

July 1983

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Bruce R. Toole

Partner, Crowley, Haughey, Hanson, Toole & Dietrich

Peter F. Habein

University of Montana School of Law

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Recommended Citation

Bruce R. Toole and Peter F. Habein, *The Warranty of Habitability: A Bill of Rights for Homebuyers*, 44 Mont. L. Rev. (1983).

Available at: <https://scholarship.law.umt.edu/mlr/vol44/iss2/1>

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ARTICLES

THE WARRANTY OF HABITABILITY: A BILL OF RIGHTS FOR HOMEBUYERS

Bruce R. Toole* and Peter F. Habein**

I. INTRODUCTION

We have long had the Uniform Commercial Code and strict liability for buyers of all sorts of articles, from food to hand tools to automobiles. It is strange that the current of social progress has left barren and dry the island of real estate with the homebuyer stranded on it. In *Chandler v. Madsen*,¹ however, the Montana Supreme Court washed away the island and swept the homebuyer into the mainstream with this simple and straightforward statement:

The doctrine of *caveat emptor* no longer serves the realities of the marketplace. Therefore, we hold that the builder-vendor of a new home impliedly warrants that the residence is constructed in a workmanlike manner and is suitable for habitation.²

For most people the purchase of a home represents the largest investment they will ever make. A new home represents the fulfillment of a dream—or so the buyer hopes. Previously, to protect his dream in the event of faulty construction, the buyer had either to prove fraud in the inducement to the sale or negligence in the construction of the home. Protecting one's house was thus significantly more difficult than protecting one's car or boat or gun.

No longer says the court; there will now be an implied warranty of habitability in Montana. Its American origins probably go back no further than 1957 when the Ohio Court of Appeals decided *Vanderschrier v. Aaron*.³ In *Vanderschrier* the court chose to

* J.D., University of Montana School of Law, 1949. Mr. Toole is a partner in the firm of Crowley, Haughey, Hanson, Toole & Dietrich in Billings, Montana. Mr. Toole represented Mr. and Mrs. Chandler and assisted at the birth of the warranty of habitability in Montana.

** A.B., Dartmouth College, 1979; M.A., University of Virginia, 1980; J.D., University of Montana School of Law, 1983.

1. _____ Mont. _____, 642 P.2d 1028 (1982).

2. *Id.* at _____, 642 P.2d at 1031.

3. 103 Ohio App. 340, 140 N.E.2d 819 (1957).

adopt what it perceived to be the Law of England, finding "the rule to be that, upon the sale of a house *in the course of construction*, there is an implied warranty that the house will be finished in a workmanlike manner."⁴ A subsequent Colorado case, *Carpenter v. Donohoe*,⁵ eliminated the imported technicality that the house be bought while still under construction. By 1980 at least thirty-five state courts had implied some form of habitability warranty to protect purchasers of new homes.⁶ In *Chandler v. Madsen* Montana joined the growing majority.

This article projects the likely development of the warranty in Montana and concludes with some thoughts on the process of judicial lawmaking which produced the implied warranty of habitability.

II. THE WARRANTOR

A. *The Builder-Vendor*

In *Chandler*, the court held that the "builder-vendor" was liable under the implied warranty of habitability for defects in the home he had constructed. A seller becomes a "builder-vendor" if he also built the house, as in *Chandler*,⁷ or if he contracted with a builder to construct the house for sale.⁸ The term "builder-vendor" is analogous to "merchant" in the Uniform Commercial Code (UCC): it denotes one who "by his occupation holds himself out as having knowledge or skill" in the construction and sale of new homes.⁹ The analogy, however, is misleading in one particular: warranties under the UCC arise from the business of selling, not from manufacture. But as most courts apply the warranty of habitability to new homes, it is closely tied to the actual construction—hence, the term "builder-vendor."

B. *The Lender-Vendor*

A number of courts have distinguished sharply between the "builder-vendor" and a "lender-vendor"—a lender who forecloses

4. *Id.* at 342, 140 N.E.2d at 821 (emphasis added).

5. 154 Colo. 78, 388 P.2d 399 (1964).

6. Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL EST. L.J. 291, 303 (1980).

7. See also *Sloat v. Matheny*, 625 P.2d 1031 (Colo. 1981).

8. *Mazurek v. Nielsen*, 42 Colo. App. 386, 599 P.2d 269 (1979); *Klos v. Gockel*, 87 Wash. 2d 567, 554 P.2d 1349 (1976); *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975).

9. *McDonald v. Miannecki*, 79 N.J. 275, 398 A.2d 1283 (1979); *Klos v. Gockel*, 87 Wash. 2d 567, 554 P.2d 1349 (1976); *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975). See UCC §§ 2-104(1), 2-314(1) (codified at MONT. CODE ANN. §§ 30-2-104(1), 314(1) (1981)).

on a defaulted builder, completes construction, and then sells the home.¹⁰ These courts hold that the lender is "not engaged in the business of building and selling homes" and "cannot be said to have warranted the construction because it did not do the construction."¹¹ Thus many courts at least implicitly hold that the warranty arises chiefly from the business of building and not from the sale.

This rigid distinction between the builder and seller makes little sense in the commercial setting and achieves an unsatisfactory result. It often leaves the seller with the buyer's money and the buyer with a defective house and an insolvent builder. If one purpose of the implied warranty is to place the risk of loss on the party better able to bear it or prevent it,¹² then the seller should be treated no differently from the builder-vendor. As in the sale of goods, the warranty should arise as much from the *business of selling* the new home as from its construction because it is often the seller on whom the buyer in fact relies.¹³ That is, many buyers deal exclusively with the seller and base their decision to purchase on the seller's inevitable representations that the home is fit for habitation. Whether a warranty arises from the *sale* of a home should then depend upon whether the seller holds himself out as having knowledge or skill peculiar to the business of selling homes.

III. THE WARRANTY

In the case of a defect, it is not necessary for the owner of a new home to prove that there was negligence or fraud on the part of the builder. In *Chandler* the plaintiff alleged negligence and attempted to prove it. The trial court found that there may have been negligence, but also found that the plaintiff failed to prove such negligence was the proximate cause of the defects in the house. The Montana Supreme Court refused to disturb that finding,¹⁴ sustaining the judgment for the plaintiff solely on the theory of implied warranty of habitability. In effect, the only proof before

10. *Walters v. First Fed. Sav. and Loan Ass'n.*, 131 Ariz. 321, 641 P.2d 235 (1982); *Smith v. Continental Bank*, 130 Ariz. 320, 636 P.2d 98 (1981).

11. *Smith v. Continental Bank*, 130 Ariz. 320, 322, 646 P.2d 98, 100 (1981). See also Comment, *Washington's New Home Implied Warranty of Habitability - Expiration and Model Statute*, 54 WASH. L. Rev. 185, 205 (1978) [hereinafter cited as Wash. Comment].

12. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120 (1960) [hereinafter cited as Prosser]; *Chandler*, _____ Mont. at _____, 642 P.2d at 1032.

13. Prosser, *supra* note 12, at 1123; *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

14. *Chandler*, _____ Mont. at _____, 642 P.2d at 1032-33.

the court was that the house was defective. There was no legally effective proof showing why or how the defects developed.

A. *Workmanlike Construction*

Although discussion in *Chandler* centers on the warranty of habitability, the court arguably considered two implied warranties: (1) "that the residence is constructed in a workmanlike manner"¹⁵ and (2) that it "is suitable for habitation."¹⁶ The commentators have noted that the warranty of workmanlike construction is a common law warranty implied in most service contracts.¹⁷ The warranty attaches to the reasonableness of the workman's conduct¹⁸ and is closely related to the question of negligence in the construction of the home.¹⁹ Although the court in *Chandler* did not clearly distinguish the warranty of habitability from the warranty of workmanlike construction, the court plainly premised liability on habitability and not on a showing of negligence. As a matter of practice, the attorney could plead both warranties, but questions of workmanlike construction and negligence will burden the discovery process far more than the question of habitability.

B. *Habitability*

Focusing on habitability, the court held that the central issue is "whether the defect relates essentially to useful occupancy of the house."²⁰ The court then reiterated, with slightly different emphasis, that the defect must be "essential to occupancy."²¹ This does not mean that the house must become uninhabitable. The Chandlers, for instance, were living in their home at the commencement of the suit and throughout the trial.²² Moreover, the court affirmed the trial court's conclusion that the warranty of habitability was breached because "settling of the house had caused it to develop defects which greatly exceeded reasonable building tolerances" and which "rendered the house insecure and . . . greatly depreciated

15. *Id.* at _____, 642 P.2d at 1031.

16. *Id.*

17. Comment, *Implied Warranties in the Sale of Real Estate in Colorado: Rational Boundaries of the Doctrine*, 53 U. COLO. L. REV. 137, 145-47 (1981).

18. *Lewis v. Anchorage Asphalt Paving Co.*, 535 P.2d 1188 (1975), *appeal after remand*, 579 P.2d 532 (Alaska 1978).

19. *Cline v. Sawyer*, 600 P.2d 725 (Wyo. 1979), *appeal after remand*, 618 P.2d 144 (Wyo. 1979).

20. *Chandler*, _____ Mont. at _____, 642 P.2d at 1032.

21. *Id.*

22. *Cf. Klos v. Gockel*, 87 Wash. 2d 567, 554 P.2d 1349 (1976) (failure to move out held evidence that warranty was not breached).

its value."²³

The tests of habitability are imprecise and probably must remain so to accommodate a great variety of factual settings. Washington courts have adopted a relatively narrow test which demands that the house be "unsafe for occupancy."²⁴ Limited to structural defects, the Washington test has been criticized for its literal interpretation of "habitability" and its failure to implement the purpose of the warranty: to ensure that the buyer receives what he bargained for—a home without major defects.²⁵ In an early case, the Idaho court adopted a broader view of the warranty:

The implied warranty of fitness does not impose upon the builder an obligation to deliver a perfect house. No house is built without defects, and defects susceptible of remedy ordinarily would not warrant rescission. But major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution.²⁶

More recently, the North Carolina court defined the warranty of habitability in even more generous terms: "a builder-vendor impliedly warrants to the initial purchaser that a house and all its fixtures will provide the service or protection for which it was intended under normal use and conditions."²⁷

In the end, the legal conclusion that the warranty has been breached turns on the peculiar facts of each case. A sampling of cases reveals breaches of the habitability warranty in houses with the following defects: premature failure of a septic tank;²⁸ faulty electrical wiring;²⁹ failure to waterproof the basement;³⁰ leaking roof;³¹ improper grading resulting in seepage;³² cracked walls and foundation;³³ cracked driveway, unstable deck, malfunctioning of air conditioning, stereo, and television;³⁴ high iron content making well water unusable;³⁵ sticking doors, poor patio drainage, and sag-

23. Order of the District Court, 13th Dist., Yellowstone Cnty., Mont. (January 15, 1981).

24. *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969).

25. Wash. Comment, *supra* note 11, at 205.

26. *Bethlahmy v. Bechtel*, 91 Idaho 55, 68, 415 P.2d 698, 711 (1966).

27. *Lyon v. Ward*, 28 N.C. App. 446, 448, 221 S.E.2d 727, 729 (1976).

28. *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975).

29. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

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

31. *Sorensen v. Pickens*, 99 Idaho 564, 585 P.2d 1275 (1979).

32. *Utz v. Moss*, 31 Colo. App. 475, 503 P.2d 365 (1972).

33. *Duncan v. Shuster-Graham Homes, Inc.*, 194 Colo. 441, 578 P.2d 637 (1978).

34. *Sloat v. Matheny*, 44 Colo. App. 1, 605 P.2d 71 (1980), *rev'd on appeal*, 625 P.2d 1031 (Colo. 1981).

35. *Forbes v. Mercado*, 283 Or. 291, 583 P.2d 552 (1979).

ging ceilings;³⁶ separation of chimney from house and leaky basement;³⁷ inadequate flow of water from well.³⁸

1. *Duration of the Warranty and Statutes of Limitation.*

Generally, the duration of the warranty is measured by the standard of reasonableness.³⁹ Under this rule a builder's warranty with respect to the foundation might very well be twenty years or more, but less on non-structural components of the house.⁴⁰ Reasonable service life thus becomes a fact issue in each case, and the service life would be measured from the initial sale.⁴¹

The duration of the warranty must be distinguished from any statute of limitations problems which could arise in an action on the warranty. Few cases have considered what statute of limitations applies to a breach of the implied warranty of habitability.⁴² The Montana court, however, might look to Oregon for some guidance. In *Sponseller v. Meltebeke*,⁴³ the Oregon court applied a ten year statute of limitations to an action on an implied warranty of habitability.⁴⁴ The plaintiff-owner had purchased the house in 1968, two years after its construction in 1966. By 1976 the house was more than ten years old and had settled badly, resulting in structural damage and damage to fixtures. By analogy to the UCC, the owner argued that the implied warranty "explicitly extends to future performance," and therefore "the cause of action accrues when the breach is or should have been discovered."⁴⁵ The court rejected this analogy, holding that the house was an improvement to real property and subject to the Oregon statute prescribing a ten year limit on actions "to recover damages for . . . the construction . . . of any improvement to real property."⁴⁶

36. *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

37. *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982).

38. *Lyon v. Ward*, 28 N.C. App. 446, 221 S.E.2d 727 (1976).

39. *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A.2d 529 (1973); *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967).

40. *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975).

41. The Uniform Land Transaction Act establishes a uniform six-year limitation on warranties, running from the initial sale. UNIF. LAND TRANS. ACT § 2-521. New Jersey has a three-tiered limitation on the *duration* of warranties, depending on the nature of individual defects. N.J. REV. STAT. § 36:3B-2, 3 (1937).

42. See, e.g., *Ware v. Christenberry*, 637 P.2d 452 (Kan. App. 1981); *Sponseller v. Meltebeke*, 280 Or. 361, 570 P.2d 974 (1977).

43. 280 Or. 361, 570 P.2d 974 (1977).

44. OR. REV. STAT. § 12.135 (1976).

45. *Sponseller*, 280 Or. at 365, 570 P.2d at 976.

46. OR. REV. STAT. § 12.135 (1976).

The Oregon statute is substantially similar to section 27-2-208 of the Montana Code Annotated: "no action to recover damages . . . arising out of . . . construction . . . done in connection with any improvement to real property shall be commenced more than 10 years after completion of such improvement."⁴⁷ Following the reasoning in *Sponseller v. Meltebeke*, failure to discover a defect would not toll the statute. Thus, the statute establishes a ten-year limit to actions on the implied warranty of habitability, though the *duration* of the warranty may be longer.

A final caveat, related to the statute of limitations, concerns the requirement of notice. The UCC imposes a requirement that the breaching party receive notice of the breach to allow for repair and mitigation of damages.⁴⁸ In *Pollard v. Saxe & Yolles Development Co.*,⁴⁹ the California Supreme Court applied this requirement to a breach of the implied warranty of habitability. The court held that four years was unreasonable delay in giving notice of a defect and thus barred recovery under the warranty.⁵⁰ The notice requirement seems commercially reasonable and may prove to be an additional limitation on recovery in Montana.

2. *Subsequent Purchasers.*

The duration of the warranty is closely tied to issues of contract privity and protection of subsequent purchasers. The strict requirement of contract privity does not limit the warranty in situations where the builder sells to a realtor, who in turn sells to the first occupant of the house.⁵¹ The same is true when the original, intended buyer resells to a third party without an intervening tenancy.⁵² A majority of courts, however, limit recovery under the warranty to the first purchaser-occupant of the house. This limitation is rooted in the view, adopted by the Montana court in *Chandler*,⁵³ that the warranty of habitability arises from a contract and is subject to traditional contract principles. Privity is one such principle which most courts are not willing to stretch beyond the

47. MONT. CODE ANN. § 27-2-208 (1981). The court complicated this analysis by holding that "breach of an implied warranty is a breach of contract." *Chandler*, _____ Mont. at _____, 642 P.2d at 1034. It might be argued that section 27-2-208 is more specific and governs over the more general contract limitations. See also text accompanying notes 55-59.

48. UCC § 2-607(3) (codified at MONT. CODE ANN. § 30-2-607(3) (1981)).

49. 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

50. *Id.* at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652.

51. *Utz v. Moss*, 31 Colo. App. 475, 503 P.2d 365 (1972).

52. *Gay v. Cornwall*, 6 Wash. App. 595, 484 P.2d 1371 (1972).

53. *Chandler*, _____ Mont. at _____, 642 P.2d at 1034.

first purchaser.⁵⁴

This limitation is mistaken at its roots. All commentators agree that the action on a warranty evolved from tort into contract and contains important elements from both forms of action.⁵⁵ At least two prominent scholars have long argued persuasively that an action on an implied warranty exists independently of the contract and should not be limited by concepts of privity.⁵⁶ Dean Prosser arrived at this conclusion with inimitable clarity: "If warranty is a matter of tort as well as contract, and if it can arise without any intent to make it a matter of contract, then it should need no contract; and it may arise and exist between parties who have not dealt with one another."⁵⁷ Such common sense is still a voice crying in the wilderness, but it underlies the growing number of decisions extending the implied warranty of habitability to subsequent purchasers. By the end of 1982, five state courts had extended the warranty to subsequent purchasers.⁵⁸ They premised their decisions on Prosser's reasoning to the reality of the marketplace:

While the warranty of habitability has roots in the execution of the contract for sale, we emphasize that it exists independently. Privity of contract is not required. Like the initial purchaser, the subsequent purchaser has little opportunity to inspect the construction methods used in building the home. Like the initial purchaser, the subsequent purchaser is usually not knowledgeable in construction practices and must, to a substantial degree, rely upon the expertise of the person who built the home.⁵⁹

If the limitation of privity is lifted, the issue of who may recover under the warranty will depend on the duration of the warranty which in part depends on the nature of the defects.

In *Chandler* the plaintiffs attempted to raise a claim of strict liability. They were foreclosed at trial and on appeal by both courts' unwillingness to "discuss" strict liability once they had settled on the implied warranty contract⁶⁰ rationale. A strict liability

54. See, e.g., *Mellander v. Kileen*, 86 Ill. App. 3d 213, 407 N.E.2d 1137 (1980).

55. S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1505-06 (W. Jaeger 3d ed. 1970).

56. Jaeger, *Product Liability: The Constructive Warranty*, 39 NOTRE DAME LAW. 501 (1964); Prosser, *supra* note 12, at 1127.

57. Prosser, *supra* note 12, at 1127.

58. *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979); *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976).

59. *Redarowicz v. Ohlendorf*, 441 N.E.2d 324, 330 (Ill. 1982).

60. *Chandler*, ___ Mont. at ___, 642 P.2d at 103.

action might have avoided the privity controversy⁶¹ and provided the courts with more flexibility in awarding damages. Theoretically, strict liability probably represents the true nature of the warranty more faithfully than does the contract rationale adopted by the court.^{61.5}

3. Damages.

Rescission, restitution, and money damages are available to the homeowner in an action on an implied warranty.⁶² Rescission alone is frequently inadequate because it fails to compensate for improvements made prior to discovery of latent defects. In *Chandler*, for instance, the plaintiffs had invested substantial sums of money in a swimming pool, fences, and other landscaping.

The court in *Chandler* held that damages were to be measured under section 27-1-311 of the Montana Code Annotated: "the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom."⁶³ Under this standard, the court held the builder liable for costs of repair plus consequential damages for interim rental and moving expenses. In addition, a few cases⁶⁴ have held emotional distress to be a compensable item of damage:

The largest single investment the average American family will make is the purchase of a home. . . . Consequently, any reasonable builder could easily foresee that an individual would undergo extreme mental anguish if their newly constructed house contained defects as severe as those shown to exist in this case.⁶⁵

This reasoning apparently overcomes the greatest barrier to recovery for emotional distress in a contract action—foreseeability. As a general rule, the foreseeability requirement defeats recovery

61. RESTATEMENT (SECOND) OF TORTS § 402A(2)(b).

61.5 Cf. *Thompson v. Nebraska Mobile Homes Corp.*, ___ Mont. ___, 647 P.2d 334 (1982) (manufacturer is strictly liable for defects in mobile home).

62. See, e.g., *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (Rescission, restitution).

63. MONT. CODE ANN. § 27-1-311 (1981). See also *Mitchell v. Carlson*, 132 Mont. 1, 313 P.2d 717 (1957) (benefit of the bargain measure of damages).

Because the award for repairs alone substantially exceeded the value of the house, the court's treatment of damages in *Chandler* has already been criticized. See *Burnham, Contract Damages in Montana Part I: Expectancy Damages*, 44 MONT. L. REV. 1, 27-28 (1983) [hereinafter cited as *Burnham*].

64. *B & M Homes, Inc. v. Hogan*, 376 So.2d 667 (Ala. 1979); *Mid-State Homes, Inc. v. Bice*, 361 So.2d 275 (La. App. 1978). See also Annot., 7 A.L.R. 4th 1178 (1981).

65. *B & M Homes, Inc. v. Hogan*, 376 So.2d 667, 672 (Ala. 1979).

for emotional distress,⁶⁶ but some courts have carved narrow exceptions. A California court held that damages for emotional distress are permitted when the contract directly concerns the comfort and happiness of the party.⁶⁷ The Montana court has not considered this precise issue, but the contract rationale adopted in *Chandler* makes recovery for emotional distress less likely than under a tort or strict liability theory. In *Chandler*, plaintiffs claimed damages for and presented evidence of emotional distress under their strict liability action. As noted, however, the court did not address this issue once it had decided the case on the warranty-contract theory.

4. *Disclaiming the Warranty.*

The warranty of habitability may be disclaimed by the builder-vendor. The Colorado Supreme Court has ruled, however, that such disclaimers "must be accomplished by clear and unambiguous language" and "must also be strictly construed against the builder-vendor."⁶⁸ The Missouri court in *Crowder v. Vandendeale*⁶⁹ went further:

[O]ne seeking the benefit of such a disclaimer must not only show a conspicuous provision which fully discloses the consequences of its inclusion but also that such was *in fact* the agreement reached. The heavy burden thus placed upon the builder is completely justified, for by his assertion of the disclaimer he is seeking to show that the buyer has relinquished protection afforded him by public policy.⁷⁰

Some courts have held disclaimers of the implied warranty of habitability to the same standards promulgated by the UCC⁷¹ for modification or exclusion of warranties in the sale of goods.⁷² Section 30-2-316 of the Montana Code Annotated codifies the general "conspicuous" standard, the purpose of which is to "protect the

66. See, e.g., *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 606 P.2d 944 (1980).

67. *Crisci v. Security Ins. Co. of New Haven*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). See also *Burnham*, *supra* note 61, at 11; *Prosser*, *supra* note 12, at 1128.

68. *Sloat v. Matheny*, 625 P.2d 1031, 1034 (Colo. 1981). See also *Petersen v. Hubschman Constr. Co.*, 26 Ill. 2d 31, 389 N.E.2d 1154 (1979). Cf. *Tibbits v. Openshaw*, 18 Utah 2d 442, 425 P.2d 160 (1967) ("as is" clause in ordinary type held enforceable).

69. 564 S.W.2d 879 (Mo. 1978).

70. *Id.* at 881 n. 4. See also *Colsant v. Goldschmidt*, 97 Ill. App. 3d 53, 421 N.E.2d 1073 (1981).

71. UCC § 2-316 (codified at MONT. CODE ANN. § 30-2-316 (1981)).

72. See, e.g., *MacDonald v. Mobley*, 555 S.W.2d 916 (Tex. 1977); *Casavant v. Campopiano*, 114 R.I. 24, 327 A.2d 831 (1974).

buyer from unexpected and unbargained language. . . ."⁷³ It is unclear, however, whether simply "conspicuous" language of disclaimer satisfies the purpose of the statute in Montana.⁷⁴ A builder seeking to disclaim warranties would be well advised to meet the standard set out in *Crowder* and show that the disclaimer was *in fact* part of the bargain.

IV. THE QUESTION OF COVENANTS

Complaint has been made that the *Chandler* decision does violence to section 70-20-304 of the Montana Code Annotated⁷⁵ which limits what may be implied from a conveyance of real property.⁷⁶ That section provides that only certain covenants are implied from the use of the word "grant" in a conveyance. No covenant of warranty of habitability is listed in the statute.

The question was not specifically addressed by the court in *Chandler*. There is, however, a good answer to it. The Montana statute was borrowed from the California Code, which in turn was based upon the old Field Code.⁷⁷ In adopting the California Code, Montana also adopted the California interpretations of it.⁷⁸ Three early California cases help to construe the statute as pertaining only to covenants of title.⁷⁹ The interpretation is made more forcibly in later cases. For instance, in *Pollard v. Saxe & Yolles Development Co.*,⁸⁰ the California court very specifically held that the section does not say that warranties as to fitness and suitability of structures upon land cannot arise unless expressed in the deed of conveyance. A similar statute in Oregon has been construed as not precluding implied covenants of habitability.⁸¹

V. JUDICIAL LAWMAKING

The *Chandler* rule, though new to Montana, is perhaps "old

73. MONT. CODE ANN. § 30-2-316 Comment 1 (1981).

74. *Compare* *Schlenz v. John Deere Co.*, 511 F. Supp. 224 (D.C. Mont. 1981) with *Kopishke v. First Cont. Corp.*, _____ Mont. _____, 610 P.2d 668 (1980) and *Transcont. Refrig. Co. v. Figgins*, 179 Mont. 12, 585 P.2d 1301 (1978) and *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977).

75. MONT. CODE ANN. § 70-20-304 (1981).

76. *See* *Cogley, New Liabilities for Homebuilders*, MONT. LAWYER, May 1982 at 10 [hereinafter cited as *Cogley*].

77. CAL. CIV. CODE § 1113 (1979).

78. *In re* *Murphy's Estate*, 99 Mont. 114, 43 P.2d 233 (1935).

79. *Waggle v. Worthy*, 74 Cal. 266, 15 P. 831 (1887); *Bryan v. Swain*, 56 Cal. 616 (1880); *Lawrence v. Montgomery*, 37 Cal. 183 (1869).

80. *Pollard v. Saxe & Yolles Dev. Co.*, 32 Cal. App. 3d 390, 108 Cal. Rptr. 174 (1973) (citing *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968)).

81. *Yeppen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974).

hat" to most lawyers. It has been around in our sister states for a long time. What is really most fascinating about the *Chandler* case is that the court chose to make new law. On appeal, considerable issue was made in the *Chandler* case of the lawmaking character of the decision. In making law, however, the Montana court was not without precedent. But is precedent alone the limit to the power of the court? When and under what circumstances should a court take such drastic measures? These questions pose an ancient problem, a dicotomy between positive law and natural law which has fascinated legal philosophers for centuries and to which there is yet no pat solution but plenty of room for discussion.

In *Chandler*, the Montana Court took a leaf from *Brandenburger v. Toyota*.⁸² As in *Brandenburger*, the court created new law, not merely an interpretation or a "filling in," but a new rule imposing new duties and creating new rights. As was the case with *Brandenburger*, there was plenty of precedent elsewhere on which to base the *Chandler* decision. Nonetheless, *Brandenburger* and *Chandler* help to give us a better view of the ancient dicotomy, marshalling the need for certainty and clarity in the law against the ill-defined but potent demand for justice.

Chandler poignantly demonstrates the dicotomy. Madsen was a good builder and after the case was tried, no negligence of his was found to have caused any loss to the plaintiff.⁸³ Any lawyer adhering to established law would be hard pressed to advise Madsen in a similar situation that he should throw in the towel and take back the house or spend tens of thousands of dollars repairing it. After all, the law of caveat emptor in the sale of real property has reigned supreme for centuries. If there is no stability in the law governing the sale of real estate we lawyers might as well fold up our tents and steal away. And yet consider that the plaintiffs mortgaged their future to buy this place, and they ended up with a home where they could not lock the doors, where joints in the plumbing were pulling apart, and there were so many creaks and groans in the house that they hesitated even to have guests over for supper because there was no conversation save that relating to the house. Where is justice when the plaintiffs pay much and receive little?

Most lawyers are "positivists" at heart, preferring law clearly laid down (posited), certain in its application, sanctions for its violation known and limited. Without this, how can a lawyer advise a

82. 162 Mont. 506, 513 P.2d 268 (1973) (strict products liability and doctrine of "second collision").

83. *Chandler*, _____ Mont. at _____, 642 P.2d at 1032-33.

client, prepare a contract, or try a lawsuit? Certainly the positivist ideals are deep in our hearts. It is practically a constitutional mandate: "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature."⁸⁴ "No law contained in any of the statutes of Montana is retroactive unless expressly so declared."⁸⁵ The Montana Supreme Court has repeatedly stated that "it is a rule recognized by the authorities everywhere that retrospective laws are looked upon with disfavor."⁸⁶ The Montana court has been loath to take upon itself a change of law, particularly in a retroactive manner.⁸⁷

Chandler has been criticized for being new law, applied retroactively.⁸⁸ *Chandler* is a new rule. It is a new law. It *did* operate retroactively. Other cases of its ilk have long been questioned. But some lawyers and scholars are delighted when justice, finally overcomes arbitrary rules and cruel logic:

All those whose mistress is the law ought to congratulate themselves for the good fortune of living in such exciting times. If *stare decisis* were the rule of the day, the mutation reflected in implied warranty as a remedy for structural deficiencies in unfinished houses would have been the end of the matter. As it was, facts and environment conspired, at least in America, to illustrate that rules and logic are not the whole of the law story. Facts involving roofs sustained by several nails, together with an environment in which building has become an assembly-line affair, have conspired to undermine everyman's respect for *caveat emptor* as the distillation of justice. . . . [J]ustice requires man-made rules that change in the light of new facts and an evolving environment, and at the same time serve as provisional polestars illuminating the here and now so that the day's business can be done. The shock of recognizing that there may be no pragmatically sanctioned rules, even in the short run, has hit the housing-merchant scene with full force. The job now is to restructure the market in light of the bits and pieces of conventional wisdom found in the decisions which shattered the repose of *caveat emptor*.⁸⁹

Particularly when judges are about to declare new law, they

84. MONT. CONST. ART. II, § 31.

85. MONT. CODE ANN. § 1-2-109 (1981).

86. *Dunham v. Southside National Bank*, 169 Mont. 466, 548 P.2d 1383 (1976); *Sullivan v. City of Butte*, 65 Mont. 495, 211 P. 301 (1922).

87. *Kussler v. Burlington Northern, Inc.*, _____ Mont. _____, 606 P.2d 520 (1980); *Consolidated Freightways Corp. v. Osier*, _____ Mont. _____, 605 P.2d 1076 (1979).

88. *Cogley*, *supra* note 74, at 10.

89. *Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 868 (1967).

speaking in profound and ringing terms about the need for justice: "The law should be based upon current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times."⁹⁰ With characteristic eloquence, Justice Cardozo declared, "If judges have willfully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."⁹¹

The judges, however, rarely address the question of how they acquired the authority to declare society's morals, mores, and rights and wrongs. They should address that question, for what seems moral and proper to one judge may seem quite the contrary to another.

Notwithstanding the philosophical problem with the declaration of what is "justice," we lawyers accept the fact that courts make law. Certainly the Montana court need not be embarrassed for arrogating to itself the lawmaking power. It is in good company. In *MacPherson v. Buick Motor Company*⁹² and in *Greenman v. Yuba Power & Light*,⁹³ prestigious courts made new rules and found a new morality in the law of torts. The Montana court in *Brandenburger* and *Chandler* has done nothing radical compared to them.

There is ample philosophical support for judicial lawmaking. Thomas Aquinas said, "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community. The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally."⁹⁴ William Blackstone added that the natural law "is binding over all the globe in all countries, and at all times: no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."⁹⁵ Perhaps this is just a long way of trying to explain why many of us intuitively sense that the Montana court reached the correct result in *Chandler*.

From the beginning of civilization, courts have tried to grace the dicotomy between the need for certainty, predictability and

90. *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 31, 298 A.2d 529, 531 (1973).

91. B. CARDOZO, *THE GROWTH OF THE LAW*, 136-37 (1924) (quoted in *Tavares v. Horstman*, 542 P.2d 1275, 1278 (Wyo. 1975)).

92. 217 N.J. 282, 111 N.E. 1050 (1916).

93. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

94. *SUMMA THEOLOGICA OF ST. THOMAS AQUINAS* (Benziger ed. 1947) (quoted in E. BODENHEIMER, *JURISPRUDENCE* 25 (1978)).

95. 1 W. BLACKSTONE, *COMMENTARIES* 31 (Lewis ed. 1900).

promulgation of law (positive law) and the need for morality, justice, and reason (natural law). "Hard cases" do not necessarily make bad law, but they do make law and they are the fiery point of impact between these ancient but alive and vital contesting philosophies.

Chandler is a "hard case," as was *MacPherson*, *Greenman*, and at our local level, even *Brandenburger*. There are many others. In each a new right and a new duty were found. There will be hard cases again. Their resolution is a timeless process. It is a process which the criticisms of *Chandler* failed to take into account. Its result is judge-made law.

The decisions of our courts in cases like *MacPherson*, *Greenman*, and *Brandenburger* have renewed interest by legal scholars in the process of judge-made law. Indeed, not since the 1930's has the process been studied, rationalized, and defined with such care by jurists.⁹⁶ But one is hard pressed to find in all the writings a satisfactory statement of the limit on judges to make law, to fashion remedies, and to thereby inspire the body of the written law with the soul of justice. There is, of course, a political limit. So long, however, as decisions accord with prevailing concepts of fairness, reason, and common good, the political limit will not be approached. The beckoning of the natural law, ancient though its call may be, is still a potent force, and *Chandler* is its natural offspring.

96. See generally R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977); H. KELSON, PURE THEORY LAW (N. Knight trans. 1967); H. L. A. HART, THE CONCEPT OF LAW (1961); Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

