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APARTMENTS AND HOUSES: THE WARRANTY OF HABITABILITY

DR. WALTER H. E. JAEGER*

INTRODUCTION

FIFTEEN YEARS AGO, the following statement regarding the desirability of having a warranty regarding habitability of dwelling houses appeared in the definitive work on contract law:

> It would be much better if this enlightened approach [referring to the warranties which accompany the sale of chattels] were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years.[1]

Beginning in the second half of the twentieth century, a phenomenal development occurred in the extension of warranties implied in law, better described as *constructive* warranties, to the sale of new dwelling houses to homeowners. The significance of new housing construction is perhaps best indicated by the fact that, according to the United States Department of Commerce, between two and three billions of dollars were spent for new homes each month during 1970-1978.

Breaking away from traditional but outworn property-ridden concepts to the effect that there are no implied warranties in the sale of real property, the more enlightened courts have rejected the doctrine of *merger*, as summarized here by the court in *Union Producing Co. v. Sanborn*:[2]

> It is well settled in Texas that all agreements, whether oral or written, entered into by and between the parties to a deed prior to its execution are presumed to have been merged in the deed in the absence of pleading and proof that all references thereto were omitted from the deed through mistake, accident, or fraud, and after delivery and acceptance of a deed in performance of a contract for the purchase and sale of land the deed is regarded as the final expression of the

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[1] 7 WILLISTON ON CONTRACTS § 926A (3d (Jaeger) ed. 1963).

[2] 194 F. Supp. 121 (E.D. Tex. 1961).

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agreement of the parties and the sole repository of the terms on which they have agreed.[3]

The case of *Levy v. C. Young Construction Co., Inc.*,[4] is frequently cited and quoted as representative of the orthodox albeit rather archaic and demoded concept that there are no *implied in law* warranties in the sale of real property.

The plaintiffs complained that, in the construction of their new house, defendant had been "under a duty" to make sure that it would be built "in a good and workmanlike manner with suitable materials"; that the sewer pipes "were not properly laid, as a result of which they were broken," which forced the plaintiffs to replace the pipes and soil cover in order to make the sewage disposal system operable.[5]

> To prevail [said the court] the burden was on plaintiffs to establish a duty owed them by defendant and which it had breached. Such a duty would have to grow out of an express or an implied warranty . . . . There is nothing in either the contract of purchase or in the deed which spells out an agreement by defendant to sell plaintiffs a well constructed house. There is no warranty of construction.[6]
>
> Ultimately, then, plaintiffs must justify a recovery on the basis of an implied warranty. Defendant contends that the acceptance of a deed by the purchaser from the vendor terminates the contractual relationship between the parties, and their respective rights and liabilities are thereafter determined solely by the deed and not by the contract of sale. This argument fairly summarizes prevailing law throughout the country.[7]
>
> Although the doctrine of *caveat emptor*, so far as personal property is concerned, is very nearly abolished, it still remains as a viable doctrine in full force in the law of real estate. Absent any convenant binding defendant to sell a well constructed house, plaintiffs cannot sue on an implied warranty.[8] That the rule of *caveat emptor* applies, and that there are no implied warranties in the sale of real estate, has been criticized, especially when applied to the sale of new housing.[9]

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[3] *Id.* at 126, *citing* Baker v. Baker, 207 S.W.2d 244, 249-50 (Tex. Civ. App. 1947); Whitehead v. Weldon, 264 S.W. 958, 960 (Tex. Civ. App. 1924); 19 TEX. JUR. 2D *Deeds* § 190 (1960).

[4] 46 N.J. Super. 293, 134 A.2d 717 (1957).

[5] *Id.* at 295, 134 A.2d at 718.

[6] *Id.* at 296, 134 A.2d at 718-19.

[7] *Id.* at 296, 134 A.2d at 719, *citing* Campbell v. Heller, 36 N.J. Super. 361 (Ch. Div. 1955); Dieckman v. Walser, 114 N.J. Eq. 382 (E. & A. 1933); 2 RESTATEMENT OF CONTRACTS § 413 (1932); 4 WILLISTON ON CONTRACTS § 926 (rev. ed. 1936); Annot., 38 A.L.R.2d 1310 (1954); Annot., 8 A.L.R.2d 218 (1949); 55 AM. JUR. *Vendor & Purchaser* § 368 (1946).

[8] *Id., quoting* 4 WILLISTON ON CONTRACTS § 926 (rev. ed. 1936). *See also* 7 WILLISTON ON CONTRACTS § 926A (3d (Jaeger) ed. 1963).

[9] *Id.* at 296-97, 134 A.2d at 719, *quoting* Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose,* 37 MINN. L. REV. 108 (1952-1953); Note, 4 W. RES. L. REV. 357 (1953).

Thus, a builder who sold a completed house was not liable to the purchaser for damages resulting from defects in the absence of express warranties in the deed or fraud or concealment.[10]

In a well reasoned dissent, the following appears:

> The defendant is a developer, and erected the house involved in this suit to sell to any one who would want it for a home. The plaintiff was such a person.
>
> Since the defendant is in the business of erecting houses to sell, it represented that it possessed a reasonable amount of skill necessary for the erection of a house. This representation was impliedly made to whomever purchased from the defendant a house erected by it for the purpose of selling. Such a representation is indispensable to effectuate the sale of a house erected by a developer, for the purpose of selling. Otherwise, there would be no sales. A person in the business of building houses to sell is fully aware that a purchaser relies upon such an implied representation. Since the defendant impliedly represented that it possessed a reasonable amount of skill requisite for the erection of a house, it follows that it also impliedly represented that the house was erected in a proper and reasonably workmanlike manner. Such representations as above mentioned are essential to good faith and fair dealing in the business of this nature; and good faith and fair dealing are implied in every contract of sale of a house. That which is implied in a contract is as much a part of it as that which is expressed.[11]

Basically, the views expressed in the dissenting opinion state the grounds for the more recent decisions, especially *Schipper v. Levitt & Sons.*[12]

Various reasons have been suggested for this anachronism. They have been stated by the court in *Evens v. Young*[13] in traditional, archaic terminology:

> Whether this be on grounds of public policy, or because the rule of *caveat emptor* governs, and no warranty will be implied or whether it be because the precedent negotiations are supplanted by the deed when the vendee receives it or whether the reason is to be found in the fact that the delivery of the deed practically terminates the relation of vendor and purchaser, whereas the relation of landlord and tenant is a continuing one, or whether such damages are not

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[10] *Id.* at 297, 134 A.2d at 719.
[11] *Id.* at 298, 134 A.2d at 720 (Waesche, J., dissenting).
[12] 44 N.J. 70, 207 A.2d 314 (1965).
[13] 196 Tenn. 118, 264 S.W.2d 577 (1954).

supposed to be within the reasonable contemplation of the parties—whatever be the reason, the fact remains.[14]

Gradually, however, the need for consumer or purchaser protection in the sale of new houses became more and more apparent to the courts. Step by step, the courts have discarded or encroached upon the inhibiting influence of merger. Generally, these more recent decisions are based on an enlightened public policy.

In one of the earliest of these cases, *Hoye v. Century Builders,*[15] the plaintiff entered into contract with a builder to construct a house on certain land. Upon completion, it was discovered that there was a continuing "discharge of raw sewage, which condition stubbornly resists correction."[16] The court held that the builder's contract to build a house for plaintiffs impliedly warranted it would be fit for human habitation.

Among other early departures from the strictures of real property law were three decisions: one from a federal court applying the law of the State of Colorado, *F & S Construction Co. v. Berube,*[17] and two from that state's supreme court, *Glisan v. Smolenske*[18] and *Carpenter v. Donohoe.*[19]

In the first case, a builder had the soil tested before construction and a consultant approved the proposed foundations. The soil contained a clay which swelled and heaved when wet by rainfall and irrigation of lawns and shrubs. A written warranty was given to the purchaser, but it did not cover the soil defect.

Some four or five months after the deed and possession were delivered to the purchaser, heaving of the soil cracked the walls and warped window and door frames and floors. There was no finding of negligence or defective workmanship, nor that the builder knew such results would flow from the condition of the soil. Applying state law, the federal court of appeals affirmed a judgment for the purchaser on the ground of breach of an implied warranty of fitness.

As the court said in this case of novel impression:

> The first of the principal points raised by the appellant is that this transaction was a sale of real estate, and that there can be no implied warranty as to fitness in such a sale. . . .

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[14] *Id.* at 126, 264 S.W.2d at 580, *quoting* Smith v. Tucker, 151 Tenn. 349, 362, 270 S.W. 66, 70 (1925).

[15] 52 Wash. 2d 830, 329 P.2d 474 (1958).

[16] *Id.* at 835, 329 P.2d at 477.

[17] 322 F.2d 782 (10th Cir. 1963).

[18] 153 Colo. 274, 387 P.2d 260 (1963).

[19] 154 Colo. 78, 388 P.2d 399 (1964).

> There is no evidence whatever that the appellant knew that the condition of the soil would cause the results which here followed. The court made no finding of negligence or that the workmanship of the appellant was defective. There is no issue of fraud here, only an action on implied warranty of fitness.[20]

Many authorities were cited to the court by both parties litigant.[21] From them, it could be properly concluded that where the contract of sale of a completed house was entered into, the transaction was one involving the conveyance of real property. However, where the contract was for the sale of an incomplete structure, or for a house yet to be built on the selected site, the courts were inclined to regard this as an agreement for construction rather than for the sale of real property. Where construction is involved, a warranty may properly be implied that the completed house will be fit for human habitation.[22]

A few years later, the decisions rendered in the other two cases rejected the ancient doctrine of merger and followed the trend towards greater consumer protection. In the first, *Glisan v. Smolenske,* the plaintiff agreed to buy a house from the builder while it was still under construction. When it turned out to be defective, the court posed the basic question: "Was there an implied warranty that the house, when completed, would be fit for habitation?"

It was answered in line with the growing trend:

> There is a growing body of law on this question, which, if followed, requires an answer in the affirmative.
>
> It is the rule that there is an implied warranty where the contract relates to a house which is still in the process of construction, where the vendor's workmen are still on the job, and particularly where completion is not accomplished until the house has arrived at the contemplated condition — namely, finished and fit for habitation.[23]

In the second case, the same court refused to follow an untenable distinction:

> That a different rule should apply to the purchaser of a house

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[20] 322 F.2d at 784.

[21] These included Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962); Mitton v. Granite State Fire Ins. Co., 196 F.2d 988 (10th Cir. 1952); Cohen v. Vivian, 141 Colo. 443, 349 P.2d 366 (1960); Denver Business Sales Co. v. Lewis, 365 P.2d 895 (Colo. 1961); Oil Creek Gold Mining Co. v. Fairbanks Morse & Co., 19 Colo. App. 142, 74 P. 543 (1903).

[22] *See* Miller v. Cannon Hill Estates, Ltd., [1913] 2 K.B. 113. This case marks one of the earliest departures from the traditional property-grounded concept of *caveat emptor* in real estate transactions. For later cases upholding the validity of this newer concept, *see* Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958); Jennings v. Tavenner, [1955] 2 All E.R. 769 (Q.B.).

[23] 153 Colo. at 279, 387 P.2d at 262-63.

> which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it. . . .[24]

The court goes on to state:

> We hold that the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in a workmanlike manner and is suitable for habitation.[25]

SCHIPPER V. LEVITT & SONS AND ITS PROGENY

Two years later came the opinion in the truly classic case[26] which definitely cast aside the obsolete limitations the law of real property had placed on sales of new houses.

The purchaser of a new mass-produced house leased it; the tenant's child was severely burned by scalding hot water which spurted out of a bathroom faucet. The trial court dismissed the complaint, and an appeal resulted. Reversing, the appellate court held that the case should have gone to trial.

The first point raised by the plaintiff was that defendant should be held liable for negligence. As to this, the court commented: "When their marketed products are defective and cause injury to either immediate or remote users, such manufacturers may be held accountable under ordinary negligence principles . . . as well as under expanding principles of warranty or strict liability."[27]

After a comprehensive review of various cases[28] dealing with negligent construction of homes, the appellate court adverted to the second point

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[24] 154 Colo. at 83, 388 P.2d at 402, *citing* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults upon the Rule,* 14 VAND. L. REV. 541 (1961).

[25] *Id.* at 83-84, 388 P.2d at 402.

[26] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[27] *Id.* at 82, 207 A.2d at 321, *citing* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

[28] *See* Dow v. Holly Mfg. Co., 49 Cal. 2d 720, 321 P.2d 736 (1958); Leigh v. Wadsworth, 361 P.2d 849 (Okla. 1961); Sernicandro v. Lake Developers, Inc., 55 N.J. Super. 475, 151 A.2d 84 (1959).

made by the plaintiffs to the effect that the defendant should be held liable for breach of the warranty of habitability. The court agreed in the following terms:

> Law as an instrument for justice has infinite capacity for growth to meet changing needs and mores; nowhere was this better illustrated than in *Henningsen*.[29] There a Plymouth automobile with a defective steering mechanism was sold by Chrysler to one of its dealers who in turn sold it to Mr. Henningsen. While the car was being driven by Mrs. Henningsen, its steering mechanism failed causing serious accident and severe injury. The Henningsens sued the Chrysler Corporation claiming that it had impliedly warranted that when it delivered its automobile it was not defective but was reasonably fit for its intended use, that this warranty had been breached, foreseeably causing injury to an ultimate user of the automobile, and that it should be held strictly responsible for the injury caused by its breach without further showing of fault or negligence.[30]

The court concluded that the law should be based on current concepts of what is right and just. The judiciary should be alert to the never ending need for keeping common law principles abreast of the times. Ancient distinctions which no longer have any significance in present day society and tend to discredit the law should be readily obliterated as they were step by step in *Henningsen v. Bloomfield Motors, Inc.*[31] and *Santor v. A. & M Karagheusian, Inc.*[32]

As the court pointed out:

> We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles of *Henningsen* and *Santor* should be carried over into the realty field, at least in the aspect dealt with here. . . .
>
> When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper con-

[29] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
[30] 44 N.J. at 89, 207, A.2d at 324-25.
[31] 32 N.J. 358, 161 A.2d 69 (1960).
[32] 44 N.J. 52, 207 A.2d 305 (1965).

> struction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.[33]

The arguments advanced by the defendant in opposition to strict liability or liability for breach of constructive warranty not only did not impress the court, but appeared "to lack substantial merit."[34] Thus the contention that *caveat emptor* should be applied and the deed viewed as embodying all the rights and responsibilities of the parties disregarded the realities of the situation.[35]

> *Caveat emptor* developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.[36]

Thereupon, the defendant voiced the fear of "uncertainty and chaos" taking place in the home building industry "if responsibility for defective construction is continued after the builder-vendor's delivery of the deed and its loss of control of the premises. . . ."[37] However, the court interposed, "we fail to see why this should be anticipated or why it should materialize any more than in the products liability field where there has been no such result."[38]

Defendant also contended that imposition of warranty or strict liability principles would make builder-vendors of homes "virtual insurers of the safety of all who thereafter come upon the premises."[39] This contention was flatly rejected:

> That is not at all so, for the injured party would clearly have the burden of establishing that the house was defective when constructed and sold and that the defect proximately caused the injury. In de-

[33] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90-91, 207 A.2d 314, 325-26 (1965).
[34] *Id.* at 91, 207 A.2d at 326.
[35] *Id.*
[36] *Id.* at 91-92, 207 A.2d at 326.
[37] *Id.* at 92, 207 A.2d at 326.
[38] *Id.*
[39] *Id.*

termining whether the house was defective, the test admittedly would be reasonableness rather than perfection.[40]

The defendant relied on "the traditional rule that warranties in the sale of real property are not to be implied" and sought to distinguish various cases which either limited the rule or discarded it.[41] As to these, the court remarked: "Whether or not the cases may be differentiated, they undoubtedly evidence the just stirrings elsewhere towards recognition of the need for imposing on builder vendors an implied obligation of reasonable workmanship and habitability which survives delivery of the deed."[42]

After reviewing some of the more significant departures from the orthodox rule excluding any implied warranties in the sale of real property, the court joined the ranks of the more forward-looking jurisdictions, quoting *Carpenter v. Donohoe* as a leading precedent.[43] The court held in *Carpenter* that the implied warranty doctrine must be extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. The pertinent language of *Carpenter,* that most often quoted by writers in this field, includes the following:

> There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation.[44]

The court, in *Schipper v. Levitt & Sons, Inc.* went on to state:

> It is worthy of note that although the 1936 edition of WILLISTON, CONTRACTS, upon which Levitt places reliance, stated flatly that there are no implied warranties in the sale of real estate, the 1963 edition took quite a different approach. In this edition, Professor Jaeger pointed out that although the doctrine of *caveat emptor* is still broadly applied in the realty field, some courts have inclined towards making "an exception in the sale of new housing where the vendor is also the developer or contractor" since in such situation the purchaser "relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house will be fit for human dwelling." In concluding his discussion

[40] 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).

[41] *Id. See* Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Glisan v. Smoleneske, 153 Colo. 274, 387 P.2d 260 (1964); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Weck v. A:M Construction Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

[42] *Id.* at 93, 207 A.2d at 327.

[43] 154 Colo. 78, 388 P.2d 399.

[44] 44 N.J. at 94, 207 A.2d at 327, *quoting* Carpenter v. Donohoe, 154 Colo. at 83-84, 388 P.2d at 402.

of the subject, the author remarked that "it would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."[45]

As the defendant took pains to point out, the cases from other jurisdictions relied on by the court were direct actions by the original vendees against the builder-vendors; therefore, the matter of privity or lack thereof was not an issue. Relying on its own decisions, the court replied:

> But it seems hardly conceivable that a court recognizing the modern need for a vendee occupant's right to recover on principles of implied warranty or strict liability would revivify the requirement of privity, which is fast disappearing in the comparable products liability field, to preclude a similar right in other occupants likely to be injured by the builder vendor's default. Issues of notice, time limitation and measure of proof, which have not really been discussed in the briefs, would seem to be indistinguishable from those which have been arising in the products liability field and are there being dealt with by developing case law and occasional statutory enactment. . . .
>
> We are satisfied that, in the particular situation here, the plaintiffs may rely not only on the principles of negligence set forth under their first point but also on the implied warranty or strict liability principles set forth under their second point. We note, however, as indicated earlier in this opinion, that even under implied warranty or strict liability principles, the plaintiffs' burden still remains of establishing to the jury's satisfaction from all the circumstances that the design was unreasonably dangerous and proximately caused the injury.[46]

Following in the judicial footsteps of the classic decision examined above, another court adopted the views expressed therein when confronted with a similar situation. In this instance, the suit was for rescission and restitution and was brought against the realtor and builder by the purchasers of a home which they claimed was uninhabitable.[47]

An open drainage ditch ran through the property underneath the garage; as a result, water seeped into the basement rooms of the dwelling house. The builder was unsuccessful in his efforts to stop the seepage of water. Plaintiffs eventually moved out of the house and notified the builder-vendor that they had rescinded their contract and tendered possession of the house. This tender was refused.

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[45] *Id.* at 94-95, 207 A.2d at 328, *citing* 7 WILLISTON ON CONTRACTS § 926A (3d (Jaeger) ed. 1963).

[46] *Id.* at 95-96, 207 A.2d at 328.

[47] Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966).

Judgment for defendants was reversed with respect to the builder. Adverting to the classic precedent referred to above,[48] the court commented:

> The *Schipper* decision is important here because: (1) it illustrates the recent change in the attitude of the courts toward the application of the doctrine of *caveat emptor* in actions between the builder-vendor and purchaser of newly constructed dwellings; (2) it draws analogy between the present case and the long-accepted application of implied warranty of fitness in sales of personal property; and (3) the opinion had the unanimous approval of the participating justices.[49]

After review of a number of out-of-state decisions including *Carpenter v. Donohoe,*[50] *Weck v. A:M Sunrise Construction Co.*[51] and *Jones v. Gatewood,*[52] all of which afforded the home buyer a remedy based on breach of constructive warranty, the court noted:

> The foregoing decisions . . . show the trend of judicial opinion is to invoke the doctrine of implied warranty of fitness in cases involving sales of new houses by the builder. The old rule of *caveat emptor* does not satisfy the demands of justice in such cases. The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of *caveat emptor* to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice.
>
> 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. The builder-vendor's legitimate interests are protected by the rule which casts the burden upon the purchaser to establish the facts which give rise to the implied warranty of fitness, and its breach.[53]

In *Waggoner v. Midwestern Development, Inc.,*[54] another case involving seepage, the house was located in a new development where a pond fed by springs had been filled in with loose dirt. It appeared that this condition was likely to continue. Respondent building contractor who had sold the house to the homeowners strongly contended that there could be no

[48] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314.

[49] 91 Idaho at 66, 415 P.2d at 709.

[50] 154 Colo. 78, 388 P.2d 399.

[51] 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

[52] 381 P.2d 158 (Okla. 1963).

[53] 91 Idaho at 67-68, 415 P.2d at 710-11.

[54] 83 S.D. 57, 154 N.W.2d 803 (1967).

implied warranty once the vendor of realty parted "with title, possession and control." In support of this view, the following passage was quoted from *Levy v. C. Young Construction Co., Inc.*:[55]

> As defendant notes, the policy reasons underlying the rule that the acceptance of a deed without covenants as to construction is the cut-off point so far as the vendor's liability is concerned, are rather obvious. Were plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability.[56]

The court showed a definite disinclination to follow these outworn concepts of real property law and observed:

> The courts of several jurisdictions have recently departed from the original nonliability rule expressing the view that there is no sound reason for a distinction between the liability of a person who erects houses for sale to the public and the manufacturer who supplies dangerous or defective chattels. This conforms to the reasoning of the product liability cases.
>
> ....
>
> The third count [of the complaint] is predicated as indicated upon implied warranty of fitness. It is contended that defendant engaged in the business of building houses for sale impliedly represented that it possessed the requisite skill for building houses and impliedly warranted that the house sold to plaintiffs was constructed in a workmanlike manner and reasonably fit for habitation.[57]

Thus, it may be said that warranties are express, implied in fact, or implied in law (also known as constructive warranties), and arise under certain circumstances by operation of law.[58] The last mentioned are intended to hold vendors to a course of fair dealing.[59] Constructive warranties do not rest upon any supposed agreement in fact.[60] The court found them to be "obligations which the law raises upon principles foreign to the actual contract; principles which are strictly analogous to those upon which vendors are held liable for fraud. It is merely for the sake of convenience that this obligation is permitted to be enforced under the form of a contract."[61]

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[55] 46 N.J. Super. 293, 134 A.2d 717 (1957).

[56] 83 S.D. at 61-62, 154 N.W.2d at 805-06.

[57] *Id.* at 62, 64, 154 N.W.2d at 806, 807.

[58] *Id.* at 64, 154 N.W.2d at 807, *citing* Lee v. Cohort, 57 S.D. 387, 232 N.W.900 (1930).

[59] *Id.*

[60] *Id., quoting* Hoe v. Sanborn, 21 N.Y. 552, 564 (1860).

[61] *Id.*

The court concluded: "Proof of the breach of an implied warranty is sufficient to justify recovery irrespective of fault or negligence of the seller."[62]

The general rule has long been recognized that where a person, such as a builder or contractor, holds himself out as being especially qualified and particularly able to perform work of a certain character, there is an implied or constructive warranty that it shall be done in "a reasonably good and workmanlike manner and that the completed product or structure" will be reasonably fit or suited for its intended purpose.[63]

> These principles [the court continued] are particularly applicable where plans are furnished or a building is to be constructed according to a model already built.
>
> It may be assumed for the purpose of decision that the doctrine of *caveat emptor* applies generally to sales of real property and that in the absence of a covenant binding the vendor to sell a well constructed house the vendee has no cause of action on implied warranty. No such right arises on the resale of used housing since the vendor usually has no greater skill with respect to determining the quality of a house than the purchaser. There is, however, a notable lack of harmony in decisions as to the existence of an implied warranty of fitness upon the sale of a new house or one to be erected or in the course of erection.[64]
>
> In the 1963 edition of WILLISTON ON CONTRACTS, there is a review of recent decisions bearing on the question of implied warranty and discussion of the recent trend of decisional law. The author says: "Over the years, the number of cases which apply the rule of *caveat emptor* strictly appears to be diminishing, while there is a distinct tendency to depart therefrom either by way of interpretation or exception, or by simply refusing to adhere to the rule where it would work injustice. . . . Broad as is the application of the principle of *caveat emptor* in sales of real estate, a few courts have been inclined to make an exception in the sale of new housing where the vendor is also the developer or contractor. In such a situation, a purchaser relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house will be fit for human dwelling. . . . It would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."[65]

The court then engages upon an extensive discussion of the leading

[62] *Id., citing* 77 C.J.S. *Sales* § 304 (1952); PROSSER, LAW OF TORTS § 83 (2d ed. 1955).

[63] *Id.* at 64, 154 N.W.2d at 807.

[64] *Id.*

[65] *Id.* at 65, 154 N.W.2d at 807, *quoting* 7 WILLISTON ON CONTRACTS § 926A (3d (Jaeger) ed. 1963).

precedent, *Schipper v. Levitt & Sons, Inc.*,[66] quoting from the opinion at some length. Then, the early doctrine as to houses in course of construction is presented by the court in a leading case, *Perry v. Sharon Development Co.*[67]

> In the first place, the maximum [maxim?] *caveat emptor* cannot apply, and the buyer, in so far as the house is not yet completed, cannot inspect it, either by himself or by his surveyor, and in the second place, from the point of view of the vendor, the contract is not merely a contract to sell, but also a contract to do building work, and, in so far as it is a contract to do building work, it is only natural and proper that there should be an implied undertaking that the building work should be done properly.[68]

Defendant then argued that "there is no implied warranty in the sale of a completed house even though such warranty arises when the vendor is the builder and the house was in process of construction at the time of contract."[69]

This argument may be deemed specious and entirely without merit:

> That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it. . . .
>
> We conclude that where in the sale of a new house the vendor is also a builder of houses for sale there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed. The builder is not required to construct a perfect house and in determining whether a house is defective the test is reasonableness and not perfection. The duration of liability is likewise determined by the standard of reasonableness.[70]

In *Humber v. Morton*,[71] a defectively installed fireplace in a new home caused a fire which damaged the house and the homeowners brought an action. The trial court granted defendant builder-vendor's motion for summary judgment; the intermediate appellate court affirmed, and the plaintiff

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[66] 44 N.J. 70, 207 A.2d 314 (1965).

[67] [1937] 4 All E.R. 390.

[68] 83 S.D. at 66-67, 154 N.W.2d at 808, *quoting* Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390, 393-94.

[69] *Id.* at 67, 154 N.W.2d at 809.

[70] *Id.*, *citing* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1969); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[71] 426 S.W.2d 554 (Tex. 1968).

alleged error. The state supreme court reversed and remanded "for a conventional trial upon the merits."[72]

The court continued:

> There are numerous cases that an implied covenant or warranty to build in a workmanlike manner is not destroyed by the deed.
>
> If the passage of a deed does not operate to extinguish a warranty, either expressed or implied, in the case of an uncompleted house, it is difficult to understand how the deed could operate to merge and thus destroy an implied warranty raised by law in the case of a sale of a completed new house. It would be a strange doctrine indeed for the law to raise an implied warranty from a sale and then recognize that such warranty could be defeated by the passage of title to the subject matter of the sale. The issue here is not whether the implied warranty was extinguished by a conveyance, but whether such warranty ever came into existence in the first place.
>
> ....
>
> We return to the crucial issue in the case — Does the doctrine of *caveat emptor* apply to the sale of a new house by builder-vendor?
>
> Originally, the two great systems of jurisprudence applied different doctrines to sales of both real and personal property. The rule of the common law — *caveat emptor* — was fundamentally based upon the premise that the buyer and seller dealt at arm's length, and that the purchaser had means and opportunity to gain information concerning the subject matter of the sale which were equal to those of the seller. On the other hand, the civil law doctrine — *caveat venditor* — was based upon the premise that a sound price calls for a sound article; that when one sells an article, he implies that it has value.

Today, the doctrine of *caveat emptor* as related to sales of personal property has a severely limited application.[73]

There follows an extensive quotation from the opinion of the Supreme Court of the United States in *Kellogg Bridge Co. v. Hamilton,*[74] wherein it applied the doctrine of implied warranty to "a real property situation involving false work and pilings driven into the bed" of a river.

> Although the plaintiff in error [Kellogg Bridge Company, defendant in the trial court] is not a manufacturer, in the common acceptation of that word, it made or constructed the false work which it sold to Hamilton. The transaction, if not technically a sale, created between the parties the relation of vendor and vendee. The business of the

[72] *Id.* at 555.

[73] *Id.* at 556-57. *See* Decker & Sons v. Capp, 139 Tex. 609, 164 S.W.2d 828 (1942); Putman v. Erie City Mfg. Co, 338 F.2d 911 (5th Cir. 1964).

[74] 110 U.S. 108 (1884).

> company was the construction of bridges. By its occupation, apart from its contract with the railroad company, it held itself out as reasonably competent to do work of that character. Having partially executed its contract with the railroad company, it made an arrangement with Hamilton whereby the latter undertook, among other things, to prepare all necessary false work, and, by a day named, and in the best manner, to erect the bridge then being constructed by the bridge company — Hamilton to assume and pay for such work and materials as that company had up to that time done and furnished.[75]

It was anticipated by the parties that Hamilton should commence where the company left off. It was never contemplated that he should incur the expense of removing the false work put up by the company and commence anew. On the contrary, he agreed to assume and pay for, and therefore it was expected by the company that he should use, such false work as it had previously prepared. It is hardly reasonable to suppose that he would buy something he did not intend to use, or that the company would require him to assume and pay for that which it did not expect him to use, or which was unfit for use. In the cases of sales by manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But, plainly, such an argument would impeach the whole doctrine of implied warranty, for there are no sales of personal property wherein the buyer may not, if he chooses, insist on an express warranty against latent defects. The Court added:

> All the facts are present which, upon any view of the adjudged cases, must be held essential in an implied warranty. The transaction was, in effect, a sale of this false work, constructed by a company whose business it was to do such work; to be used in the same way the maker intended to use it, and the latent defects in which, as the maker knew, the buyer could not, by any inspection or examination, at the time discover; the buyer did not, because in the nature of things he could not, rely on his own judgment; and, in view of the circumstances of the case, and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone of the parties to the contract had or could have knowledge of the manner in which the work had been done. The law, therefore, implies a warranty that this false work was reasonably suitable for such use as was contemplated by both parties.[76]

In a more recent case, the buyers of a residence in a housing development brought an action against various participants in the development in-

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[75] *Id.* at 117.
[76] *Id.* at 118-19.

cluding the defendant building and loan association which financed it. In an extensive opinion, the court, in *Connor v. Great Western Savings & Loan Association,*[77] held the building and loan association liable for damages resulting from defectively designed foundations of certain homes sold to purchasers and financed by the association.

The trial court had entered judgment of nonsuit, and the plaintiffs appealed. The appellate court reversed. One of the principal points advanced by the appellant was the existence of a joint venture between the building and loan association and the builders.

The appellate court pointed out that there was no express agreement, either written or oral, creating a joint venture between the parties.[78] Such documents as were produced only indicated typical option and purchase agreements, and loan and security transactions. However, the plaintiffs insisted that at least by inference, an implied agreement of joint venture existed between the building and loan association and the builder-developers.

The state supreme court examined the requirements for a joint venture:

> A joint venture exists when there is "an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, and understanding as to the sharing of profits and losses, and a right of joint control."
>
> Although the evidence establishes that Great Western and Conejo combined their property, skill, and knowledge to carry out the tract development, that each shared in the control of the development, that each anticipated receiving substantial profits therefrom, and that they cooperated with each other in the development, there is no evidence of a community or joint interest in the undertaking. Great Western participated as a buyer and seller of land and lender of funds, and Conejo participated as a builder and seller of homes. Although the profits of each were dependent on the overall success of the development, neither was to share in the profits or the losses that the other might realize or suffer. Although each received substantial payments as seller, lender, or borrower, neither had an interest in the payments received by the other. Under these circumstances, no joint venture existed.[79]

In the next paragraph of the opinion, the court comments on the rela-

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[77] 69 Cal. 2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968).

[78] Joint ventures are discussed in detail in 2 WILLISTON ON CONTRACTS §§ 318-19 (3d (Jaeger) ed. 1963) and Jaeger, *Joint Ventures,* 9 AM. U.L. REV. (*Part I*) 1 and (*Part II*) 111 (1970). *See also* Jaeger, *Joint Ventures—Recent Developments,* 4 WASHBURN L.J. 9 (1964); Jaeger, *Partnership or Joint Venture?* 37 NOTRE DAME LAW. 138 (1961).

[79] 69 Cal. 2d at 863, 73 Cal. Rptr. at 375, 447 P.2d at 615 (citations omitted).

tionship of the parties. This brings up the question, how much more would be necessary to create a joint venture?

Even in the absence of an express agreement, it has repeatedly been held that the conduct of the parties *may* result in a finding of joint venture. It would appear that when a judgment of nonsuit was entered against the plaintiffs by the trial court, they were in effect foreclosed from any opportunity of establishing a joint venture, even assuming that one existed. The existence of a joint venture is generally regarded as a question of fact.[80]

The court continued:

> Even though Great Western is not vicariously liable as a joint venturer for the negligence of Conejo, there remains the question of its liability for its own negligence. Great Western voluntarily undertook business relationships with South Gate and Conejo to develop the Weathersfield tract and to develop a market for the tract houses in which prospective buyers would be directed to Great Western for their financing. In undertaking these relationships, Great Western became much more than a lender content to lend money at interest on the security of real property. *It became an active participant in a home construction enterprise. It had the right to exercise extensive control of the enterprise.* Its financing, which made the enterprise possible, took on ramifications beyond the domain of the usual money lender. It received not only interest on its construction loans, but also substantial fees for making them, a 20% capital gain for "warehousing" the land, and protection from loss of profits in the event individual home buyers sought permanent financing elsewhere.
>
> Since the value of the security for the construction loans and thereafter the security for the permanent financing loans depended on the construction of sound homes, Great Western was clearly under a duty of care to its shareholders to exercise its powers of control over the enterprise to prevent the construction of defective homes .... The crucial question remains whether Great Western also owed a duty to the home buyers in the Weathersfield tract and was therefore also negligent toward them.[81]

The court held that although Great Western was not in privity of contract with any of the plaintiffs except as a lender, this did not absolve it of liability for its own negligence in creating an unreasonable risk of harm to them.

"Privity of contract is not necessary to establish the existence of a

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[80] National State Bank of Newark v. Terminal Const. Corp., 217 F. Supp. 341 (D.C.N.J. 1963), *aff'd*, 328 F.2d 315 (3d Cir. 1964); Wittner v. Metzger, 72 N.J. Super. 438, 178 A.2d 671 (1962); 2 WILLISTON ON CONTRACTS § 318 (3d (Jaeger) ed. 1963); Jaeger, *supra* note 78 at (*Part I*) 1.

[81] 69 Cal. 2d at 864-65, 73 Cal. Rptr. at 376-77, 447 P.2d at 616 (emphasis added).

> duty to exercise ordinary care not to injure another, but such duty may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty." . . .
>
> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are
>
> [1] The extent to which the transaction was intended to affect the plaintiff,
>
> [2] The foreseeability of harm to him,
>
> [3] The degree of certainty that the plaintiff suffered injury,
>
> [4] The closeness of the connection between the defendant's conduct and the injury suffered,
>
> [5] The moral blame attached to the defendant's conduct, and
>
> [6] The policy of preventing future harm."
>
> In the light of the foregoing tests Great Western was clearly under a duty to the buyers of the homes to exercise reasonable care to protect them from damages caused by major structural defects.[82]

The court found that the value of the security for Great Western's construction loans as well as the projected security for its long-term loans to plaintiffs depended on the soundness of construction. When Great Western failed to exercise reasonable care to preclude major structural defects in the homes whose construction it financed and controlled, it failed in its duty to its stockholders. It also failed in its obligation to the buyers because it was aware that the usual buyer of a home is ill-equipped with experience or financial means to discern or ascertain such structural defects. A home is not only a major investment for the usual buyer but is generally the only shelter he has. Thus it becomes doubly important to protect him against structural defects that could prove beyond his capacity to remedy.

The court added:

> By all the foregoing tests, Great Western had a duty to exercise reasonable care to prevent the construction and sale of seriously defective homes to plaintiffs. . . . In any event, there is no enduring social utility in fostering the construction of seriously defective homes. If reliable construction is the norm, the recognition of a duty on the part of tract financiers to home buyers should not materially increase the cost of housing or drive small builders out of business. If existing sanctions are inadequate, imposition of a duty at the point of effective financial control of tract building will insure responsible building practices. Moreover, in either event the losses of family savings invested in

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[82] *Id.* at 865-66, 73 Cal. Rptr. at 377, 447 P.2d at 617.

seriously defective homes would be devastating economic blows if no redress were available.[83]

In another case, *Kriegler v. Eichler Homes, Inc.*,[84] a heating system did not function properly in a home. The owner filed action against the builder who cross-complained against the supplier of the materials and the heating contractors. Judgment was rendered for the plaintiff on the complaint, and for the supplier and heating contractors on the cross-complaint. Thereupon, the defendant appealed.

The house had been built some eight years earlier, but a copper shortage had caused the installation of steel tubing in place of copper. Corrosion of the steel tubing caused the failure of the heating system and required total replacement of the tubing.

The defendant argued on appeal that the trial court was in error in holding that liability existed even in the absence of negligence, basing its decision on "the theory of strict liability." In light of the decisions by the courts, the defendant was forced to recognize that the doctrine of strict liability applies to physical harm to chattels, but contended that such liability did not extend "to homes or builders."

Pointing out that this was a case of novel impression, the appellate court commented on the application of the doctrine of strict liability. It was seen to apply when one can prove an injury which occurred while using an instrumentality in a way in which it was intended to be used, if that injury was a result of a defect in design and manufacture of which the user was not aware and which made the instrumentality unsafe for its intended use. While it had been limited in California only to manufacturers, retailers and suppliers of personal property and rejected as to sales of real estate, the reasoning behind that limitation demanded the court's scrutiny since the doctrine should apply to any case of injury resulting from the risk-creating conduct of a seller in any stage of the production and distribution of goods.

> We think, in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. Law, as an instrument of justice, has infinite capacity for growth to meet changing needs and mores. Nowhere is this better illustrated than in the recent developments in the field of products liability. The law should be based on current concepts of what is right and just and the judiciary should

[83] *Id.* at 867-68, 73 Cal. Rptr. at 378-79, 447 P.2d at 618-19.

[84] 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

be alert to the never-ending need for keeping legal principles abreast of the times.[85]

[Adverting to a classic precedent, *Schipper v. Levitt & Sons, Inc.*,[86] the court noted that it was] almost on all fours with the instant one . . . [since] the purchaser of a mass-produced home sued the builder-vendor for injuries sustained by the child of a lessee. The child was injured by excessively hot water drawn from a faucet in a hot water system that had been installed without a mixing valve, a defect as latent as the incorrect positioning of the pipes in the instant case. In reversing a judgment of nonsuit, the Supreme Court held that the builder-vendor was liable to the purchaser on the basis of strict liability. . . .

"Buyers of mass produced development homes are not on an equal footing with the builder-vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale." [The] imposition of strict liability principles on builders and developers would not make them insurers of the safety of all who thereafter came on the premises. In determining whether the house was defective, the test would be one of reasonableness rather than perfection.[87]

In the precedent cited, the court did not, however, confine its holding for the injured plaintiff to "strict liability" but also accepted the doctrine of implied or *constructive* warranty as noted above. Most courts permit recovery on either theory.[88]

The foregoing and other significant precedents[89] are reviewed in comprehensive fashion in a case of novel impression, *Wawak v. Stewart*,[90] where the buyers of a new home encountered a serious defect when heavy rains caused the heating and air conditioning system to be flooded. As a result, silt and sand were deposited in various parts of the house.

The trial court gave judgment for the plaintiff-buyers for breach of implied warranty. When defendant-builder appealed, the appellate court affirmed, declaring:

The trial court was right. Twenty years ago one could hardly find any American decision recognizing the existence of an implied warranty in a routine sale of a new dwelling. Both the rapidity and

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[85] *Id.* at 227, 74 Cal. Rptr. at 752 (citations omitted).

[86] 44 N.J. 70, 207 A.2d 314 (1965).

[87] 269 Cal. App. 2d at 228, 74 Cal. Rptr. at 752-53.

[88] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[89] These are reviewed and analyzed in detail in Jaeger, *The Warranty of Habitability, Part I*, 46 CHI.-KENT L. REV. 123, *Part II*, 47 CHI.-KENT. L. REV. 1 (1970) and 13 WILLISTON ON CONTRACTS § 1565A (3d (Jaeger) ed. 1970).

[90] Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970).

the unanimity with which the courts have recently moved away from the harsh doctrine of *caveat emptor* in the sale of new houses are amazing, for the law has not traditionally progressed with such speed.

Yet there is nothing really surprising in the modern trend. The contrast between the rules of law applicable to the sale of personal property and those applicable to the sale of real property was so great as to be indefensible. One who bought a chattel as simple as a walking stick or a kitchen mop was entitled to get his money back if the article was not of merchantable quality. But the purchaser of a $50,000 home ordinarily had no remedy even if the foundation proved to be so defective that the structure collapsed into a heap of rubble.[91]

A decidedly similar view was expressed as to implied or constructive warranties accompanying the sale of new automobiles in the unanimous opinion of the Supreme Court of New Jersey, *Henningsen v. Bloomfield Motors, Inc.*[92] After citing various law review articles, the *Wawak* court continued:

> In 1963 a new edition of WILLISTON'S CONTRACTS added its weight to the movement, pointing out a practical advantage in the new point of view: "It would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."
>
> In the past decade six states [Colorado,[93] Idaho,[94] New Jersey,[95] South Dakota,[96] Texas[97] and Washington[98]; today, the states recognizing the warranty of habitability are in the majority] have recognized an implied warranty — of inhabitability, sound workmanship, or proper construction — in the sale of new houses by vendors who also build the structures.[99]

Having quoted at some length from several of the earlier precedents, the court pointed out:

> 'The *caveat emptor* rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to

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[91] *Id.* at 923.

[92] 32 N.J. 358, 161 A.2d 69 (1960), discussed in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE U.L. REV. 1 (1963) and in Jaeger, *Warranties of Merchantability and Fitness for Use,* 16 RUTGERS L. REV. 493 (1962).

[93] Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

[94] Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966).

[95] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[96] Waggoner v. Midwestern Dev. Co., 83 S.D. 57, 154 N.W.2d 803 (1967).

[97] Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

[98] House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

[99] 449 S.W.2d at 923, *quoting* 7 WILLISTON ON CONTRACTS § 926A (3d (Jaeger) ed. 1970).

the industry itself by lending encouragment to the unscrupulous, fly-by-night operator and purveyor of shoddy work.'[100]

Various arguments were advanced by the defendant builder, including the usual suggestion that a change so drastic should come from the legislature rather than the courts. Rejecting this contention, and citing "a famous case" (*MacPherson v. Buick Motor Co.*[101]) abolishing the so-called requirement of privity — "accepted as commonplace throughout the nation" — the court added:

> We have no doubt that the modification of the rule of *caveat emptor* that we are now considering will be accepted with like unanimity within a few years [and this is the case today].[102]
>
> ....
>
> To sum up, upon the facts before us in the case at bar we have no hesitancy in adopting the modern rule by which an implied warranty may be recognized in the sale of a new house by a seller who was also the builder.[103]

Among the more recent decisions in which the warranty of habitability has been adopted is the case of *Cochran v. Keeton*.[104] The defendants built a house in Cherokee, Alabama, which was then sold to the plaintiffs. Some five months later, defective wiring caused a fire in the house, but the defendants failed to make necessary repairs. Subsequently, the presence of smoke induced the plaintiffs to notify the defendants that something was amiss; a further inspection was made but before the defect could be repaired, another fire broke out and caused serious damage to the Cochran home. Thereupon, the plaintiffs brought an action based on negligence and the implied warranty of habitability.

A judgment for defendants in the trial court was reversed by the appellate court and certiorari was granted. The Supreme Court of Alabama rendered judgment for the plaintiffs and an earlier precedent to the contrary, *Druid Homes, Inc. v. Cooper*,[105] was expressly overruled.

> Being presented with the opportunity to review *Druid*, we do overrule *Druid* insofar as it adopts the rule of *caveat emptor* in the sale by a builder-vendor of a newly constructed house.
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> ....

The modern trend, even in some of the jurisdictions from which this

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[100] *Id.* at 925.

[101] 217 N.Y. 382, 111 N.E. 1050 (1916).

[102] *See* Jaeger, *An Emerging Concept: Consumer Protection in Products Liability and the Sale of New Homes*, 11 VAL. U.L. REV. 335 (1977).

[103] Wawak v. Stewart, 449 S.W.2d at 925-26.

[104] 287 Ala. 439, 252 So. 2d 313 (1971).

[105] 272 Ala. 415, 131 So. 2d 884 (1961).

Court cited opinions in *Druid* is to repudiate the doctrine of *caveat emptor* in fact situations similar to the one here under consideration. Considerable comment has been made by legal scholars about the new trend toward judicial abolition of the doctrine of *caveat emptor* in real estate sales. Most scholars question the retention of the rule in view of current day conditions.[106]

In a later case, *Loch Ridge Construction Company v. Barra,*[107] the Alabama Supreme Court affirmed a judgment for plaintiff home buyers, *including the award of punitive damages,* where fraud and misrepresentations were to the effect that the house had been built to conform to the Veterans Administration requirements when in fact it had not, and there were numerous material discrepancies. The case is of special interest because of the award of punitive damages.

THE WARRANTY AS APPLIED TO APARTMENTS

In an even more remarkable departure, a number of courts are applying the concept of habitability to apartments. To some extent, this is based on violations of building codes where these exist. Thus, in a very recent case in Texas, *Kamarath v. Bennett,*[108] the Texas Supreme Court held, citing 6 WILLISTON ON CONTRACTS § 890 (3d (Jaeger) ed. 1962):

> This case presents the questions of whether in Texas an implied warranty of habitability arises as a consequence of a landlord-tenant relationship. Wilford Kamarath, a lessee of an apartment in Dallas, Texas, filed this suit against C. C. Bennett, for damages for the breach of implied warranty of habitability of the urban residential rental property. The trial court, without a jury, rendered judgment that tenant Kamarath take nothing. The court of civil appeals affirmed, holding the implied warranty does not exist, 549 S.W. 2d 784. We granted the application for writ of error to review this determination and we reverse and remand.[109]

The material facts showed that on March 1, 1975, Petitioner Kamarath entered into an oral, month-to-month lease of a one-bedroom apartment from the Respondent C. C. Bennett. The agreed rent was $110.00 per month with Bennett agreeing to pay for all utilities. The apartment was one of four in a two-story building owned by Bennett. Kamarath inspected the premises before accepting and occupying them with his family on March 1, 1975. However, his undisputed testimony was that some of the defects — ancient plumbing that burst, depriving them of hot water; faulty electrical

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[106] 287 Ala. at 440, 252 So. 2d at 314 (citations omitted).
[107] 291 Ala. 312, 280 So. 2d 745 (1973).
[108] 568 S.W.2d 658 (Tex. 1978).
[109] *Id.* at 659.

wiring, and structural defects causing the bricks of the building to fall — were not visible to him at the time of his inspection. On June 24, 1975, building inspectors of the City of Dallas surveyed the premises and supported Kamarath's testimony of the defects' nondiscoverability.

Based on its findings of fact, the trial court concluded that Bennett did not breach his contract with Kamarath, the tenant, or violate any duty in law owed to the tenant concerning the state of repair of the premises. The court of civil appeals affirmed and applied the common law rule, long followed in Texas, that in the absence of fraud or deceit, there is no implied warranty on the part of the lessor that premises leased for residential purposes are suitable for their intended use. The court observed:

> The Law has regarded the relationship of landlord and tenant as one governed by the precepts and doctrines of property law. . . . Today the agrarian concept of landlord-tenant law has lost its credence, and has become less and less representative of the relationship existing between the lessor and lessee. The tenant is more concerned with habitability than the possibility of the landlord's interference with his possession. The present-day dweller, in seeking the combination of living space, suitable facilities and tenant services, has changed the basic function of the lease. . . . The importance of the lease of an apartment today is not to create a tenurial relationship between the parties, but rather to arrange the leasing of a habitable dwelling.[110]

There are a number of factors to be considered in determining the legal principles to be applied to the current relationship of landlord and tenant existing in residential leases:

1. Legislatures have now recognized that public policy requires that dwellings offered for rental must be safe and fit for human habitation.

2. The landlord has a superior knowledge of the condition of the premises he leases to the tenant. Housing code requirements (and their violations) are usually known, or notice thereof is given to the landlord.[111] The landlord is in a better position to know of latent defects which might go unnoticed by the tenant who rarely has the sufficient knowledge or experience to discover defects in wiring, plumbing or structural failures.

3. It is appropriate that the landlord should bear the cost of repairs to make the premises safe and suitable for human habitation. In the modern housing market, the landlord is generally in a much better bargaining position than the tenant. Otherwise, this could result in the rental of poor housing facilities in violation of public policy.

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[110] *Id.* at 660, *citing* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 925 (1970), *and* Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969).
[111] Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

> In our opinion [the *Kamarath* court concluded] the above considerations demonstrate that in a rental of a dwelling unit, whether for a specified time or at will, there is an implied warranty of habitability by the landlord that the apartment is habitable and fit for living. This means that at the inception of the rental lease there are no latent defects in the facilities that are vital to the use of the premises for residential purposes and that these essential facilities will remain in a condition which makes the property livable.
>
> As stated in *Marini v. Ireland,* "the very object of the letting was to furnish the defendant with quarters suitable for living purposes. This is what the landlord at least impliedly (if not expressly) represented he had available and what the tenant was seeking." The implied warranty of habitability which we hold exists in such a case is imposed by law on the basis of public policy and it arises by operation of law because of the relationship of the parties and the nature of the transaction.
>
> In order to constitute a breach of implied warranty of habitability, the defect must be of a nature which will render the premise unsafe, or unsanitary, or otherwise unfit for living therein. . . . The existence of a breach is usually a question of fact to be determined by the circumstances of each case.[112]

At present, fourteen states (California,[113] Hawaii,[114] Illinois,[115] Iowa,[116] Kansas,[117] Massachusetts,[118] Michigan,[119] Minnesota,[120] Missouri,[121] New Hampshire,[122] New Jersey,[123] Pennsylvania,[124] Texas[125] and Wisconsin[126]) and the District of Columbia[127] have applied the warranty of habitability to the leasing of apartments. It is altogether probable that, as in the case of the sale of new homes, this will become the majority rule in the near future.

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[112] 568 S.W.2d at 659-61 (citations omitted).

[113] Green v. Superior Court, 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974).

[114] Lemle v. Breeden, 51 Haw. 426, 462 P.2d 470 (1969).

[115] Jack Spring, Inc., v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

[116] Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

[117] Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974).

[118] Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973).

[119] Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972).

[120] Fritz v. Warthen, 298 Minn. 54, 213 N.W. 2d 339 (1973).

[121] King v. Moorehead, 495 S.W.2d 65 (Mo. App. 1973).

[122] Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

[123] Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970).

[124] Commonwealth v. Monumental Properties, Inc., 459 Pa. 450, 329 A.2d 812 (1974).

[125] Kamerath v. Bennett, 568 S.W.2d 658 (Tex. 1978).

[126] Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[127] Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 925 (1970).

CONCLUSION

The trend towards greater consumer protection so evident in the products liability field is clearly discernible in the sale of new homes by the builder-vendor, and in the leasing of apartments by landlords.

Some of the fundamental concepts of real property law, especially those which make no sense in modern society, have been, or are being, overruled and superseded by more enlightened and public policy-minded decisions of both the federal and state courts. It seems safe to predict that the warranty of habitability which governs the sale of new homes by the builder-vendor, adopted by a substantial majority of jurisdictions, will soon become the majority rule as to apartments.