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LATENT DEFECTS IN HOME CONSTRUCTION: THE
ILLINOIS SUPREME COURT REDEFINES LEGAL
OPTIONS FOR THE SUBSEQUENT
PURCHASER

Redarowicz v. Ohlendorf,
92 Ill. 2d 171, 441 N.E. 2d 324 (1982)

LAWRENCE R. PILON, 1984*

"He that builds a fair house upon an ill seat committeth himself to prison." Francis Bacon, *ESSAYS* (1625)

In the time between Francis Bacon's admonition and the early part of the twentieth century, the remedies available in contract law for actions by a home's initial purchaser against the builder-vendor for latent construction defects became substantially limited by the doctrines of *caveat emptor*,¹ substantial performance,² and merger.³ Underlying

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1. "Let the buyer beware. This maxim summarizes the rule that a purchaser must examine, judge, and test for himself." *BLACK'S LAW DICTIONARY* 202 (5th ed. 1979). See, e.g., *Mercer v. Meinel*, 290 Ill. 395, 125 N.E. 288 (1919). The doctrine of *caveat emptor* prevented the buyer from complaining after the sale that an item did not meet the buyer's standards, because the buyer had been given the opportunity to inspect the item prior to purchase. The doctrine was generally applied to the sale of finished homes, although a minority of jurisdictions followed the English lead in *Miller v Cannon Hill Estates, Ltd.*, 2 K.B. 113 (1931), and allowed an exception for a contract on an unfinished home sometimes known as the *Miller* exception. See, e.g., *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958). For a general discussion of *caveat emptor's* application in sales of homes, see Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 *VAND. L. REV.* 541 (1961)(hereinafter cited as Bearman); Jaeger, *The Warranty of Habitability, Part II*, 47 *CHI.-KENT L. REV.* 1, 29-31 (1970)(hereinafter cited as Jaeger II); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 *CORNELL L.Q.* 835, 835-837 (1967)(hereinafter cited as Roberts). For a history of the doctrines development as the product of nineteenth-century judicial laissez-faire, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 *YALE L.J.* 1133, 1178-1187 (1931).

2. "Honestly and faithfully" performed "material and substantial" particulars, but with "technical or unimportant omissions or defects." *BLACK'S LAW DICTIONARY* 1281 (5th ed. 1979). The contract doctrine of substantial performance protects a party who has failed to perform a constructive condition to the contract, but not to an extent so as to be considered a *material* breach of the contract. The party failing to perform in this way is still considered to be in breach of the contract and liable for damages which flow therefrom. However, the party is protected from the possibility of cancellation of the contract and retention of the (immaterially flawed) property which could otherwise flow from a failure of a condition. See *RESTATEMENT (SECOND) OF CONTRACTS* §§ 235-241 (1981), *CALAMARI & PERILLO, THE LAW OF CONTRACTS*, §§ 11-22 (2d ed. 1977). The doctrine has found important application in building contracts because of the perceived inequity of allowing the buyer to default on payment, while retaining possession of the building, because of the builder's "technical or unimportant omissions or defects." See, e.g., *Joray Mason Contractors, Inc. v. Four J's Constr. Corp.*, 61 Ill. App. 3d 410, 378 N.E.2d 328 (2d Dist.

these doctrines in part was the "ethic of self-reliance," *i.e.*, the attitude that the builder-vendor and the initial purchaser dealt with each other at arm's length as equally knowledgeable, capable business partners who could adequately protect their respective interests in the bargain. The initial purchaser's protection from defective construction was expected to come more from his or her own knowledge, experience, and self-interest than from the courts.⁴

The subsequent purchaser of a defectively constructed home who desired to recover against the builder for latent construction defects stood in an even weaker legal position than the initial purchaser. The builder, whose construction techniques created or incorporated the latent defect, was no longer the vendor. Thus, the subsequent purchaser could not show privity of contract with the builder,⁵ and this lack of contractual privity generally blocked recovery in contract law.⁶ To circumvent the privity problem, the subsequent purchaser often turned to tort theories of recovery, particularly negligence.⁷ However, recovery in negligence carried its own obstacles. A number of courts found that the builder owed no duty of reasonable care to subsequent purchasers.⁸

1978); *J-M Builders & Supplies Corp. v. McIntyre*, 56 Ill. App. 3d 714, 372 N.E.2d 420 (2d Dist. 1978); *Brink v. Hayes Branch Drainage Dist.*, 59 Ill. App. 3d 828, 376 N.E.2d 78 (4th Dist. 1978). *Cf.* *Petersen v. Hubschman Constr. Co.*, 53 Ill. App. 3d 626, 368 N.E.2d 1044 (2d Dist. 1977), *aff'd*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979)(builder did not substantially perform and thus had no right to insist that buyer perform); *Brewer v. Custom Builders Corp.*, 42 Ill. App. 3d 668, 356 N.E.2d 565 (5th Dist. 1976).

3. Under the law of real property doctrine of merger, all conditions in the sales contract (such as an implied warranty of a home's fitness) are considered merged into the deed when the deed is executed. Thus a condition does not survive as an independent promise after the deed's execution unless expressly made as a collateral undertaking. This would exclude implied conditions such as an implied warranty of fitness or habitability. *See, e.g.*, *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979), *aff'g*, 53 Ill. App. 3d 626, 368 N.E.2d 1044 (2d Dist. 1977); *Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (3d Dist. 1963), *aff'd*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964). *See generally* Jaeger II, *supra* note 1, at 28-29.

4. *See* CALAMARI & PERILLO, *THE LAW OF CONTRACTS*, § 10-1, at 348 (2d ed. 1977). The harsh effect of all of these doctrines is discussed in some detail by the Illinois Supreme Court in *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

5. *See, e.g.*, *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 105 Ill. App. 3d 951, 435 N.E.2d 210 (2d Dist. 1982); *Kramp v. Showcase Builders*, 97 Ill. App. 3d 17, 422 N.E.2d 958 (2d Dist. 1981); *Mellander v. Killeen*, 86 Ill. App. 3d 213, 407 N.E.2d 1137 (4th Dist. 1980).

6. Attempts to recover in contract without privity between the builder and the subsequent purchaser typically argued the subsequent purchaser as a third-party beneficiary to the contract between the builder and the initial purchaser. *See, e.g.*, *Waterford Condominium Ass'n v. Dunbar Corp.*, 104 Ill. App. 3d 371, 432 N.E.2d 1009 (1st Dist. 1982); *Altevogt v. Brinkoetter*, 85 Ill. 2d 44, 421 N.E.2d 182 (1981); *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

7. *See, e.g.*, *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 105 Ill. App. 3d 951, 435 N.E.2d 210 (2d Dist. 1982); *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. Dist. Ct. App. 1981); *Steinberg v. Coda Roberson Constr. Co.*, 79 N.M. 123, 440 P.2d 798 (1968).

8. *See, e.g.*, *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 105 Ill. App. 3d at 957-58, 435 N.E.2d at 214-15; *Redarowicz v. Ohlendorf*, 95 Ill. App. 3d 444, 447, 420 N.E.2d

Even if a duty was found to exist, there were serious evidentiary problems associated with establishing the builder's breach of duty.⁹ Moreover, because the builder's work had been completed and accepted by both the initial and subsequent purchasers, the accepted work doctrine¹⁰ could block the subsequent purchaser's recovery against the builder in negligence. The subsequent purchaser could of course sue the initial purchaser and let the initial purchaser bring an action against the builder-vendor, but in practice the initial purchaser often proved an unsuitable defendant.¹¹ The initial purchaser was a non-commercial seller who was even less likely than the builder to have known of latent construction defects. If brought into court, the initial purchaser, like the builder, found the court quick to invoke the *caveat emptor* and doctrine of merger protections, and unwilling to find implied warranties.¹²

Post-World War II changes in home construction and sales methods brought new changes in the courts' traditional approaches to actions against the builder-vendor for construction defects.¹³ The development of the mass-produced, tract-style home, with its concomitant subdivision development marketing techniques based on models and standard designs, made the law of products sales and products lia-

209, 211 (4th Dist. 1981) *aff'd in part, rev'd in part*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982). The *Foxcroft* court rejected an alleged duty "to build in a reasonably workmanlike manner" owing to future owners of the home as an attempt to recast a contract action into one in negligence so as to avoid a dismissal for lack of privity. The *Redarowicz* appellate court decision is discussed *infra* in text accompanying notes 72-80.

9. See, e.g., *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978) ("Often the only proof will be by inference from the result — a difficult problem where, as will often be the case, many parties may be involved in design, providing materials and construction.") *Id.* at 882.

10. The accepted work doctrine relieves an independent contractor from tort liability for completed work which has been accepted by the purchaser of the independent contractor's work. See *Redarowicz*, 95 Ill. App. 3d at 450-51, 420 N.E.2d at 213, reviewing the development of the doctrine in Illinois courts.

11. See Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965) (hereinafter cited as Haskell). For a discussion of the problem in the products liability area created by requiring the subsequent purchasers to sue down the privity "chain," i.e., consumer, to retailer, to wholesaler, to manufacturer, see Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1117 (1960) (hereinafter referred to as *The Assault upon the Citadel*); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799-800 (1966) (hereinafter referred to as *The Fall of the Citadel*).

12. See generally Haskell, *supra* note 11.

13. "We consider that there are no meaningful distinctions between . . . mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same." *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90, 207 A.2d 314, 325 (1965). *Accord* *Inman v. Binghamton Hous. Auth.*, 1 A.D. 2d 559, 152 N.Y.S. 2d 79 (1956) (dictum that architects and builders should be held to the same standard as automobile manufacturers per *MacPherson v. Buick Motor Co.*), *rev'd on other grounds* 3 N.Y. 2d 137, 164 N.Y.S. 2d 699 (1957); *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 36, 389 N.E.2d 1154, 1158 (1979). See generally, *Bearman, supra* note 1, at 542-43.

bility appear more appropriate in this setting than it had in the past.¹⁴ The pivotal Illinois case in this regard came in 1979 with the Illinois Supreme Court's decision in *Petersen v. Hubschman Construction Co.*¹⁵ The *Petersen* decision recognized an implied warranty of habitability in the sale of a new home, running from the builder-vendor to the purchaser, whereby the builder impliedly covenanted that the home was free from latent defects which would render the home not reasonably suited for its intended use.¹⁶ In so holding, the *Petersen* court triggered a period of reappraisal in the Illinois courts of the policies and assumptions underlying the law of the housing market.¹⁷

The result of this reappraisal has been both an expansion and a reordering of the legal options in contract and in negligence available to both initial and subsequent purchasers of defective homes in suits against builders. In *Redarowicz v. Ohlendorf*,¹⁸ the Illinois Supreme Court addressed diverging decisions in the appellate courts and announced fundamental changes in the way that Illinois courts will now deal with construction defect litigation brought by purchasers against builders under contract and tort theories. The *Redarowicz* decision abandons the privity requirement for actions based on an implied warranty of habitability and thus extends recovery under this theory to subsequent purchasers. At the same time, however, the *Redarowicz* decision bars actions in tort for home buyers who allege damages which can be characterized as solely "economic loss."¹⁹

This case comment will first review the shift in recovery options available to the home buyer on an implied warranty of habitability theory and in negligence after *Petersen*. It will then analyze the *Redarowicz* decision and its likely impact on future litigation in Illinois

14. See generally, Roberts, *supra* note 1; Bearman, *supra* note 1; Roeser, *The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois*, 1978 S. ILL. U. L.J. 178 (hereinafter referred to as Roeser).

15. 76 Ill. 2d 31, 389 N.E.2d 1154 (1979), *aff'g* 53 Ill. App. 3d 626, 368 N.E.2d 1044 (2d Dist. 1977).

16. *Id.* at 40-42, 389 N.E.2d at 1158-59.

17. The *Petersen* decision has been cited in nearly two dozen Illinois appellate and supreme court decisions involving actions against builders for recovery on an implied warranty of habitability. It continues to be the Illinois courts' starting point for analysis of the implied warranty in the sale of residential property. See, e.g., *Redarowicz v. Ohlendorf*, 92 Ill. 2d at 181-82, 441 N.E.2d at 329.

18. 92 Ill. 2d 171, 441 N.E.2d 324 (1982), *rev'g in part, aff'g in part* 95 Ill. App. 3d 444, 420 N.E.2d 209 (4th Dist. 1981).

19. "Economic loss" in products liability cases is that damage which can be characterized as loss of "benefit of the bargain" such as repair costs or diminution of value. It does not include damages through personal injury, or accidental damage to other property, which is attributable to the product's defect. See, e.g., *Redarowicz* 92 Ill. 2d at 177, 441 N.E.2d at 327 (1982); *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443, 449 (1982).

over home construction defects. It will conclude that the *Redarowicz* expansion of the implied warranty of habitability brings a needed, although not necessarily most appropriate, cause of action to the subsequent purchaser, but does so in a way which leaves a number of important questions unanswered. It will further conclude that the "economic loss" limitation placed by the *Redarowicz* court on negligence actions brings an unclear, inappropriate, and unnecessary doctrine into the law of real property. The result will be an arbitrary application of questionably appropriate contract law, an unnecessary pleading limitation for homeowners, and a potential problem for Illinois' small-time investment property owners.

THE IMPLIED WARRANTY OF HABITABILITY

From Petersen to Redarowicz

The Illinois Supreme Court's 1979 decision in *Petersen v. Hubschman Construction Co.* established the general outline of the implied warranty of habitability²⁰ applicable to the sale of a single-family home from a builder-vendor to the original purchaser.²¹ Plaintiff Petersen contracted with the defendant construction company for the sale of a piece of land and the construction of a home on the land, and furnished a deposit. The home proved to be seriously flawed. The defects included an improperly pitched basement, improperly installed siding, and numerous other defects which rendered the home habitable but undesirable. Petersen refused to accept the home and sued for the return of the deposit. The trial and appellate courts found that the builder had not substantially performed and held for Petersen. The Illinois Supreme Court upheld the lower court decisions, but not because the builder had not substantially performed. Rather, the *Peter-*

20. Prior to the *Petersen* decision in the Illinois Supreme Court, an implied warranty of fitness or habitability in the sale of a home had already been allowed in the appellate courts of three Illinois districts. See *Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962); *Hanavan v. Dye*, 4 Ill. App. 3d 576, 281 N.E.2d 398 (3d Dist. 1972); *Garcia v. Hynes & Howes Real Estate, Inc.*, 29 Ill. App. 3d 479, 331 N.E.2d 634 (3d Dist. 1975); *Conyers v. Molloy*, 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977); *Goggin v. Fox Valley Constr. Corp.*, 48 Ill. App. 3d 103, 365 N.E.2d 509 (1st Dist. 1977). The implied warranty of habitability had been rejected in one district. See *Narup v. Higgins*, 51 Ill. App. 2d 102, 200 N.E.2d 922 (5th Dist. 1964). The *Petersen* decision itself had been decided for the buyer at the appellate court level on the basis of the builder's failure to substantially perform, with no mention of an implied warranty of fitness or habitability. See *Petersen v. Hubschman Constr. Co.*, 53 Ill. App. 3d 626, 368 N.E.2d 1044 (2d Dist. 1977), *aff'd* 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

21. The *Petersen* case involved a contract to build the home rather than a contract to sell it, and thus could have invoked the *Miller* exception, see *supra* note 1. However, this distinction was not discussed in later Illinois cases. For a discussion of the anomolous results based on this distinction, see Bearman, *supra* note 1, at 545-47.

sen court found that an implied warranty protected the purchaser against latent defects which made the home not reasonably suitable for its intended use.²² The implied warranty arose out of the purchase contract as an independent undertaking between the buyer and the seller which was not merged into the deed,²³ and operated in a way analogous to the Uniform Commercial Code's warranty of merchantability,²⁴ and warranty of fitness for a particular purpose.²⁵

The *Petersen* court cited *Jack Spring, Inc. v. Little*,²⁶ where an implied warranty of habitability was first recognized in Illinois in a landlord-tenant setting, but did not place its reliance solely on this case or the number of decisions in other states which had already found an implied warranty of habitability in the sale of new homes.²⁷ The court noted as well the widespread approval among the commentators for the implied warranty of habitability as the most appropriate means of curing the injustices that *caveat emptor* and the doctrine of merger created for the home buyer.²⁸ In the *Petersen* court's view, significant changes in the housing industry had taken place which now made the applica-

22. 76 Ill. 2d at 40, 389 N.E.2d at 1158. The latent defects complained of in *Petersen* included an improperly pitched basement floor and improperly installed siding, windows, door, and interior drywall. *Id.* at 36, 389 N.E.2d at 1156.

23. *Id.* at 41, 389 N.E.2d at 1158, citing *Brownell v. Quinn*, 47 Ill. App. 2d 206, 197 N.E.2d 721 (1st Dist. 1964)(an express covenant to construct in a workmanlike manner does not merge into the deed).

24. ILL. REV. STAT. ch. 26, para. 2-314 (1977), providing in pertinent part:

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale . . .

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) . . .

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) . . .

(f) . . .

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

25. ILL. REV. STAT. ch. 26, para. 2-315 (1977) providing in pertinent part:

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

26. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

27. Cases from England and fifteen U.S. states supporting an implied warranty of fitness or habitability in the sale of residential property were collected in Annot., 25 A.L.R. 3d 383, 413-25 (1969) cited by the *Petersen* court. The 1982 supplement to this annotation has added fifteen new U.S. states.

28. 76 Ill. 2d at 38-39, 389 N.E.2d at 1157 citing *Roeser*, *supra* note 14; *Bearman*, *supra* note 1; *Roberts*, *supra* note 1; *Haskell*, *supra* note 11; *Jaeger*, *The Warranty of Habitability, Part I*, 46 CHI.-KENT L. REV. 123 (1969); *Jaeger II*, *supra* note 1. See also Comment, *Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute*, 54 WASH. L. REV. 185 (1978).

tion of *caveat emptor* and the doctrine of merger unfair to the home buyer.²⁹ The modern home buyer often bought from model homes or pre-drawn plans with neither the knowledge nor the opportunity to intelligently inspect construction. The buyer was thus obliged to rely on the builder's integrity and skill. Furthermore, the modern home builder had become a "mass producer" of a product held out to the public as reasonably fit for use as a home. The *Petersen* court concluded that the law of sales now provided the more appropriate legal guidelines for disputes over latent defects in the builder's "product," and an implied warranty of habitability was an appropriate buyer protection.³⁰

Having now received the Illinois Supreme Court's approval of the implied warranty of habitability in the sale of homes, the Illinois appellate courts quickly expanded the implied warranty's protection for the original purchaser. Condominiums³¹ and condominium common areas³² were found to be covered, as were leased single-family homes.³³ Developer-sellers were found to be potentially subject to the implied warranty,³⁴ as were part-time "one-home-at-a-time" builders.³⁵ "Latent defects" were found to include violations of building setback restrictions³⁶ and septic system installation in improper soil conditions.³⁷

Subsequent purchasers of defectively constructed homes, however, were denied this remedy in their suits against the builder. The *Petersen* court had found the implied warranty to arise out of the builder's sales contract,³⁸ but the subsequent purchaser could show no privity with the builder. Expanding the warranty's coverage to include the subsequent purchaser would thus require dropping what was viewed as a funda-

29. 76 Ill. 2d at 39-40, 389 N.E.2d at 1157-58.

30. *Id.* at 41-42, 389 N.E.2d at 1158-59. The *Petersen* court expressly left open questions of how the warranty was to be applied after delivery of deed, and its applicability when the home is built on the buyer's land for another not in privity with the builder, as when a home is built for resale by a developer. *Id.* at 44, 389 N.E.2d at 1160.

31. *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 410 N.E.2d 902 (1st Dist. 1980).

32. *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1st Dist. 1980).

33. *Pole Realty Co. v. Sorrells*, 84 Ill. 2d 178, 417 N.E.2d 1297 (1981), *rev'g in part, aff'g in part* 78 Ill. App. 3d 361, 397 N.E.2d 539 (1st Dist. 1979).

34. *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 410 N.E.2d 902 (1st Dist. 1980).

35. *Park v. Sohn*, 90 Ill. App. 3d 794, 414 N.E.2d 1 (3d Dist. 1980), *aff'd in part, rev'd in part*, 89 Ill. 2d 453, 433 N.E.2d 651 (1982).

36. *Id.*

37. *Kramp v. Showcase Builders*, 97 Ill. App. 3d 17, 422 N.E.2d 958 (2d Dist. 1981). The *Kramp* decision distinguished pre-*Petersen* decisions in *Conyers v. Molloy*, 50 Ill. App. 3d 17, 364 N.E.2d 986 (4th Dist. 1977), and *Witty v. Schramm*, 62 Ill. App. 3d 185, 379 N.E.2d 333 (3d Dist. 1978), where soil conditions were not held covered by an implied warranty of habitability, as not in keeping with the rationale and spirit of the Illinois Supreme Court's subsequent decision in *Petersen*.

38. *See supra* text accompanying note 23.

mental requirement to recovery in contract and this expansion was refused whenever the issue was presented.³⁹

THE ECONOMIC LOSS DOCTRINE

While homeowner protections against latent construction defects were generally being expanded in the wake of *Petersen* under the implied warranty of habitability, protection under a negligence theory was being restricted. Borrowing a doctrine developed in the products liability area,⁴⁰ Illinois appellate courts barred recovery in negligence for purchasers who had sustained solely "economic loss," i.e., repair costs or diminution of the home's value with no accompanying personal injury or damage to other (e.g. personal) property.⁴¹

The New Jersey and California supreme courts had established the essential arguments over the economic loss doctrine in *Santor v. A. and M. Karagheusian, Inc.*⁴² and *Seely v. White Motor Co.*⁴³ In *Santor* the plaintiff purchased carpeting, manufactured by the defendant, from a third-party distributor. The carpeting later developed unsightly lines due to defective manufacture, and the plaintiff sued under an implied warranty theory. The New Jersey Supreme Court allowed the action in spite of a lack of privity between the parties, and noted in dicta that another alternative would have been to sue under strict liability in tort theory. This theory had been found to apply where a defective product caused personal injury or damage to other property, and there was no reason why the manufacturer's responsibility should be any different because the only damage was to the product sold.⁴⁴

In *Seely* the plaintiff had purchased a truck, manufactured by the defendant, from a third-party dealer. The truck was involved in an accident caused by defective brakes, but there was no personal injury.

39. See *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 105 Ill. App. 3d 951, 435 N.E.2d 210 (2d Dist. 1982); *Mellander v. Killeen*, 86 Ill. App. 3d 213, 407 N.E.2d 1137 (4th Dist. 1980). The question of an implied warranty of habitability as protection for a subsequent purchaser was expressly left open by the court in *Altevogt v. Brinkoetter & Co.*, 81 Ill. App. 3d 711, 401 N.E.2d 1302 (4th Dist. 1980). The *Altevogt* implied warranty of habitability count was held barred by the statute of limitations on appeal to the Illinois Supreme Court in *Altevogt v. Brinkoetter*, 85 Ill. 2d 44, 421 N.E.2d 182 (1981), thus the Illinois Supreme Court did not get to the question of the implied warranty's possible extension to subsequent purchasers.

40. See generally Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966). (hereinafter referred to as *Economic Loss*).

41. See, e.g., *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 105 Ill. App. 3d 951, 435 N.E.2d 210 (2d Dist. 1982); *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1st Dist. 1980).

42. 44 N.J. 52, 207 A.2d 305 (1965).

43. 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

44. 44 N.J. at 66, 207 A.2d at 312.

The plaintiff sued under an express warranty theory to recover for the cost of repair and replacement, and lost profits.⁴⁵ The California Supreme Court allowed recovery on the warranty, and noted in dicta that in the absence of physical injury, recovery would not be possible under a strict liability in tort theory. The court criticized the *Santor* decision, noting:

The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He *can* appropriately be held liable [in tort] for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He *cannot* be held [in tort] for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands.⁴⁶

The *Seely* court found contract law's provisions appropriate for dealing with the ordinary commercial risks and economic expectations of the parties in a commercial transaction. Tort law made the manufacturer an insurer, which was appropriate for risks of personal injury but not for commercial risks and economic expectations.⁴⁷

The *Santor-Seely* debate was soon taken up by the Illinois appellate courts. The economic loss doctrine was explicitly considered in Illinois for the first time in 1977 by the second district in *Alfred N. Koplín & Co. v. Chrysler Corp.*⁴⁸ In *Koplín*, the plaintiff Koplín purchased air conditioning units, manufactured by defendant Chrysler, for its place of business. When the air conditioning units failed, Koplín sued for recovery of its repair and replacement costs under breach of warranty and negligence theories.⁴⁹ The second district found that recovery for breach of warranty was blocked by an effective warranty disclaimer, and recovery for negligence was blocked by the economic loss doctrine.⁵⁰ The *Koplín* court agreed with the California Supreme Court's economic loss rationale in *Seely*, and concluded that contract law was inherently better suited to deal with the risk of economic loss,⁵¹

45. 63 Cal. 2d at 12-13, 45 Cal. Rptr. at 19-20, 403 P.2d at 147-48.

46. *Id.* at 18, 45 Cal. Rptr. at 23, 403 P.2d at 151 (emphasis added).

47. *Id.* at 19, 45 Cal. Rptr. at 24, 403 P.2d at 152.

48. 49 Ill. App. 3d 194, 364 N.E.2d 100 (2d Dist. 1977).

49. *Id.* at 195-96, 364 N.E.2d 101-02.

50. *Id.* at 197, 204, 364 N.E.2d at 102, 107.

51. *Id.* at 197-202, 364 N.E.2d at 102-05, relying on *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965) ("A consumer should not be charged at the will of the manu-

and had damage provisions that were more appropriate for bargain situations.⁵² Allowing negligence actions to be brought by the buyer for loss of the "benefit of the bargain" could result in an undesirable excess of litigation and exposure of the vendor to an unreasonably high and unforeseeable level of liability, which would unjustifiably increase prices for all consumers.⁵³

However, the Appellate Court of Illinois for the Fourth District rejected the "economic loss" limitation on tort actions with its 1980 decision in *Moorman Manufacturing Co. v. National Tank Co.*⁵⁴ In *Moorman*, the plaintiff feed processor purchased from the manufacturer a grain storage tank which developed a crack some ten years later.⁵⁵ The feed processor filed a complaint alleging liability for the defective tank based on strict liability in tort, misrepresentation, and negligence, but all three of these tort counts had been dismissed by the trial court because of the economic loss doctrine.⁵⁶

In rejecting the economic loss limitation to recovery in tort, the appellate court took the New Jersey Supreme Court's *Santor* approach, noting the doctrine's inconsistent result when identical plaintiffs, with identically defective products, incurred different injuries.⁵⁷ If one of

facturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations . . . "). The California Supreme Court's decision in *Seely* (opinion by Justice Traynor) is widely cited in support of the economic loss doctrine. See, e.g., *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981); *Pittway Corp. v. Lockheed Aircraft Corp.*, 641 F.2d 524 (7th Cir. 1981); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980); *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. 1973).

52. Damages in contract are limited to those which were foreseen or reasonably foreseeable to the defendant at the time that the contract was made. This is often referred to as the "Rule of *Hadley v. Baxendale*" after the 1854 English case by that name, 156 Eng. Rep. 145 (1854). See CALAMARI & PERILLO, *THE LAW OF CONTRACTS*, § 14-5 (2d ed. 1977). Furthermore, punitive damages are generally not granted in contract actions. See CALAMARI & PERILLO, *THE LAW OF CONTRACTS*, § 14-3 (2d ed. 1977). Neither of these limitations on recovery apply to tort actions. See PROSSER, *THE LAW OF TORTS*, § 92 at 619-20 (1971).

53. Allowing recovery in tort for solely economic loss "in no way justifies requiring the consuming public to pay more for their products so that a manufacturer can insure against the possibility that some of his products will not meet the business needs of some of his customers." 49 Ill. App. 3d at 203, 364 N.E.2d at 105, citing, *Seely v. White Motor Co.*, 63 Cal. 2d at 19, 45 Cal. Rptr. at 24, 403 P.2d at 152.

54. 92 Ill. App. 3d 136, 414 N.E.2d 1302 (4th Dist.1980), modified, 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

55. 92 Ill. App. 3d at 136-37, 414 N.E.2d at 1304.

56. *Id.* The plaintiff was permitted by the trial court to amend its complaint to include a fourth count alleging breach of an express warranty. This count survived a motion to dismiss as barred by the statute of limitations (four years, see ILL. REV. STAT. ch. 26, par. 2-725 (1977)) because the trial court found the warranty to have been extended to future performance of the tank. *Id.*

57. "[W]e reject out of hand the hollow distinction that would allow a buyer to recover the value of an air conditioner in strict liability in tort if it has damaged his premises by leaking (citation omitted) but deny recovery if the air conditioner has failed to cool the premises. (citation

these plaintiffs incurred personal injury or additional property damage as a result of the product's defect, recovery could be had in tort with its relatively liberal allowance for damages. If the other of these plaintiff's was "fortunate" enough to escape personal injury and additional property damage, the economic loss doctrine would bar recovery in tort. This plaintiff would be obliged to seek recovery in contract with its stricter limitation of damages to those which were foreseen or reasonably foreseeable at the time of the sale. Thus, the economic loss doctrine unfairly penalized the injury-minimizing plaintiff.⁵⁸

The fourth district's *Moorman* decision was appealed to the Illinois Supreme Court where it was reversed on the question of the economic loss doctrine's applicability in Illinois courts.⁵⁹ In his majority opinion for the supreme court, Justice Moran followed *Seely* and found a logical and reasonable rationale behind the doctrine which justified its use in product liability cases such as this one. He reasoned that contract and tort law were each particularly appropriate for the protection of particular interests. Contract law was suited to the protection of the plaintiff's economic expectations, whereas tort law was suited to the protection of the plaintiff from an unreasonable risk of harm.⁶⁰ Furthermore, the two bodies of law differed in their provisions for risk allocation, with contract law providing the appropriate mechanisms for allocating economic risk, and tort law providing the appropriate mechanisms for allocating risk of accidental physical harm or property damage.⁶¹ Contract law protected the seller from liability that tort law would permit for the unforeseeable damages of subsequent purchasers.⁶² Tort law would not allow a producer to limit or disclaim its own liability, but contract law allowed for both limitations and disclaimers,

omitted)" *Id.* at 142-43, 414 N.E.2d at 1308, citing *Admiral Oasis Hotel Corp. v. Home Gas Indus., Inc.*, 68 Ill. App. 2d 297, 216 N.E.2d 282 (1st Dist. 1965); *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill. App. 3d 194, 364 N.E.2d 100 (2d Dist. 1977).

58. 92 Ill. App. 3d at 141, 414 N.E.2d at 1307.

59. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

60. *Id.* at 80-81, 435 N.E.2d at 448.

61. *Id.* The court took particular note of sections of the Uniform Commercial Code as enacted by Illinois governing parol evidence (ILL. REV. STAT. ch. 26, par. 2-202 (1977)), express warranties (ILL. REV. STAT. ch. 26, par. 2-213 (1977)), implied warranties (ILL. REV. STAT. ch. 26, par. 2-314 (1977)), disclaimers, (ILL. REV. STAT. ch. 26, par. 2-316 (1977)), notice requirements on discovery of breach, (ILL. REV. STAT. ch. 26, par. 2-607 (1977)), limitations on the extent of liability (ILL. REV. STAT. ch. 26, pars. 2-718, 2-719 (1977)), and the statute of limitations (ILL. REV. STAT. ch. 26, par. 2-725 (1977)).

62. If a defendant were held strictly liable in tort for the commercial loss suffered by a particular purchaser, it would be liable for business losses of other purchasers caused by the failure of the product to meet the specific needs of their business, even though these needs were communicated only to the dealer.

91 Ill. 2d at 79, 435 N.E.2d at 447; see also, *id.* at 88, 435 N.E.2d at 451 (applying same argument in negligence analysis).

and encouraged contracting parties to bargain over warranties.⁶³ Thus the effect of allowing suits in tort for solely economic loss would be to eviscerate these provisions in the comprehensive commercial law scheme.⁶⁴

For the initial purchaser of a defectively constructed home, *Moorman's* limitation on recovery in negligence was compensated for by the expanded opportunities under the *Petersen* implied warranty of habitability. For the subsequent purchaser, however, the outlook had dimmed. The protections of the *Petersen* implied warranty remained unavailable, while tort protections under *Moorman* would now be restricted to only those plaintiffs who could also show resultant physical injury or damage to other property.⁶⁵ It was in this atmosphere of changing law and dwindling legal options that the *Redarowicz* dispute arose.

REDAROWICZ V. OHLENDORF

*Facts of the Case*⁶⁶

In late 1975 or early 1976, the defendant Ohlendorf, doing business as Ohlendorf Builders, completed a home for the original owners. The home was subsequently sold by the original owners to the plaintiff, Redarowicz, approximately one year later. Shortly thereafter, Redarowicz discovered structural defects in the home. These were principally defects in the construction of the chimney, its foundation, and its adjoining outer wall.⁶⁷ As a result of the construction defects, these structural members were separating from the rest of the house,

63. *Id.* at 79, 435 N.E.2d at 447.

64. *Id.* at 79-80, 435 N.E.2d at 448.

65. Suits alleging fraudulent misrepresentation of a home's fitness had continued after *Petersen* whenever the particular facts of the case warranted. However, strict interpretation of pleading requirements left home purchasers rarely able to allege the builder's knowledge of the defect or intent to induce reliance with sufficient specificity. *See, e.g.,* Park v. Sohn, 90 Ill. App. 3d 794, 414 N.E.2d 1 (3d Dist. 1980), *aff'd in part, rev'd in part*, 89 Ill. 2d 453, 433 N.E.2d 651 (1982); Waterford Condominium Ass'n v. Dunbar Corp., 104 Ill. App. 3d 371, 432 N.E.2d 1009 (1st Dist. 1982). Actions on the contract for breach of express warranties of fitness of course continued to be available to parties in privity. However, attempts by the subsequent purchaser to recover as a third-party beneficiary to the builder-original purchaser contract continued to be uniformly denied. *See, e.g.,* Altevogt v. Brinkoetter, 81 Ill. App. 3d 711, 401 N.E.2d 1302 (4th Dist. 1980), *aff'd in part, rev'd in part*, 85 Ill. 2d 44, 421 N.E.2d 182 (1981).

66. As a result of its treatment in the lower courts, i.e., dismissal for failure to state a cause of action followed by an affirmation of the trial court at the appellate court level, the facts before the Illinois Supreme Court in *Redarowicz* were based solely on the pleadings. Certain facts in the case were thus at the time both undeveloped and unproven. All properly pleaded allegations were assumed to be true, 95 Ill. App. 3d at 444-45, 420 N.E.2d at 209-10, *citing* Giers v. Anten, 68 Ill. App. 3d 535, 386 N.E.2d 82 (1st Dist. 1978).

67. Redarowicz also alleged defective construction of the home's patio.

admitting water into the basement and causing further damage to the structure.⁶⁸

Redarowicz complained to the builder about these defects and notified the city. A city inspection found the defects to constitute building code violations and the builder was threatened with city action.⁶⁹ When complaints to the builder and pressure from the city evoked promises to repair but no repairs, Redarowicz filed suit in the Circuit Court of McLean County. Redarowicz' six-count complaint against the builder was grounded in both contract and tort, alleging negligent construction of the home and patio; breach of a contract to repair between the builder and the city, with Redarowicz as a third-party beneficiary; breach of an implied warranty of habitability; fraud; and breach of a contract to repair between the builder and Redarowicz.⁷⁰

All six counts of the complaint were dismissed with prejudice by the trial court for failure to state a cause of action.⁷¹ Redarowicz appealed to the Appellate Court of Illinois for the Fourth District.

*The Appellate Court Opinion*⁷²

Justice Webber, writing for a 2-1 majority, approached the dismissal of Redarowicz' six counts *seriatim*, finding the dismissal of all but the count pleading an express contract between Redarowicz and the builder, to have been proper.⁷³

68. It may be assumed from the Illinois Supreme Court's discussion of "solely economic damages" that Redarowicz was either able to avoid damage to personal property as a result of the defects or did not plead these damages.

69. This is not explicitly stated by either the appellate court or the supreme court, but may be inferred from both courts' discussions of Redarowicz' express contract with the builder, which would have been based upon bargaining between Redarowicz and the builder over repairs, and his recovery as a third-party beneficiary, which would have been based upon bargaining between the city and the builder over repairs. See *infra* notes 73, 92, and text accompanying notes 79-80 *infra*.

70. 95 Ill. App. 3d at 445, 420 N.E.2d at 210. This pleading of five alternative theories of recovery for the same damages was typical of construction defects pleading in Illinois at that time. See, e.g., *Kramp v. Showcase Builders*, 97 Ill. App. 3d 17, 422 N.E.2d 958 (2d Dist. 1981)(plaintiff pleaded alternative theories of recovery in fraud, implied warranty of habitability and negligence). All five theories pleaded in *Redarowicz* are discussed in some detail in *Jaeger II*, *supra* note 1.

71. The trial court's reasoning and support is not given in either the appellate court's or the supreme court's decision. In view of the appellate court's uncertainty as to whether the negligence counts were dismissed on economic loss, lack of duty, or lack of privity grounds, it can fairly be assumed that the trial record is not complete. See 95 Ill. App. 3d at 446, 420 N.E.2d at 210.

72. 95 Ill. App. 3d 444, 420 N.E.2d 209 (4th Dist. 1981), *aff'd in part, rev'd in part*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

73. Dismissal of the third-party beneficiary count was held to have been proper because Redarowicz was not a direct beneficiary of the contract to repair between the builder and the city, 95 Ill. App. 3d at 447, 420 N.E.2d at 211. In Justice Webber's view, the purpose of this contract was to compel code compliance for the benefit of the public, not Redarowicz. The court cited for support *Porter v. City of Urbana*, 88 Ill. App. 3d 443, 410 N.E.2d 610 (4th Dist. 1980)(municipality

The dismissal of the two negligence counts was held to have been proper because no duty was owed by the defendant builder to third persons, such as a subsequent purchaser.⁷⁴ The court agreed with Redarowicz that privity was no longer required for recovery in tort, but disagreed that the consequence of this was a duty owing to subsequent purchasers. Arguments going to whether the plaintiff was alleging a solely economic loss, and whether recovery for this loss was permissible, were unneeded and inappropriate if no duty was owed to the plaintiff. Furthermore, in the court's view a home was not a "product" within the contemplated protection of the economic loss doctrine. Thus the plaintiff's reliance on the Fourth District's narrowing of this doctrine in *Moorman*⁷⁵ to allow recovery in tort for solely economic loss in products liability cases was inapposite.⁷⁶

Dismissal of the implied warranty of habitability count was held to have been proper because Redarowicz was a subsequent purchaser.⁷⁷ The court had considered and denied extending the implied warranty to subsequent purchasers in *Mellander v. Kileen*,⁷⁸ and saw no need to re-examine its position.

Only the dismissal of the contract count based on Redarowicz' agreement not to sue, in exchange for the builder's promise to repair,

is not liable in tort to crime victim, because duty to maintain community well-being is owed to general public, not to specific members). Dismissal of the fraud count was held to have been proper because the builder's promises to repair were not misrepresentations of a past or existing fact, and because Redarowicz had no right to rely to his detriment on these promises, 95 Ill. App. 3d at 448, 420 N.E.2d at 211, citing *Polivka v. Worth Dairy, Inc.*, 26 Ill. App. 3d 961, 328 N.E.2d 350 (1st Dist. 1974). Justice Webber found *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 371 N.E.2d 634 (1977) distinguishable in that *Steinberg*, where a fraud action against a private medical school was allowed for a promise to take a future action, *i.e.* to evaluate applicants according to published criteria, involved a *scheme or plot* to defraud the plaintiff of his application fees. 95 Ill. App. 3d at 447, 420 N.E.2d at 211.

74. 95 Ill. App. 3d at 446-47, 420 N.E.2d at 210-11, citing *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978).

75. Leave to appeal the Fourth District's *Moorman* decision had been allowed by the Illinois Supreme Court at the time of the Fourth District's *Redarowicz* decision. See 84 Ill. 2d 19 (1981). But *Moorman* had not yet been reversed by the supreme court, 91 Ill. 2d 69, 435 N.E.2d 443 (1982).

76. Discussion of the economic loss doctrine was necessitated by the fact that the Fourth District decision in *Moorman* had abolished the economic loss bar to recovery in negligence for that district. See *supra* text accompanying notes 54-58.

77. 95 Ill. App. 3d at 447, 420 N.E.2d at 211.

78. 86 Ill. App. 3d 213, 407 N.E.2d 1137 (4th Dist. 1980). The *Mellander* decision rejected public policy arguments in favor of expanding the *Petersen* implied warranty of habitability to subsequent purchasers. The court noted in *Mellander* that the implied warranty sounded in contract rather than in tort, and thus required privity. Extensions of the implied warranty of habitability to subsequent purchasers in other jurisdictions, such as the Indiana Supreme Court's decision in *Barnes v. MacBrown and Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976), were an unwarranted extension of tort concepts into a contracts area.

was found by the appellate court to have been improper.⁷⁹ Illinois case law established that a promise to refrain from legal action was valuable consideration, and an agreement based on such consideration was thus enforceable.⁸⁰ The court determined that the case should be remanded for further proceedings on this count.

Justice Craven's dissent⁸¹ took issue with the majority's dismissal of Redarowicz' negligence counts and focused on the roles of privity, the economic loss doctrine, and the accepted work doctrine in tort law.⁸² Justice Craven pointed out that since *Suvada v. White Motor Co.*,⁸³ as clarified by *Rozny v. Marnul*,⁸⁴ privity was not an element of products liability negligence actions in Illinois. Thus Redarowicz' negligence counts could not be barred by his lack of privity with the builder.⁸⁵ Furthermore, the court's own decision in *Moorman* now allowed the purchaser of a defective grain storage tank to recover in tort for its solely economic loss.⁸⁶ The difference between a grain storage tank and a home should not compel a different result. Justice Craven noted in his dissent that other states now allowed home buyers to recover against the builder for solely economic loss, citing decisions from South Dakota, Wyoming, and California.⁸⁷ Finally, the defendant builder was arguing that the accepted work doctrine⁸⁸ barred recovery in tort, but Illinois Supreme Court decisions now circumscribed this doctrine so as to allow recovery against an independent contractor who knew of concealed defects.⁸⁹

79. 95 Ill. App. 3d at 448, 420 N.E.2d at 213.

80. *Id.*, citing *White v. Walker*, 31 Ill. 422 (1863)(waiving a right to sue on a breach of the implied warranty of quiet enjoyment was consideration supporting a modification lowering the rent on a lease contract); *United Factors Div. of United Merchants & Mfrs., Inc. v. Murphy*, 345 F. Supp. 768 (N.D. Ill. 1971)(lender's forbearance from suing on debt owed was consideration for stockholder's giving of a subordination agreement).

81. 95 Ill. App. 3d at 449, 420 N.E.2d at 213 (Craven, J., concurring in part, dissenting in part).

82. Justice Craven did not directly address the issue of a builder's duty to subsequent purchasers, which formed the basis of the majority's dismissal of the counts in negligence. See *supra* text accompanying notes 74-76.

83. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

84. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

85. The majority agreed with Justice Craven on this point. 95 Ill. App. 3d at 448, 420 N.E.2d at 211.

86. See *supra* text accompanying notes 54-58.

87. *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Sabella v. Wisler*, 59 Cal. 2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963).

88. See *supra* note 10. The majority opinion did not discuss the accepted work doctrine. Presumably, Justice Craven's discussion was based on his perception that it was this doctrine which was preventing the majority from finding a duty owed. See *supra* text accompanying note 74.

89. 95 Ill. App. 3d at 450, 420 N.E.2d at 213, citing *Paul Harris Furniture Co. v. Morse*, 10 Ill. 2d 28, 139 N.E.2d 275 (1956); *Hunt v. Blasius*, 74 Ill. 2d 203, 384 N.E.2d 368 (1978). In *Harris*

The Craven dissent also took issue with the majority's dismissal of the implied warranty of habitability count. In the dissent's view, the result in *Mellander*, barring a subsequent purchaser's recovery on an implied warranty of habitability, had been incorrect. The better approach would recognize the implied warranty as a mixture of tort and contract principles born out of the need to protect home purchasers generally, and remove unjustifiable obstacles in the way of placing liability for construction defects on the builder. The purposes of the implied warranty of habitability were frustrated by the retention of privity requirements.⁹⁰

Redarowicz petitioned the Illinois Supreme Court for leave to appeal, which was granted.

The Supreme Court Majority Opinion

Justice Clark delivered the 5-2 majority opinion of the court.⁹¹ The court upheld the appellate court's dismissal of the negligence and fraud counts, but reversed the dismissal of the third-party beneficiary and implied warranty of habitability counts.⁹²

The Illinois Supreme Court upheld the appellate court's dismissal of the two negligence counts, but not because Redarowicz was outside the scope of the builder's duty to others as the appellate court had found.⁹³ The question of the scope of the builder's duty did not need to be addressed. Rather, the court returned to the economic loss argu-

Furniture the Illinois Supreme Court recognized exceptions to the accepted work doctrine which would allow a negligence action by a property owner against a heating contractor where the work involved dangerous materials or procedures, or where the independent contractor knew of concealed defects.

90. 95 Ill. App. 3d at 452-53, 420 N.E.2d at 214-15. See also *The Fall of the Citadel*, *supra* note 11, at 800-02.

91. 92 Ill. 2d 171, 441 N.E.2d 324 (1982). The dissenting opinion was by Chief Justice Ryan, and was joined by Justice Underwood.

92. As the appellate court had done, the supreme court discussed all of the plaintiff's counts. The fraud and third-party beneficiary counts, *see supra* note 73 required only brief explanation. The dismissal of the fraud count was upheld, but for reasons other than given by the appellate court. The supreme court, citing both Illinois case law and 37 C.J.S. *Fraud* § 3 (1943), found that Redarowicz had failed in his pleadings to allege an intent on the defendant builder's part to induce the plaintiff to act. Thus the fraud count was missing an element in the pleadings essential to state a cause of action. 92 Ill. 2d at 186, 441 N.E.2d at 331 (1982). Dismissal of the count pleading recovery as a third-party beneficiary was reversed based on the supreme court's arrival at the opposite conclusion when it examined Redarowicz' status as a direct and intended beneficiary. Both courts had examined the nature of contracts between a builder and the city where the builder promises to repair code violations in return for the city's promise to forego prosecution. The appellate court had found in this situation that the home owner was not a direct and intended beneficiary. *See supra* note 73. The supreme court found however that he was. 92 Ill. 2d at 179, 441 N.E.2d at 328 (1982)(citing from both Illinois case law and treatises).

93. 92 Ill. 2d at 176-77, 441 N.E.2d at 326-27 (1982). *See supra* text accompanying note 74.

ment that had been dismissed by the majority in the appellate court. Redarowicz' complaint alleged qualitative defects in the home's construction constituting solely economic loss.⁹⁴ The court's recent reversal of the appellate court's *Moorman* decision in the interim between the *Redarowicz* decision in the Fourth District and its consideration before the Illinois Supreme Court removed any doubt that recovery in tort was barred in Illinois courts for solely economic losses.⁹⁵ The *Moorman* action had been brought by the purchaser of a defective grain storage tank whereas the *Redarowicz* action was being brought by the purchaser of a defective home, but the court found "no sound reason to treat either of the aforementioned purchasers differently from one another."⁹⁶

In the majority's view, disappointment, frustrated expectations, and diminished value when a product proved to be of inferior quality were not the sort of harms that tort law was intended to redress.⁹⁷ Rather, actions in negligence required a showing of physical damage through either personal injury or damage to other property. Plaintiff Redarowicz was not complaining of physical injuries or damage to personal property caused by a collapsing structure. He was complaining that he had received a structure that was less than he had bargained for.⁹⁸

94. See *supra* text accompanying notes 67-68.

95. The *Moorman* decision in the Fourth District had created a split in the Illinois appellate courts on the question of recovery in negligence for solely economic losses. The Fourth District had allowed these losses in *Moorman*, while the First and Second Districts had denied them in *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1st Dist. 1980) and *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 105 Ill. App. 3d 951, 435 N.E.2d 210 (2d Dist. 1982).

96. 92 Ill. 2d at 177, 441 N.E.2d at 327. Accord 95 Ill. App. 3d at 449, 420 N.E.2d at 213 (Craven, J., concurring in part, dissenting in part). Justice Craven, arguing in his appellate level dissent that the fourth district's *Moorman* rejection of the economic loss doctrine permitted Redarowicz' tort counts, had found no sound reason to treat the *products* (i.e. storage tank and home) differently from one another. See *supra* text accompanying notes 86-87.

97. 92 Ill. 2d at 176-78, 441 N.E.2d at 327 (1982), citing *Economic Loss supra* note 40; Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages-Tort or Contract?*, 114 U. PA. L. REV. 539 (1966). (hereinafter referred to as *Manufacturers' Liability*). The court also quoted the Missouri Supreme Court's distinction between the safety-related damages traditionally protected in tort and the quality-related damages traditionally protected in contract in *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978). In *Crowder*, the Missouri Supreme Court recognized the existence of an implied warranty of habitability in sales of new homes to the initial purchasers, but rejected claims based on negligence and an implied warranty of habitability in an action brought against the builder by a subsequent purchaser.

98. 92 Ill. 2d at 178, 441 N.E.2d at 327 (1982). By incorporating a collapsing structure into his hypothetical example Justice Clark confounded the issue, as in this situation two different means of avoiding the economic loss doctrine are arguable. Justice Clark may have been focusing on the injury or additional property damage as the reason for allowing recovery in tort, or he may have been focusing on the accidental self-destruction of the product, in this case the home. Accidental self-destruction of the product has been the basis for allowing recovery in tort regardless of

The majority's reversal of the appellate court on Redarowicz' plea for recovery on an implied warranty of habitability entailed an historical analysis of the growth of this protection and a review of the rationales behind, and the purposes served by, the implied warranty. The court noted the modern trend toward an implied warranty of habitability in the sale of new homes, citing cases in 23 states other than Illinois.⁹⁹ Within Illinois, the implied warranty of habitability was first recognized in a landlord-tenant context in *Jack Spring, Inc. v. Little*,¹⁰⁰ but had now been extended to the sale of new homes in *Weck v. A:M Sunrise Construction Co.*¹⁰¹ and *Park v. Sohn*¹⁰² as well as *Petersen*.

Justice Clark stated that the purpose of the implied warranty of habitability was protection from latent construction defects for the home buyer, who typically lacked both the opportunity and the knowledge to inspect the builder's methods, and was thus forced to rely to a substantial degree on the builder's integrity and expertise.¹⁰³ In the sale of a new home, the builder-vendor and the purchaser did not stand on equal footing, and the implied warranty of habitability was a "judicial innovation" designed to protect the innocent purchaser in this situation.¹⁰⁴ The subsequent purchaser was equally deserving and needful of this protection. The subsequent purchaser was typically no more knowledgeable than the initial purchaser as to housing construction, and thus relied to the same degree on the builder's integrity and skill.

Justice Clark reasoned that repair costs incurred by the purchaser as a result of defective construction should be borne by the builder who was responsible for those defects.¹⁰⁵ The mobility of modern society created a situation where the builder could expect some homes to be

physical injury or damage to additional property, and has come to be known as the 'property damage' exception to the economic loss doctrine. See Note, *Products Liability: Expanding the Property Damage Exception in Pure Economic Loss Cases*, 54 CHI.-KENT L. REV. 963 (1978). Cases applying this exception are compiled at 16 A.L.R. 3d 683 (1967). In *Santor*, the New Jersey Supreme Court suggested that additional property damage would remove the economic loss doctrine's bar to recovery in tort. See *supra* text accompanying note 44. But the *Santor* court did not discuss accidental self-destruction. In *Seely*, the California Supreme Court suggested that only personal injury would remove the doctrine's bar to recovery. See *supra* text accompanying notes 45-47.

99. 92 Ill. 2d at 180-81, 441 N.E.2d at 328-29 (1982). The states recognizing the implied warranty of habitability for new homes, and the cases in which this recognition was made in each state, are listed at Shedd, *The Implied Warranty of Habitability; New Implications, New Applications*, 8 REAL ESTATE L. J. 291, 303-06 (1980). Shedd lists 37 states plus the District of Columbia recognizing the implied warranty as of 1980.

100. 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

101. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962).

102. 89 Ill. 2d 453, 433 N.E.2d 651 (1982).

103. 92 Ill. 2d at 183, 441 N.E.2d at 330 (1982), citing *Petersen* and *Park*.

104. 92 Ill. 2d at 183, 441 N.E.2d at 330 (1982).

105. *Id.*

resold within a short period of time, before latent defects had become apparent. In these situations it was unfair that the builder could escape the liability that would otherwise attach because of a privity requirement limiting the life of the implied warranty to the time that the home was held by the initial buyer.¹⁰⁶ A privity requirement placed an illogical, arbitrary limit on the implied warranty which frustrated the purposes for which it was created. The better approach would be to limit the implied warranty of habitability to a reasonable time period without regard to a privity requirement.¹⁰⁷

The court observed that this extension of the implied warranty to protect subsequent purchasers had already been made by the supreme courts of Indiana, in *Barnes v. Mac Brown and Co.*;¹⁰⁸ Wyoming, in *Moxley v. Laramie Builders Inc.*;¹⁰⁹ South Carolina, in *Terlinde v. Neely*;¹¹⁰ and Oklahoma, in *Elden v. Simmons*.¹¹¹ Finally it noted that this extension of the implied warranty was consistent with Section 2-312 of the Uniform Land Transactions Act,¹¹² which provides for third-party beneficiaries and assignment of warranty.

*Chief Justice Ryan's Dissent*¹¹³

Chief Justice Ryan did not disagree with the result itself, i.e. the ability to recover against the builder for repair costs or diminution of value even though the plaintiff was not in privity with the builder, and the fact that the plaintiff incurred solely an economic loss. Rather, the

106. The court quoted the Supreme Court of Wyoming's decision in *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979) ("any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving of recovery is incomprehensible"). *Id.* at 736.

107. 92 Ill. 2d at 185, 441 N.E.2d at 331 (1982).

108. 264 Ind. 227, 342 N.E.2d 619 (1976).

109. 600 P.2d 733 (Wyo. 1979).

110. 275 S.C. 395, 271 S.E.2d 768 (1980).

111. 631 P.2d 739 (Okla. 1981). Other courts which had extended the implied warranty of habitability to subsequent purchasers were the Supreme Court of Arkansas, in *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321 (Ark. 1981); and the Superior Court of New Jersey, in *Hermes v. Staiano*, 181 N.J. Super. 424, 437 A.2d 925 (1981). However, during the same six-year period after the Indiana Supreme Court's *Barnes* decision, courts in six states expressly rejected this extension. See *Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. Dist. Ct. App. 1981); *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979); *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978); *Duncan v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 578 P.2d 637 (1978); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977); *Herz v. Thornwood Acres 'D' Inc.*, 86 Misc.2d 53, 381 N.Y.S.2d 761 (Justice Ct. 1976), *aff'd*, 91 Misc.2d 130, 397 N.Y.S.2d 358 (1977).

112. 13 UNIF. LAWS ANN. 615 (1980). THE UNIFORM LAND TRANSACTIONS ACT, § 2-312 (b) states as follows:

Notwithstanding any agreement that only the immediate buyer has the benefit or 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.

113. 92 Ill. 2d at 186, 441 N.E.2d at 331 (Ryan, C.J., dissenting).

Chief Justice disagreed with the *means* by which the majority achieved its result.

The Chief Justice briefly reviewed the development of strict liability in tort for products liability from its origin as a contract action based on an implied warranty, and thus requiring privity;¹¹⁴ through an intermediate stage as an action based on an implied warranty but with the privity requirement dropped;¹¹⁵ to its present status as a tort action with no privity requirement.¹¹⁶ In his view, by removing the privity requirement from an action based on an implied warranty of habitability, the majority was now retracing the same steps, i.e., transforming an action on an implied warranty from a contract action into strict liability in tort.¹¹⁷ Furthermore, by utilizing the fiction of an implied warranty without privity, the majority was doing so in a way which thus allowed "strict liability in tort" recovery for solely economic loss in spite of the court's earlier ruling to the contrary only months before in *Moorman*.¹¹⁸ If the intent of the majority was to retreat from the court's decision in *Moorman* and allow recovery for solely economic loss under a strict liability in tort theory, Chief Justice Ryan would prefer that the court do so straight-forwardly rather than by returning to the fiction of the implied warranty without privity.¹¹⁹

ANALYSIS

In *Redarowicz*, the Illinois Supreme Court perceived the subsequent purchaser of a defectively constructed home as inadequately protected under the law as it existed previously. This perception is widely shared and is undoubtedly correct. The *Redarowicz* decision makes Illinois the ninth state in the last six years to recognize a subsequent purchaser's cause of action against the builder for latent defects in home construction. The courts have based their decisions either on tort theories,¹²⁰ an implied warranty of habitability,¹²¹ or both.¹²² In this

114. *Id.* at 187, 441 N.E.2d at 332.

115. *Id.*, citing *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

116. 92 Ill. 2d at 187-88, 441 N.E.2d at 332, citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

117. 92 Ill. 2d at 187, 441 N.E.2d at 332.

118. *See supra* text accompanying notes 59-64.

119. 92 Ill. 2d at 187, 441 N.E.2d at 332.

120. *See Drexel Properties, Inc. v. Bay Colony Club Condominium, Inc.*, 406 So.2d 515 (Fla. Dist. Ct. App. 1981)(negligence); *Morris v. Holt*, 380 Mass. 131, 401 N.E.2d 851 (1980)(negligence); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977)(negligence).

121. *See Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 441 N.E.2d 324 (1982); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Barnes v. MacBrown and Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976).

same time period, only Missouri has refused to recognize *any* cause of action for the subsequent purchaser against the builder over latent construction defects which cause solely economic loss.¹²³ However, in its decision to allow recovery for such losses under an implied warranty of habitability theory but not under tort theories, the Illinois Supreme Court has created a number of thorny problems.

*Extension of the Implied Warranty of Habitability
to Subsequent Purchasers*

The *Redarowicz* extension of the implied warranty of habitability protects the subsequent purchaser's economic expectation by allowing the subsequent purchaser to place liability for the economic loss of latent construction defects on the builder, rather than on the subsequent purchaser's party in privity, i.e., the previous purchaser. The rationale given for this extension is that it is the builder who is the party "at fault" for the latent defects, it is the builder who would be liable for the defects but for the fortuity of the subsequent sale, and it is thus rightfully the builder who should pay the subsequent purchaser for them.¹²⁴ Initial purchasers are now protected in a majority of states, including Illinois, by an implied warranty of habitability. As the courts have generally pointed out, the subsequent purchaser is typically no more knowledgeable than the initial purchaser as to the construction design, methods, and materials which may or may not lead to future problems.¹²⁵ Furthermore, the subsequent purchaser lacks whatever small protection the initial purchaser may gain from the opportunity to inspect and oversee the actual construction.¹²⁶ Thus, the subsequent purchaser's economic expectation would seem to be at least as deserving as the initial purchaser's, and extending the implied warranty of habitability is one means of protecting that economic expectation.

Protection of the subsequent purchaser's economic expectation is, however, not the court's only concern. The builder as well can justifiably expect legal protection from extensions of the implied warranty

122. See *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321 (Ark. 1981)(strict liability and implied warranty of habitability); *Hermes v. Staiano*, 181 N.J. Super. 424, 437 A.2d 925 (1981)(strict liability, negligence, and implied warranty of habitability); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980)(negligence and implied warranty of habitability).

123. See *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978).

124. See *supra* text accompanying notes 103-07.

125. *Id.* See also *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Barnes v. Mac Brown and Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976).

126. The recently depressed housing market has undoubtedly left numerous new homes in Illinois completed with no purchaser. Thus at this time even a large percentage of initial purchasers in Illinois may buy a home that they have not seen in its construction phases.

which would open up unforeseeable, potentially crippling long-term liability for construction flaws.¹²⁷ Avoiding unforeseeable liability to subsequent purchasers was one of the justifications given by the Illinois Supreme Court for rejecting the economic loss doctrine in *Moorman*,¹²⁸ and Illinois courts have continued to recognize that implied warranties of merchantability and fitness do not extend vertically down the privity "chain" to subsequent purchasers unless the breach of the implied warranty has caused personal injury to the plaintiff so as to invoke the privity exception created by the Illinois Supreme Court in *Berry v. G. D. Searle & Co.*¹²⁹ The courts appear to agree that it would be unfair to require that the manufacturer of grain storage tanks insure against the frustrated economic expectations of subsequent purchasers. If there is truly no reason to treat the sale of a home and a grain storage tank differently, as Justice Clark of the supreme court and Justice Craven of the appellate court believed, then it would seem equally unfair to require that the manufacturer of homes be required to so insure by extending the implied warranty of habitability to subsequent purchasers.

Hopefully, extending the implied warranty to subsequent purchasers will in practice result in a manageable additional liability. The various potential latent defects in the construction can be expected to become apparent within a period of time that, based on the builder's knowledge and experience in the trade, may be somewhat predictable. The conscientious builder can build, plan, and insure with this liability in mind.¹³⁰ Furthermore, recent studies conducted by the Census Bu-

127. See Bearman, *supra* note 1, wherein Bearman discusses implied warranty protections from the builder's perspective. Builders can at times justifiably complain that the difficulty of establishing the cause of problems in a home results in the builder being held responsible for the combination of normal wear-and-tear and unrealistic expectations.

128. 91 Ill. 2d at 79, 435 N.E.2d at 447. See *supra* note 62.

129. 56 Ill. 2d 548, 309 N.E.2d 551 (1974). In *Berry v. G.D. Searle & Co.*, the plaintiff, who was not in privity with the defendant manufacturer, was allowed by the Illinois Supreme Court to plead on an implied warranty theory against the manufacturer of an oral contraceptive that allegedly caused the plaintiff to suffer a stroke. The *Berry* exception to the general requirement of privity thus created has been consistently interpreted by the Illinois courts to require personal injury on the part of the plaintiff, caused by the defendant's breach of the implied warranty. See, e.g., *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978)(stroke allegedly caused by contraceptive). Compare *Knox v. North American Car Corp.*, 80 Ill. App. 3d 683, 399 N.E.2d 1355 (1st Dist. 1980)(worker injured by defendant's boxcar was not in the vertical chain of privity with the defendant and thus could not rely on the *Berry* exception); *Mellander v. Kileen*, 86 Ill. App. 3d 213, 407 N.E.2d 1137 (4th Dist. 1980)(subsequent purchaser of home had sustained no physical injuries and thus could not rely on the *Berry* exception). See generally, Comment, *Knox v. North American Car Corp.: Re-Examination of Privity of Contract in UCC Implied Warranty Actions*, 11 LOY. U. CHI. L.J. 637 (1980), wherein the author recommends abolishing the privity requirement to recovery on implied warranties.

130. Insurance against defective construction claims has been available to builders since 1974 when a program developed by the National Association of Home Builders, and administered by the Home Owners Warranty Corporation, came into effect. Builder enrollment in this program or

reau for the Department of Housing and Urban Development,¹³¹ and by the Mathematica Policy Research for the Federal Trade Commission,¹³² have suggested that the most common defects in residential construction are neither particularly common nor particularly severe.¹³³ The additional insurance cost incurred by the builder through the *Redarowicz* extension of the implied warranty of habitability to subsequent purchasers would appear to be minimal. However, this is undoubtedly true in other commercial contexts as well, and does not answer the question of why sellers of homes should be subjected to a greater liability than sellers of grain storage tanks.

The more serious problem with the *Redarowicz* extension of the implied warranty of habitability is the effect that it will have, in theory, on the builder's present ability to bargain with the initial purchaser on modifications and disclaimers of warranties. The *Petersen* court recognized the builder's ability to bargain for a knowing disclaimer of an implied warranty of habitability,¹³⁴ and provisions in the law of sales for warranty modifications and disclaimers was an important aspect of the *Moorman* court's adoption of the economic loss doctrine.¹³⁵ The Illinois Commercial Code expressly provides for the allocation and division of risks in Section 2-303 and the various sections covering express and implied warranties.¹³⁶ If the law of sales is the more

any other similar program has been made mandatory by statute in New Jersey, see N.J. STAT. ANN. §§43:3B(1)-(12)(West Supp. 1983); and in Minnesota, see MINN. STAT. ANN. §§ 327A(.01)-(.07)(West Supp. 1983). See generally, Weicher, *Product Quality and Value in the New Home Market: Implications for Consumer Protection Regulation*, 24 J. L. & ECON. 365 (1981)(hereinafter cited as Weicher).

131. U.S. BUREAU OF THE CENSUS, ANNUAL HOUSING SURVEY: HOUSING CHARACTERISTICS FOR SELECTED METROPOLITAN AREAS (series H-170, 1974-1976).

132. KALUZNY, A SURVEY OF HOMEOWNER EXPERIENCE WITH NEW RESIDENTIAL HOUSING CONSTRUCTION (Mathematica Policy Research 1980).

133. See Weicher, *supra* note 130, at 369-74. Weicher compiled the results of three home construction defects surveys, including the surveys conducted for HUD and the FTC, see *supra* notes 131 and 132, and determined that the two most common defects in new residential construction were fuses which tended to blow (12% of all new homes surveyed) and dampness in the basement (18% of all new homes with a basement surveyed).

134. "Although the implied warranty of habitability is a creature of public policy, we do not consider a knowing disclaimer of the implied warranty to be against the public policy of this state." *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d at 43, 389 N.E.2d at 1159. *But see* *Crowder v. Vandendeale*, 564 S.W.2d at 881 (Mo. 1978), where the Missouri Supreme Court stated that "boilerplate" disclaimers of implied warranties would not be recognized.

135. See *supra* text accompanying note 58.

136. Ill. Rev. Stat. Ch. 26 § 2-203 (1977). "§ 2-303. Allocation or division of risks. Where this Article allocates a risk or a burden as between the parties '(unless otherwise agreed)', the agreement may not only shift the allocation but may also divide the risk or burden." See also Ill. Rev. Stat. ch. 26 § 2-316 (1977). Exclusion or modification of warranties allowing for the exclusion or modification of implied warranties in subsections (3)(a) - (3)(d); § 2-317. Cumulation and conflict of warranties express or implied ("Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable

appropriate law for the resolution of disputes concerning defectively constructed homes, these provisions would appear to be available to the parties.

Yet the *Redarowicz* court gives no indication of what effect such bargaining will have on the subsequent purchaser's implied warranty, and the commercial code provides no guidance for whether an initial purchaser can bargain away the implied warranty protections of the subsequent purchaser. Thus, the builder is left to bargain with the initial purchaser over warranty modifications which later may be non-binding on the subsequent purchaser, and the initial purchaser is left to bargain on warranties which may accrue only to the benefit of the subsequent purchaser, with little way of predicting what those warranties may be worth to the subsequent purchaser.¹³⁷

Prior to the *Redarowicz* decision, the builder was given a mechanism by which to escape liability for latent construction defects at random among the homes the builder had constructed. The actuarially astute builder could rely on the mobility of new home buyers, coupled with the privity requirement, to avoid liability for construction defects in that percentage of homes that were resold before flaws appeared. The loser in the builder's gamble was of course the subsequent purchaser. With the privity requirement removed by the *Redarowicz* decision, the builder can now expect potential liability for construction flaws to continue for a period of time controlled only by the nature of the flaws themselves and the statute of limitations,¹³⁸ and the subse-

the intention of the parties shall determine which warranty is dominant . . . (c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.")

137. The problem that extending the implied warranty of habitability to subsequent purchasers creates for initial bargaining over warranties has been recognized by a number of courts in their rejection of this extension. See *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979); *Duncan v. Schuster-Graham Homes, Inc.*, 194 Colo. 441, 578 P.2d 637 (1978); *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A.2d 599 (1977). Illinois courts have been suspicious of such bargaining in cases since *Petersen*, and have ruled unanimously against modification and disclaimer contract clauses in post-*Petersen* implied warranty cases. See *Colsant v. Goldschmidt*, 97 Ill. App. 3d 53, 58-59, 421 N.E.2d 1073, 1076-77 (2d Dist. 1981); *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 592, 410 N.E.2d 902, 909 (1st Dist. 1980); *Park v. Sohn*, 90 Ill. App. 3d 794, 798, 414 N.E.2d 1, 5 (3d Dist. 1980) *aff'd in part, rev'd in part*, 89 Ill. 2d 453, 433 N.E.2d 651 (1982); *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 316-17, 415 N.E.2d 1224, 1228-29 (1st Dist. 1980). See also *infra* text accompanying notes 147-48.

138. Problems can of course be created because common construction defects do not appear within a narrow range of time. This was recognized by the court in *Wagner Constr. Co., v. Noonan*, 403 N.E.2d 1144 (Ind. 1980), where septic tank problems did not appear until the home was five years old and had already been resold by the initial purchaser. Justice Craven in his *Redarowicz* concurrence suggested that "a builder should be liable until expiration of the applicable statute of limitations for the cost of repairing a house that is falling apart." 95 Ill. App. 3d at 452, 420 N.E.2d at 214. In Illinois that would now be approximately twelve years. See *infra* note 155.

quent purchaser can buy knowing that if defects appear the court has provided some degree of protection. The protection for the subsequent purchaser was needed and is welcomed, but the *Redarowicz* court has apparently provided it by making the builder an insurer. It is this very "insurance" aspect which suggests that tort law may in fact be the more appropriate law to deal with the situation.

The Economic Loss Limitation

The Illinois Supreme Court's economic loss limitation to recovery in negligence for defectively built homes is an extension of a troublesome doctrine into an area for which it is poorly suited and unneeded. The economic loss doctrine is an attempt to reliably direct legal disputes into the area of the law best suited to deal with plaintiffs' particular losses, and best able to provide defendants with appropriate protection, while allocating the risk of loss equitably between the two.¹³⁹ However, the doctrine has been the source of more dispute than guidance since the New Jersey and California supreme courts came to opposite conclusions on the doctrine in *Santor* and *Seely*.¹⁴⁰ Courts in the *Santor* camp point to the apparent illogic of identical plaintiffs with different recoveries,¹⁴¹ while courts in the *Seely* camp point to the apparent unfairness of recovery in tort for an essentially commercial transaction.¹⁴² The *Redarowicz* decision merely cites to *Moorman* and adds nothing to this debate.

Justice Simon, in his *Moorman* concurring opinion, took a long step toward resolving the controversy over the economic loss doctrine.¹⁴³ Justice Simon pointed out that the economic loss versus physical harm distinction was being used as a proxy for the more difficult determination of whether, when all aspects of the case were considered, the "insurance policy" aspect of tort law's protection from harm or the "bargain protection" aspect of contract law's protection of economic interests provided the better approach.¹⁴⁴ The *Redarowicz* court looked

139. See *Economic Loss* *supra* note 40; *Manufacturers'* *supra* note 97.

140. See *supra* text accompanying notes 42-47.

141. See *supra* text accompanying note 44.

142. See *supra* text accompanying notes 45-47.

143. 91 Ill. 2d at 87, 435 N.E.2d at 455 (Simon, J., concurring).

144. Both Justice Simon and the *Moorman* majority in the appellate court referred approvingly to the approach taken by the Federal Court of Appeals for the Third Circuit in *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981), where the court analyzed the problem this way:

[T]he items for which damages are sought, such as repair costs, are not determinative. Rather, the line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose.

to the *Moorman* decision as its source for the economic loss doctrine, but did not consider Justice Simon's suggestion that factors other than simply plaintiff's damage be considered in determining whether the economic loss doctrine should be applied to channel the dispute into contract law. When factors such as the nature of the product, the relationship between the parties, and fault notions are considered, contract law may not clearly be the more appropriate law for dealing with disputes over defects in home construction.

It has been generally recognized that a home is an extraordinary "product" in the range of products purchased by consumers.¹⁴⁵ It is likely to be far more expensive than the consumer purchases that form the bulk of the consumer transactions governed by the commercial code.¹⁴⁶ The risk of loss due to a serious structural defect may be slight,¹⁴⁷ but the result could be financially devastating to the typical home buyer. Thus, the home buyer is in a poor position to engage in the kind of bargaining over the allocation of risk that the commercial code envisions in its warranty provisions. Faced with this risk, the home buyer may be in more need of tort law's wider scope of protection against unreasonable harm, i.e., its "insurance" aspects, than of contract law's narrower protection of the parties' economic interests.

Furthermore, the home buyer is not in an analogous position with *Moorman's* storage tank purchaser. The typical home buyer is not buying a home for commercial use, either as a place of business or as a rental property. The home buyer may have "commercial" expectations, i.e., that the home will appreciate in value and that it will create favorable tax consequences, but the intent of the buyer would seem to be more the provision of shelter than the realization of an economic benefit. A defectively constructed home is not simply a frustration of the buyer's economic expectations, it is inadequate shelter.

The sale of a home is not the "arm's length" commercial transaction that the commercial code envisions. The home buyer is typically

These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.

Id. at 1173 (emphasis added).

145. The determination of whether a home is a "product" will often be accomplished by first deciding whether products liability principles are appropriate, and then on that basis "pronounce" the home one way or the other. See, e.g., *Blagg v. Fred Hunt Co.*, 612 S.W.2d 321, 323-24 (Ark. 1981).

146. Recently released figures from the National Association of Homebuilders placed the median price of a new home in June of 1982 at \$72,600. Marth, *A Housing Era Ends*, NATION'S BUSINESS 26, 27 (Sept. 1982).

147. See Weicher, *supra* note 130 at 369-74.

presented with warranty terms from the builder on a standardized building contract, and despite the comprehensive provisions available to the parties under the commercial code, no bargaining on warranty provisions takes place at all.¹⁴⁸ Recognizing the relative bargaining positions of the parties, Illinois courts have been extremely suspicious of warranty modification or disclaimer clauses in contracts for the sale of a home and have required not only that the clause be "a conspicuous provision fully disclosing the consequences of its inclusion," but have further required the builder to independently prove that the parties *in fact* bargained to an agreement on the clause.¹⁴⁹ The courts would appear to be recognizing that the sale of a new home is not a typical commercial transaction where traditional contract interpretation guidelines can be applied.

Lastly, recent decisions extending a cause of action against the builder to subsequent purchasers have been generally based on the rationale that the builder has been "at fault" in the building of the defective home, and is the responsible party to make reparations to the subsequent purchaser.¹⁵⁰ Such reasoning strongly suggests an unspoken initial premise that builders owe a duty of care to future home owners generally to build non-negligently. In the Indiana courts where implied warranty actions brought by subsequent purchasers have been allowed since the Indiana Supreme Court's seminal 1976 decision in *Barnes v. Mac Brown and Co.*,¹⁵¹ the prima facie case for implied warranty has developed as "warranty," "breach of warranty," "causation," and "damages," with clear tort overtones.¹⁵²

The results of incorporating the economic loss doctrine into the law of real property in Illinois may be wide-ranging. The occasional buyer who has had the good fortune of totally avoiding physical injury or additional property damages as a result of a latent construction defect, or who neglects to allege such damage in the complaint, loses the option of pleading in negligence when the facts of the case, such as an extended period of time before the defect was discovered,¹⁵³ or an ar-

148. See, e.g., *Colsant v. Goldschmidt*, 97 Ill. App. 3d 53, 58-59, 421 N.E.2d 1073, 1076-77 (2d Dist. 1981); *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 592, 410 N.E.2d 902, 909 (1st Dist. 1980); *Park v. Sohn*, 90 Ill. App. 3d 794, 798, 414 N.E.2d 1, 5 (3d Dist. 1980), *aff'd in part, rev'd in part*, 89 Ill. 2d 453, 433 N.E.2d 651 (1982); *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 316-17, 415 N.E.2d 1224, 1228-29 (1st Dist. 1980).

149. *Herlihy* 92 Ill. App. 3d at 316-17, 415 N.E.2d at 1228-29.

150. See *supra* text accompanying notes 88-92.

151. 264 Ind. 227, 342 N.E.2d 619 (1976). See *supra* notes 108, 121, and 125.

152. See, e.g., *Pelz Constr. Co. v. Dunham*, 436 N.E.2d 892 (Ct. App. Ind. 1982).

153. Due to the "discovery rule" for determining when the statute of limitations begins to run. See *infra* note 155.

guably unforeseeable economic loss,¹⁵⁴ may have made that a preferable theory of recovery.¹⁵⁵ The builder as well has lost the option of arguing that tort defenses such as comparative negligence may be applicable to the case. Furthermore, the unqualified language of the *Redarowicz* court raises serious questions concerning the decision's effect on other areas of the law of real property with tort aspects. The *Redarowicz* court does not discuss the effect that the decision will have on actions pleading fraud or malpractice where the home buyer has incurred exclusively economic loss.¹⁵⁶ The *Redarowicz* court says simply that "it is now clear . . . that a plaintiff cannot recover solely economic losses in tort."¹⁵⁷ It is difficult to forecast the effect of such language in tort areas that are already confused with contract principles.¹⁵⁸

Lastly, the *Redarowicz* decision raises serious questions concerning the ability of the non-resident investment purchaser¹⁵⁹ to recover against the builder for solely economic loss. These are purchasers with clear economic expectations, yet typically they have been denied pro-

154. Unforeseeable damages are generally not recoverable in contract actions. See *supra* note 52.

155. Until recently, the Illinois statute of limitations made pleading in negligence significantly more desirable for the plaintiff who became aware of a construction defect after the home was five years old. Actions on an implied warranty of habitability were limited by the five-year statute applicable to oral contracts, ILL. REV. STAT. ch. 110 § 13-205 (1982). See, e.g., *Altevogt v. Brinkoetter*, 85 Ill. 2d 44, 421 N.E.2d 182 (1981). The limitation period began running when the home was completed and the deed was passed. *Id.* The limitation period for actions in negligence, however, which also were limited by § 13-205, began running when the plaintiff discovered or reasonably should have discovered the defect. Thus a defect which laid dormant for four years after completion and sale of the home might leave only one year in which to bring an action on an implied warranty, but five years in negligence. The Illinois legislature solved this discrepancy in June of 1982 by incorporating a new twelve year statute of limitations applying to all actions whether in contract or tort pertaining to all types of construction. ILL. REV. STAT. ch. 110 § 13-214 (1982). Furthermore, the limitation of this new section to homes built after November 29, 1979, § 13-214(e), which was in the statute as originally passed has now been repealed by the 1982 Revisory Act, Senate Bill 1247, effective July 13, 1982. The new twelve-year statute of limitations for construction defects in Illinois may remove what has been viewed in the past as the builder's most effective way of evading the expanding implied warranty of habitability protections, i.e., the fact that latent defects often would not become apparent within the statutory time period. See generally Note, *Implied Warranties of Habitability—Recent Developments*, 29 DEFENSE L. J. 505 (1980).

156. Fraud in particular has been a much-used alternative theory of recovery for home buyers. Cases in Illinois where fraud counts were included with implied or express warranty of habitability counts include *Park v. Sohn*, 90 Ill. App. 3d 794, 414 N.E.2d 1 (3d Dist. 1980), *aff'd in part, rev'd in part*, 89 Ill. 2d 453, 433 N.E.2d 651 (1982), *Kramp v. Showcase Builders*, 97 Ill. App. 3d 17, 422 N.E.2d 958 (2d Dist. 1981), *Himmelstein v. Valenti Dev. Corp.*, 103 Ill. App. 3d 911, 431 N.E.2d 1299 (1st Dist. 1982), and *Waterford Condominium Ass'n v. Dunbar Corp.*, 104 Ill. App. 3d 371, 432 N.E.2d 1009 (1st Dist. 1982).

157. 92 Ill. 2d at 176, 441 N.E.2d at 326 (1982).

158. See *Manufacturer's Liability supra* note 97.

159. The private investor who purchases a single-family or duplex dwelling as rental property for either income or investment purposes.

tection in the past under the implied warranty of habitability on the grounds that they were "commercial purchasers" rather than "consumers."¹⁶⁰ The *Redarowicz* decision now denies them protection under tort theories as well, by virtue of the fact that they do not live on the premises and thus are less likely to sustain the physical injuries or damage to personal property required by the *Redarowicz* court for recovery in tort. Thus the *Redarowicz* decision leaves these purchasers with severe limitations on their options for recovery against the builder for latent structural defects, and raises serious questions about the advisability of investment purchases for buyers who are not in a position either to knowledgeably assess the risks of defective construction, insure against the risks of defective construction, or bargain effectively for express warranties.

CONCLUSION

By extending the implied warranty of habitability to the subsequent purchaser, the *Redarowicz* decision corrects a deficiency in Illinois' legal protections for the subsequent purchaser, hopefully without creating a substantially increased builder liability in the beleaguered home construction market. The combined effect of this decision, *Petersen* and its progeny, and the new Illinois statute of limitations for construction-related actions will undoubtedly be an implied warranty of habitability in Illinois which satisfies the need of the subsequent purchaser for some degree of legal protection from defective home construction. However, it is not clear what effect this extension will have on warranties generally in the sale of real property. The result will be "bargain protection" which may not be in the best interest of home buyers generally.

By limiting future recovery in negligence to only those situations where more than solely economic loss has been incurred, the Illinois Supreme Court has grasped at an approach which may be poorly suited to the realities of the housing market and construction defects litigation, and has missed a chance to help resolve the continuing dispute over the economic loss doctrine. The result of this new limitation will be relegation of the occasional home buyer's suit with solely economic loss to contract law when to do so is not clearly a superior way of dealing with the dispute, elimination of appropriate tort law provisions, confusion in other areas of tort pleading in the law of real property,

160. See, e.g., *Hopkins v. Hartman*, 101 Ill. App. 3d 260, 427 N.E.2d 1337 (4th Dist. 1981).

and the possible denial of protection to small investors in Illinois who have chosen to invest in the housing market.