at § 777-a (1)(b).

⁵³ *Id.* at § 777-a (1)(c). See *supra* note 44 (definition of material defect).

⁵⁴ See *id.* at § 777-a (2).

⁵⁵ *Id.* at § 777-a (2)(a)(i)-(iii).

⁵⁶ *Id.* at § 777-a (2)(b).

⁵⁷ N.Y. GEN. BUS. LAW at § 777-a (3).

ranty date.⁵⁸ The owner must also give the builder a reasonable opportunity to inspect and cure his breach.⁵⁹ If these repairs prove unsatisfactory, a claim for damages grounded in breach of the housing merchant implied warranty must be brought within one year from the relevant warranty period or within four years from the warranty date, whichever is later.⁶⁰ Damages consist of either the cost of repair or replacement, or the "diminution in value" of the home.⁶¹

Section 777-b sets forth the procedures for exclusion or modification of all express or implied warranties.⁶² A builder who intends to exclude or modify the housing merchant implied warranty must do so in "clear and conspicuous language" and must strictly comply with the statutory procedure.⁶³ Of paramount importance is the fact that even if this warranty is excluded, the

⁵⁸ *Id.* at § 777-a (4)(a).

⁵⁹ *Id.*

⁶⁰ *Id.* at § 777-a (4)(b).

⁶¹ N.Y. GEN. BUS. LAW at § 777-a (4)(b). Damages will usually be based upon the reasonable cost of repair or replacement, not to exceed the cost of the home. *Id.* The court also has the discretion to give the owner the "diminution in value" produced by the breach of warranty. *Id.*

⁶² *See id.* at § 777-b. Any warranty besides the housing merchant implied warranty can be excluded or modified by written agreement which so notifies the owner in "clear and conspicuous terms." *Id.* at § 777-b (1)-(2).

⁶³ *Id.* at § 777-b (4)(a)-(i). For a limited warranty to be valid, it must be in "plain English"; state clearly at the beginning of the agreement that it is a limited warranty; list by name and address the parties involved; state whether the warranty will survive to subsequent owners; identify the products to be protected; state the standard to be applied to determine defects; and, enumerate the procedures and time constraints for the owner to bring a claim and for the builder to act. *Id.*

The statute emphasized several caveats as to the use of the limited warranty. First, if the standard used to determine whether a defect has occurred is below local governmental building code or generally accepted building practices, it shall be void as contrary to public policy. *Id.* at § 777-b (4)(e)(i). In its stead, the applicable building code shall become the warranty standard of the agreement. *Id.* Second, any agreement allowing delivery of a new home in other than habitable condition shall be void as contrary to public policy. *Id.* at § 777-b (4)(e)(ii). Third, the limited warranty coverage must meet or exceed the coverage provided under the housing merchant implied warranty. *Id.* at § 777-b (4)(g). Fourth, a limited warranty may not exclude or limit property damage proximately caused by breach of the warranty if the limitation would cause the warranty to fail of its essential purpose. *Id.* at § 777-b (4)(i). Fifth, this statute also calls for the preemption of any local laws that are inconsistent with any of its provisions. *Id.* at § 777-b (5)(b). Finally, the Act specifies that the statute shall not be read as "repeal[ing], invalidat[ing], supersed[ing] or restrict[ing] any right, liability or remedy provided by any other statute of the state, except where such construction would, as a matter of law, be unreasonable." *Id.* at § 777-b (5)(c).

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owner still retains an “express limited warranty”⁶⁴ which must provide the same periods of warranty coverage as the housing merchant implied warranty,⁶⁵ and requires the builder to meet or exceed the applicable building code when constructing a home.⁶⁶ It does not repeal section 251 of the New York Real Property Law. Rather, however, its purpose is limited to conveyance of titles.⁶⁷

The Warranties on Sales of New Homes Act received almost unanimous support upon its introduction. Only the New York State Office of Business Permits and Regulatory Assistance expressed disapproval of the new bill.⁶⁸ It remarked that since the *Caceci* decision sufficiently recognized the housing merchant implied warranty, there was no need for additional legislation.⁶⁹

The New York State Assembly, expressing approval, noted the irony that a product costing as little as one dollar was entitled to complete warranty protection under the Uniform Commercial Code, while the purchase of a new home costing thousands of dollars was unprotected by any warranty provisions simply because it was labelled “realty.”⁷⁰ Of equal importance was the New York State Attorney General’s memorandum to the Governor, which was generally supportive of the bill.⁷¹ Although concerned by the

⁶⁴ *Id.* at § 777-b (3). The builder is mandated to attach to the contract or agreement a copy of the express terms of the limited warranty and furnish said appended document to the owner prior to its execution. *Id.* at § 777-b (3)(a), (b). The express terms of agreement shall prominently state that the limited warranty excludes or modifies the housing merchant implied warranty. *Id.* at § 777-b(3)(c).

⁶⁵ N.Y. GEN. BUS. LAW § 777-b(4)(g).

⁶⁶ *Id.* at § 777-b (4)(e)(i).

⁶⁷ Memorandum by New York State Assembly in Support of Bill No.: 770-A, found in Ch. 709 [1988] N.Y. Laws (Governor’s Bill Jacket).

⁶⁸ See Memorandum of the New York State Office of Business Permits and Regulatory Assistance, found in Ch. 709 [1988] N.Y. Laws (Governor’s Bill Jacket). The agency believed that rather than being a consumer protection device, the statute would allow “builders to limit their liability with respect to the construction of new homes containing latent material defects.” *Id.*

⁶⁹ *Id.*

⁷⁰ Compare Memorandum by New York State Assembly in Support of Bill No.: 770-A (memo on amended bill), found in Ch. 709 [1988] N.Y. Laws (Governor’s Bill Jacket) (purchasers of new homes receive “less warranty protection than purchasers of other consumer goods”) with U.C.C. § 2-105(1) (1977) (protections do not extend to realty) and Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, §§ 103-110, 15 U.S.C. § 2301 (1982) (federally created warranty protections extended to all sales of consumer goods and is inapplicable to realty transactions).

⁷¹ See State of New York, Department of Law, Memorandum for the Governor, found in

bill's failure to provide a mandatory warranty insurance program which would secure relief for the consumer in the event the builder became insolvent and to allow for specific private and public enforcement remedies, the Attorney General endorsed the bill as it advanced "significant and important new protections to new home buyers."⁷²

The New York State Consumer Protection Board was also supportive of the bill for two reasons. First, the language of the bill did not diminish the relief judicially granted by the *Caceci* decision.⁷³ Second, consumers would now be protected against boilerplate disclaimers made by builders, since the statute requires "clear and conspicuous" language in order to limit the housing merchant implied warranty.⁷⁴

The New York State Builders Association's concern that there would be as many interpretations of the *Caceci* decision as there are regulatory bodies in New York State prompted its support of this new law.⁷⁵ Because the home building industry represents a \$2.5 billion per year enterprise in New York,⁷⁶ the Association's support was crucial.

Ch. 709 [1988] N.Y. Laws (Governor's Bill Jacket). The memorandum sanctioned the "legislative recognition . . . of the existence of an implied 'housing merchant' quality warranty." *Id.* at 3. Moreover, it suggested similarities between the bill and the warranty provisions of the Uniform Commercial Code regarding limited warranties. *Id.*

⁷² *Id.* at 4.

⁷³ See Memorandum of the New York State Consumer Protection Board, Ch. 709 [1988] N.Y. Laws (Governor's Bill Jacket). The bill does not mandate that damages sought under the statute be the sole remedy available to the new homeowner. *Id.* Thus, the statutory provisions supplement common law right of action and furnished the owner with cumulative remedies. *Id.* at 2.

⁷⁴ *Id.* at 1.

⁷⁵ See Memorandum Re: Support of S. 5395-A, A. 770-B, New York State Builders' Association, Inc., Ch. 709 [1988] N.Y. Laws (Governor's Bill Jacket). While at first blush such an endorsement would appear to be highly improbable, it was, in fact, a pragmatic move by the Association. *Id.* The Association's backing came on the heels of the *Caceci* ruling, which the Association theorized left several open issues. *Id.* at 2. Concerned with the possibility of each municipality creating its own individualized warranties, the Association welcomed a uniform statewide building warranty. *Id.* at 3-4.

The Association voiced its concern with the failure of the court of appeals to define the terms "skillful manner" and "material defects." *Id.* at 2. It was believed that absent legislative intervention, debates on these terms' meanings would continue *ad infinitum* in the courts. Telephone interview with William Crowell, Legal Counsel for the New York State Builders Association (Oct. 25, 1988).

⁷⁶ *Id.*

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B. Other States' New Home Warranty Statutes

While a majority of states have judicially recognized some type of an "implied warranty of habitability or skillful construction" regarding new home sales,⁷⁷ only a handful have provided statutory safeguards.⁷⁸ New Jersey provides unique protection under its New Home Warranty and Builders' Registration Act.⁷⁹ Following a judgment for the owner, the Act reimburses him for the necessary repairs to his home.⁸⁰ The Act requires New Jersey builders to participate in some type of new home security fund,⁸¹ and the integrity of the Fund insures that a successful claimant will not go without redress.⁸²

Additionally, a national program known as the Home Owner's

⁷⁷ See *Caceci v. DiCano Constr. Corp.*, 72 N.Y.2d 52, 58, 526 N.E.2d 266, 268, 530 N.Y.S.2d 771, 773 (1988) (twenty-six states renounced use of *caveat emptor* in sales of homes substituting implied warranty theory). See also Note, *Another Look at the Implied Warranty of Habitability in North Carolina*, 64 N.C.L. REV. 869, 871 n.30 (1986) (thirty-nine states and District of Columbia have judicially adopted implied warranty of habitability in sales of new dwellings); Shedd, *supra* note 7 at 293 (substantial majority of states have embraced implied warranties as basis for their decisions).

⁷⁸ See CONN. GEN. STAT. ANN. § 47-116-118 (West 1986) (detail coverage and statutory time to bring action); MD. REAL PROP. CODE ANN. § 10-201 (1988) (detail coverage and statutory period); MINN. STAT. ANN. § 327A (West 1981 & Supp. 1989) (detail coverage which allows recovery for patent defects, and statutory period); N.J. STAT. ANN. § 46:3B (West Supp. 1988) (see *infra* notes 79-82 and accompanying text); VA. CODE ANN. § 55-70 (1986 & Supp. 1988) (detail coverage which allows recovery for patent defects, and statutory period); W. VA. CODE § 36B-4-113-116 (Supp. 1988) (same). See also Grand, *Implied and Statutory Warranties in the Sale of Real Estate: The Demise of Caveat Emptor*, 15 REAL EST. L.J. 44 (1986) (national survey of statutes and case law setting forth implied warranties of habitability and good workmanship in new home sales).

⁷⁹ N.J. STAT. ANN. § 46:3B (West Supp. 1988). This Act authorizes the Commissioner of the Department of Community Affairs to institute regulations prescribing procedures to be followed in claims brought against builders under the new home warranty security fund. *Id.* at § 46:3B-3.

⁸⁰ *Id.* at § 46:3B-7(c). The Fund was established to insure that owners of new homes requiring repairs ensuing from defects would be able to obtain remedial, compensatory relief in the event the builder "willfully refused" or was unable to make the necessary repairs. *Id.* at § 46:3B-7(a). The owner's decision to have an administrative hearing for recovery of damages constitutes an "election barring all other remedies." *Id.* at § 46:3B-9 (emphasis added).

⁸¹ *Id.* at §§ 46:3B-5, 3B-8. Participation in the Fund is mandatory and it is monitored under the auspices of the New Jersey State Treasurer. *Id.* at § 46:3B-7(a). The Act requires builders of dwellings within New Jersey to be registered with the Department of Community Affairs, and able to show proof of participation in the new home warranty security fund or some other approved program. *Id.* at § 46:3B-5. Once the owner alleges a breach of warranty and the parties have been unable to effectuate a remedy, the commissioner can step in. *Id.* at § 46:3B-6.

⁸² *Id.* at § 46:3B-7(c).

Warranty (HOW) program may furnish purchasers of newly built homes some type of relief.⁸³ The HOW program is a voluntary organization, established by the National Association of Home Builders.⁸⁴ Similar to the New Jersey Act, it allows builders to purchase a ten year "insurance policy" against defects.⁸⁵

It is interesting to note the resemblance among the New York and New Jersey warranty statutes and the HOW program. The language of both states' statutes appears to have been patterned after the language in the HOW program. However, there is one significant aspect of the HOW program and the New Jersey statute that is noticeably absent from the New York statute. Whereas HOW and the New Jersey statute have granted home owners new home warranty protection in the form of an insurance program, New York offers no such provision.⁸⁶

C. *Critical Comparisons*

While the Warranties on Sales of New Homes Act sought to address many of the issues raised by the "Housing Merchant" warranty enunciated in *Caceci*, it is suggested that the Act contains ambiguities likely to result in extensive litigation unless legislative amendment is effected.

Although the Act has supplied definitions for such terms as "constructed in a skillful manner" and "material defect", it is submitted that the statutory language is open to varying interpretations. For example, the statute has defined the phrase "constructed in a skillful manner" as that which complies with the applicable building code.⁸⁷ However, as noted by the New York State Builders Association, such codes do not necessarily provide a "relevant specific standard for construction . . . and may provide

⁸³ See Shedd, *supra* note 7, at 301-02 (description of ten year insurance plan bought for purchasers of new homes by builders against defects); K. HOLTZSCHUE, *supra* note 6, § 40.02[2] at 40-11 (same).

⁸⁴ K. HOLTZSCHUE, *supra* note 6, § 40.02[1] at 40-10.

⁸⁵ *Id.* The policy calls for the builder to remedy defects for the first and second years, with the policy paying for any repairs during the next eight years. *Id.*

⁸⁶ See State of New York, Department of Law, Memorandum for the Governor at 4, found in Ch. 709 [1988] N.Y. Laws (Governor's Bill Jacket) (criticism by Attorney General of New York's failure to incorporate insurance program similar to that of New Jersey).

⁸⁷ N.Y. GEN. BUS. LAW at § 777 (3).

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only a general or non-specific statement” to follow generally accepted trade practices.⁸⁸ The “material defect” definition, adopted from the HOW program’s policy interpretation of a “major structural defect,”⁸⁹ raises the issue of what is “unsafe” or “unliveable” within the meaning of the statute.⁹⁰ It is suggested that reasonable experts could differ as to whether a given defect renders a home unsafe, or uninhabitable, as well as which generally accepted trade practice is superior. Until these and similar ambiguities are eliminated, abuses by both vendors and purchasers are likely to result. It is proposed that purchasers, unsure of what a material defect is, may repeatedly ask the builder to make minor and non-material repairs to make the home “liveable,” in the mistaken belief that the builder is so required by the Act.⁹¹ Alternatively, the purchaser may not be cognizant of which generally accepted building practice is appropriate in a given construction situation and may unwittingly rely on the vendor’s opinion. In addition, the Act makes the presumption that the buyer is sophisticated and knowledgeable as to his rights therein. As a result, the buyer may unknowingly accept less than the statute provides.

Furthermore, the final version of the Act suggests that compromises were made, possibly to the New York State Builders Association, in return for their support of this bill. Of particular significance was the legislative decision to decrease the warranty period for material defects from ten to six years,⁹² and its removal

⁸⁸ Memorandum Re: Support of S. 5395-A, A. 770-B, New York State Builders Association, Inc., found in Ch. 709 [1988] N.Y. Laws (Governor’s Bill Jacket) at 4.

⁸⁹ See K. HOLTZSCHUE, *supra* note 6, § 40.02[2] at 40-12. The HOW program has interpreted a “major structural defect” as the “actual physical damage to the following designated load-bearing portions which affects their load-bearing functions to the extent that the home becomes unsafe, unsanitary or otherwise unliveable: 1. Foundation systems and footings; 2. Beams; 3. Girders; 4. Lintels; 5. Columns; 6. Walls and partitions; 7. Floor systems; and 8. Roof framing systems.” *Id.*

⁹⁰ N.Y. GEN. BUS. LAW at § 777 (4). Neither the Act nor the the HOW program define the severity of actual physical damage necessary to cause a home to become “unsafe, unsanitary or otherwise unliveable.” See *id.*; K. HOLTZSCHUE, *supra* note 6, § 40.02[2], at 40-12 (HOW program failed to stipulate how much actual physical damage is needed before it becomes “major structural defect”, thereby making home. “unsafe, unsanitary or otherwise unliveable.”).

⁹¹ See N.Y. GEN. BUS. LAW at § 777 (4) (defining “material defect”).

⁹² Memorandum by New York Assembly in Support of Bill No.: 770-A (memo on amended bill), found in Ch. 709 [1988] N.Y. Laws (Governor’s Bill Jacket), dated Sept. 1, 1988. Between September 1, 1988 and September 6, 1988 when the statute was enacted,

of an insurance warranty program.⁹³ Therefore, a new home owner receiving a favorable judgment may ultimately be the loser due to an inability to recover damages from an insolvent builder.

Finally, it is submitted that courts may come to view the protection afforded owners under *Caceci* as obsolete, in light of the protection found within the Act. The *Caceci* court based recovery on the "reasonable expectations" of homeowners, rather than on a set time period in which to bring a claim.⁹⁴ A lower court has recently suggested, however, that the Act's remedies would not coexist with the common law approach, and would instead become the exclusive relief available to purchasers.⁹⁵ Yet, the statute does not suggest that it is the exclusive remedy and in fact its legislative history suggest the contrary.⁹⁶ It is submitted that subse-

the Assembly reduced the coverage period for protection against structural defects.

⁹³ Compare Memorandum by New York State Assembly in Support of Bill No. 770-A (memo on original draft of bill), found in Ch. 709 [1988] N.Y. Laws (Governor's Bill Jacket) (inclusion of insurance fund for owners of new homes) with Memorandum by New York State Assembly in Support of Bill No. 770-A (memo on amended bill), found in Ch. 709 [1988] N.Y. Laws (Governor's Bill Jacket) (no mention of insurance fund for new home purchasers). Mr. Crowell, counsel for New York State Builders Association viewed the elimination of insurance provision as representing no real harm to homeowner. Telephone interview with William Crowell, Legal Counsel for the New York State Builders' Association (Oct. 25, 1988). He indicated it was unnecessary to impose a state insurance program because of availability of insurance coverage under HOW program. *Id.* Although the HOW program is a legitimate and viable alternative for insurance coverage, enrollment is voluntary, and unless the purchaser requests the builder to obtain insurance under this program, none will be supplied. See *When Dream Homes Turn Into Nightmares*, U.S. NEWS AND WORLD REP., at 43, 44-45 (Dec. 11, 1978) (describing the effectiveness of the HOW program in procuring relief for the homeowner without undue hardship); Seib, *Raising the Roof: Buyers of New Homes Find Shoddiness, Flaws are Growing Problems*, Wall Street Journal, Sept. 28, 1979, at 1, 25, col. 6, 1 (same). But see New Jersey's New Home Warranty and Builders' Registration Act, N.J. STAT. ANN. § 46:3B-3 (West 1988). The New Jersey Act differs from the New York Warranties on Sales of New Homes Act in that it establishes a fund to secure owner's claims for defects and provides ten years of protection against damage resulting from "major construction defects" compared to the six year provision under the New York Act. Compare N.J. STAT. ANN. at § 46:3B-3(b)(3) with N.Y. GEN. BUS. LAW at § 777-a (1)(c).

⁹⁴ *Caceci v. DiCanio Constr. Corp.*, 72 N.Y.2d 52, 60-61, 526 N.E.2d 266, 270, 530 N.Y.S.2d 771, 775 (1988).

⁹⁵ See *Vento v. Honeybee Homes Inc.*, 141 Misc. 2d 997, 998-99, 535 N.Y.S.2d 344, 345 (N.Y.C. Civ. Ct. Richmond County 1988) (inference drawn by court that litigation arising from new home sale contracts entered into after March 1, 1989 would be subject to statute of limitations periods as set forth in the Act).

⁹⁶ See Memorandum of the New York State Consumer Protection Board, Ch. 709 [1988] N.Y. Laws (Governor's Bill Jacket) at 2. The Board noted that the legislature did not declare the housing merchant implied warranty to be the sole relief available to a claimant. *Id.* Since it appears that the legislature's intent was not to deprive a party of the common

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quent courts guard against similarly restricting a purchaser's rights against a builder contrary to the spirit of the Act.

CONCLUSION

The ability of an individual to secure the quality of workmanship bargained for in the purchase of a new home was, until recently, subject to judicial interpretation of the express contract between the vendor and purchaser. Presently, New York citizens have implicit in every sales contract for a new home certain warranties as to the habitability and skill of the work performed, as a matter of law. Yet the euphoric picture painted by the sponsors and supporters of this new law is not without its flaws. At the very least, however, a homeowner has been placed in an equal bargaining position with a vendor. Moreover, he is now better able to hold a builder to his word.

Nancy B. Burlingame

law protection prescribed in *Cacaci*, the general rule then is to treat the statutory relief as supplementing and not excluding the common law remedy. *Id.*

