

1979

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Recommended Citation

Deborah C. Welsh, *Virginia's Reaction to an Implied Warranty in Real Estate Transactions: Bruce Farms, Inc. v. Coupe*, 13 U. Rich. L. Rev. 381 (1979).

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VIRGINIA'S REACTION TO AN IMPLIED WARRANTY IN REAL ESTATE TRANSACTIONS: BRUCE FARMS, INC. V. COUPE

I. INTRODUCTION

Years ago, *caveat emptor*¹ was the rule in real estate transactions. A home buyer's own inspection was considered reliable in determining if the house was structurally sound and habitable.² Today, the situation is different. Potentially troublesome conditions in a house are easily concealed, and inspection by the buyer may not reveal latent defects.³ For this reason, the doctrine of implied warranty⁴ has replaced *caveat emptor* in many jurisdictions.⁵

Recently, in *Bruce Farms, Inc. v. Coupe*,⁶ the Virginia Supreme Court refused to apply the doctrine of implied warranty to real estate transactions. This comment traces the decline of the *caveat emptor* doctrine and examines the *Bruce Farms* decision in light of the overwhelming trend towards replacing *caveat emptor* with an implied warranty in realty sales.

II. DEVELOPMENTS OF IMPLIED WARRANTY IN REAL ESTATE TRANSACTIONS

The doctrine of *caveat emptor* was once the dominant rule in sales of both personal and real property.⁷ *Caveat emptor* was a creation of the judiciary "during the sixteenth century in the then chancy conditions of English trade operations."⁸ Subsequently, the doctrine became embedded

1. "Let the buyer beware (or take care)." BLACK'S LAW DICTIONARY 281 (Rev. 4th ed. 1968).

2. Comment, 29 MERCER L. REV. 323 (1977).

3. "The ordinary home buyer is not in a position, by skill or training, to discover defects lurking in the plumbing, the electrical wiring, the structure itself, all of which is usually covered up and not open for inspection." *Tavares v. Horstman*, 542 P.2d 1275, 1279 (Wyo. 1975).

4. Implied warranty has been defined differently in different states. See, e.g., *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964)(workmanlike manner of construction); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966)(habitability); *Theis v. Heuer*, 264 Ind. 1, 280 N.E.2d 300 (1972)(fitness for habitation); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App. 1969)(workmanlike manner of construction); *House v. Thorton*, 76 Wash. 2d 428, 457 P.2d 199 (1969)(fitness for an intended use).

5. Thirty-five states have accepted implied warranty by case law. See note 31 *infra*. For a discussion of implied warranties, see Annot., 25 A.L.R.3d 383 (1969 & Supp. 1978).

6. ___ Va. ___, 247 S.E.2d 400 (1978).

7. English courts and common law jurisdictions in America ruled with consistency that there were no implied warranties. They feared that such an introduction would inhibit vendors by leaving them uncertain both to the extent and duration of their liability to the customer. Note, *Yespen v. Burgess: Oregon Recognizes an Implied Warranty of Habitability in the Sale of New Homes*, 11 WILLAMETTE L.J. 125, 126 (1974) [hereinafter referred to as WILLAMETTE].

8. *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200, 202 (1970). See WILLAMETTE,

in the American common law.⁹

Lately, the doctrine of *caveat emptor*, with its long history of protecting the seller at the expense of the buyer, has been on the decline in both England and America.¹⁰ Due to the increasing interest in consumer protection,¹¹ most states have adopted the Uniform Commercial Code [UCC].¹² Thus, states have replaced *caveat emptor* in the sales of personal property with implied warranties of merchantability¹³ and fitness for a particular purpose.¹⁴

supra note 7, at 126. For a thorough discussion of the origins and developments of *caveat emptor*, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE, L.J. 1133 (1931).

9. *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200, 202 (1970). "The expression first appeared in print in 1534, and the doctrine became firmly established in the common law during the seventeenth and eighteenth centuries." Comment, *Caveat Emptor in Sales of Real Property—Time for a Reappraisal*, 10 ARIZ. L. REV. 484 (1968), quoted in Comment, *Extension of Implied Warranties to Developer-Vendors of Completed New Homes*, 11 URBAN L. ANN. 257, 257 n.2 (1976) [hereinafter referred to as URBAN]. The doctrine of *caveat emptor* was based upon the premise that a buyer and seller dealt at arm's length and that the purchaser, who had an opportunity to inspect the subject matter of the sale, was on an equal footing with the seller. *Humber v. Morton*, 426 S.W.2d 554, 557 (Tex. 1968).

10. See Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. URBAN L. 533, 549 (1971) [hereinafter cited as Bixby].

11. See WILLAMETTE, *supra* note 7, at 127.

12. Forty-nine states have adopted the Uniform Commercial Code. *Id.*

13. "Unless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." U.C.C. § 2-314.

14. U.C.C. § 2-315, stating that:

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

Louisiana, a civil law state, was the only state which did not adopt the UCC. But Louisiana did enact by statute an implied warranty extending both to real and personal property transactions. The Louisiana statutes are as follows:

"Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice." LA. CIV. CODE ANN. art. 2520 (West, 1952);

"Apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices." LA. CIV. CODE ANN. art. 2521 (West, 1952);

"Whether the defect in the thing sold be such as to render it useless and altogether unsuited for its purpose, or whether it be such as merely to diminish the value, the buyer may limit his demand to the reduction of the price." LA. CIV. CODE ANN. art. 2541 (West, 1952);

"The action for a reduction of price is subject to the same rules and to the same limitation as a redhibitory action." LA. CIV. CODE ANN. art. 2544 (West, 1952).

Only one other legislature, Maryland, has taken the initiative to abolish the use of *caveat emptor* and enact an implied warranty in real estate transactions. See MD. [Real Property] CODE ANN. § 10-203 (1974).

The first indication that the courts would reconsider their historic position on the doctrine of *caveat emptor* in real estate sales occurred in 1931 with the English case of *Miller v. Cannon Hill Estates Ltd.*¹⁵ The court reasoned that when a buyer purchases an uncompleted home, he has no opportunity to inspect the finished product and must rely upon the builder to complete the house in a workmanlike manner.¹⁶ Accordingly, the court extended an implied warranty to the sale of an uncompleted home. The *Miller* rule was accepted in the United States in 1957, in the Ohio case of *Vanderschrier v. Aaron.*¹⁷ Since that time, several other state courts have followed the *Vanderschrier* decision.¹⁸

In 1964, *Carpenter v. Donohoe*¹⁹ carried the implied warranty theory a step further. The Colorado Supreme Court held that an implied warranty extended to a *completed* home.²⁰ The court determined that the difference in rules between a house under construction and a completed house was "incongruous" and "without a reasonable basis."²¹ Within several years, other states recognized the need for home buyer protection.²² These jurisdictions aligned with *Carpenter* and held the builder-vendor liable for a breach of implied warranty in new home sales.²³

15. [1931] 2 K.B. 113. In this English case, the purchaser contracted with the builder-vendor to buy a home which was in the course of construction when the contract was signed. In a suit by the purchaser for structural defects, the court reasoned that while a person buying a completed home can inspect for flaws before signing his contract, a purchaser of an unfinished home has no such opportunity. See URBAN, *supra* note 9, at 259.

16. See Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VANDERBILT L. REV. 541, 544 (1961) [hereinafter cited as Bearman].

17. 103 Ohio App. 340, 140 N.E.2d 819 (1957). In *Vanderschrier*, the purchasers sought damages from the builder-vendor for faulty house construction. The house was not completed at the time of sale and the court held that the defective construction of the sewer which caused the basement to become flooded was a breach of the vendor's implied warranty that the house would be habitable and completed in a workmanlike manner.

18. *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963); *Loraso v. Custom Built Homes, Inc.*, 144 So. 2d 459 (La. 1962); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Hoye v. Century Builders*, 52 Wash. 2d 830, 329 P.2d 474 (1958).

19. 154 Colo. 78, 388 P.2d 399 (1964). The plaintiffs in *Carpenter* alleged breach of implied warranty when the walls of the house they purchased began to crack. The court found a breach of an implied warranty, even though the house was completed when the plaintiffs bought it.

20. *Id.* at 402.

21. *Id.* See Bixby, *supra* note 10, at 556.

22. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App. 1969); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969).

23. Courts have held the builder-vendor liable for a particular defect. See, e.g., *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (water seepage in basement, which spread over considerable portion of tiled floors); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App.

Other courts have assaulted the doctrine of *caveat emptor* even more extensively. In 1965, New Jersey, in *Schipper v. Levitt & Sons, Inc.*,²⁴ not only recognized the existence of implied warranties in real estate transactions, but also imposed strict liability upon the builder-vendor for personal injuries resulting from his negligence.²⁵ In addition, the court extended the implied warranty beyond the original purchaser to cover the purchaser's lessee.²⁶

California followed the liberal trend of the implied warranty doctrine in *Connor v. Great Western Savings & Loan Association*.²⁷ In *Connor*, the court upheld an implied warranty claim against both the builder-vendor and the lending institution which supplied the funds for the project. Another extension of the implied warranty theory appears in Illinois, in *Schiro v. W.E. Gould & Co.*,²⁸ where the buyer recovered for breach of an implied warranty when the house was constructed in violation of the Chicago Building Code. Finally, in *Waggoner v. Midwestern Development, Inc.*,²⁹ the South Dakota Supreme Court held that an implied warranty survived delivery of the deed.

1969)(basement walls constructed without coating or sealing to withstand surface water pressure and no proper drainage facilities in basement); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967)(water seepage in basement after heavy rains); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968)(fire caused by defective fireplace); *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969)(basement walls, floors and foundation slipped and cracked).

24. 44 N.J. 70, 207 A.2d 314 (1965). In *Schipper*, the infant plaintiff was scalded by a defective hot water faucet. The court reasoned that the same public policy considerations which led to abolition of *caveat emptor* in personalty sales were applicable to real property transactions and held the builder-vendor, Levitt, liable for breach of an implied warranty.

25. *Id.* at 321.

26. *Id.* at 324. See Young and Harper, *Quaere: Caveat Emptor or Caveat Venditor?*, 24 ARK. L. REV. 245, 269 (1970) [hereinafter cited as Young and Harper].

27. 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). The court held that where the success of the defendant association's transactions with construction companies depended on ability to induce purchasers to finance purchase of a home with the defendant's funds, defendant knew that persons in charge of construction companies were operating on thin capitalization and the resultant risk of short cuts in construction, purchasers were generally ill-equipped to discern defects, defendant had duty to exercise reasonable care to prevent defective home construction or sale and was liable to purchasers for damages.

28. 18 Ill. 2d 538, 165 N.E.2d 286 (1960). The court held that the city code, requiring that drainage and plumbing systems of each new building be separate and independent of any other building, is incorporated into any contract to sell and purchase a building. Hence, a violation of the city code constituted a breach of the implied warranty on the contract.

29. 83 S.D. 57, 154 N.W.2d 803, 809 (1967). The plaintiffs were allowed to recover for breach of an implied warranty when water seeped into their basement after a heavy rain. The court relied upon the reasoning in product liability cases to conclude that there is no sound reason for a distinction between the liability of person who erects a house and a manufacturer. *Id.* at 806.

From these developments, it appears that the trend throughout the nation is to eliminate the doctrine of *caveat emptor* in both personal and real estate sales. Courts have long since recognized that buyers of goods in an industrialized society must rely upon the skill and honesty of the supplier to assure that purchases are of adequate quality.³⁰ Reasoning along the same line, a majority of American jurisdictions have recently applied the doctrine of implied warranty to the sale of new residences.³¹

III. VIRGINIA REFUSES TO JOIN MAJORITY

A small minority of states still refuse to recognize an implied warranty in realty transactions.³² Virginia opted to remain with this minority on August 31, 1978, with the decision in *Bruce Farms, Inc. v. Coupe*.³³ In *Bruce Farms*, the Virginia Supreme Court held that an implied warranty of fitness for the intended use did not apply to the sale of a new dwelling.

30. See Bixby, *supra* note 10, at 549.

31. Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971); Lewis v. Anchorage Asphalt Paving Co., 535 P.2d 1188 (Alaska 1975); Wewak v. Stewart, 274 Ark. 1093, 449 S.W.2d 922 (1970); Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (1970); Smith v. Berwin Builders, Inc., 287 A.2d 693 (Del. Super. 1972); Gable v. Silver, 258 So. 2d 11 (Fla. 1972); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Hanavan v. Dye, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972); Theis v. Heuer, 264 Ind. 1, 280 N.E.2d 300 (1972); Griffith v. Byers Constr. Co., 212 Kan. 65, 510 P.2d 198 (1973); Crawley v. Terhune, 437 S.W.2d 743 (Ky. App. 1969); Bermes v. Facell, 328 So. 2d 722 (La. 1976); McDonough v. Whalen, 365 Mass. 506, 313 N.E.2d 435 (1974); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); Oliver v. City Builders, Inc., 303 So. 2d 466 (Miss. 1974); Smith v. Old Warson Dev. Co., 479 S.W. 2d 795 (Mo. 1972); Henggeler v. Jindra, 191 Neb. 317, 214 N.W.2d 925 (1974); Worrell v. Barnes, 87 Nev. 204, 484 P.2d 573 (1971); Norton v. Burleaud, 115 N.H. 435, 342 A.2d 629 (1975); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965); Centrella v. Holland Constr. Corp., 82 Misc. 2d 537, 370 N.Y.S.2d 832 (1975); Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974); Dobler v. Malloy, 214 N.W.2d 510 (N.D. 1973); Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978); Yepsen v. Burgess, 269 Or. 635, 525 P.2d 1019 (1974); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975). *Accord*, Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Shores v. Spann, 557 S.W.2d 67 (Tenn. 1977). *Cf.* Tibbits v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967) ("as is" clause prevents an implied warranty). See also Caporaletti v. A-F Corp., 137 F. Supp. 14 (E.D.N.Y. 1956).

32. Voight v. Ott, 87 Ariz. 128, 341 P.2d 923 (1959); Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971); Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968); Buchman Plumbing Co. v. Regents of Univ. of Minn., 298 Minn. 328, 215 N.W.2d 479 (1974); Dittman v. Nagel, 43 Wis. 2d 155, 168 N.W.2d 190 (1969).

33. ___ Va. ___, 247 S.E.2d 400 (1978).

Mr. and Mrs. Coupe, the plaintiffs, contracted to purchase a home constructed by defendant, Bruce Farms, Inc.³⁴ The home was built, and the plaintiffs moved in. The residence was one of several surfaced with a veneer of concrete bricks purchased by the defendant.³⁵ Shortly after taking possession, plaintiffs discovered cracks in some of the bricks.³⁶ As a result, they instituted suit against the defendant, alleging breach of an implied warranty.

The trial court, sitting without a jury, ruled that "the builder-vendor of a new completed building may be liable for breach of an implied warranty of the fitness of the intended use of the building."³⁷ On appeal, even after carefully reviewing the recent trend to abolish *caveat emptor*,³⁸ the Virginia Supreme Court reversed the lower court's decision,³⁹ refusing to hold that an implied warranty existed.

A. *Uniform Commercial Code Inapplicable?*

The court first concluded that warranties of merchantability and fitness for a particular purpose, created by the UCC, were not applicable in this case.⁴⁰ This is a valid conclusion since the UCC applies only to the sale of goods,⁴¹ and the *Bruce Farms* case involved the sale of a home.⁴² But this fact should not have precluded the Virginia Court from analogizing that an implied warranty was breached.⁴³

The UCC was enacted to afford protection to the consumer when his

34. Bruce Farms, Inc., was engaged in construction and sale of new homes in a residential subdivision. *Id.* at 401.

35. The defendant purchased concrete bricks from Cavalier Concrete Products, Inc. Plaintiffs sued Cavalier but subsequently non-suited Cavalier, a bankrupt. *Id.*

36. A total of 16,000 bricks were used in the construction of the Coupes' home, and approximately fifty were cracked. Brief for Appellant at 16, Bruce Farms, Inc. v. Coupe, No. 770453 (Va. August 31, 1978).

37. Bruce Farms, Inc. v. Coupe, ___ Va. ___, 247 S.E.2d 400, 401 (1978).

38. 247 S.E.2d at 402-03.

39. 247 S.E.2d at 404. The court also noted that this was a case of first impression in Virginia. 247 S.E.2d at 403.

40. 247 S.E.2d at 402 n.1.

41. U.C.C. § 2-102 as codified in VA. CODE ANN. § 8.2-102 (Added Vol. 1965).

42. By the law of accession, a home becomes a part of the realty. *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019, 1022 (1974). The Virginia Court reasoned that because there was no statute on point, the common law rule is applicable. Bruce Farms, Inc. v. Coupe, No. 770453 (Va. August 31, 1978) at 2.

43. Other courts have reasoned that the sale of goods, by analogy, should apply to the sale of homes in reaching a decision in favor of implied warranties. See *Wawak v. Stewart*, 274 Ark. 1093, 449 S.W.2d 922 (1970); *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019 (1974). See also, *Bixby*, *supra* note 10, at 550-51.

inspection of mass-produced products was no longer an adequate source for disclosing defects, which a merchant, who specialized in that product's manufacture, had a better opportunity to discover.⁴⁴ Today, the builder-vendor is "nearly identical" to the merchant.⁴⁵ The builder-vendor regularly deals in the construction and sale of new homes,⁴⁶ and since most defects in housing are latent,⁴⁷ the experienced seller of a residence is in a much better position to inspect the home and discover defects than is the average buyer.⁴⁸ Furthermore, the seller knows that the buyer is purchasing a home for habitation⁴⁹ and an accompanying warranty of fitness for habitation is simply fulfilling the expectation of both parties.⁵⁰

Another argument supporting analogy to the UCC is that many of today's large homes in the popular subdivisions are built upon small lots. The purchaser sees the sales transaction primarily as a purchase of a home with the acquisition of the land as incidental.⁵¹ To the buyer, the home

44. See Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962).

45. See Bixby, *supra* note 10, at 550. A merchant is defined as:

a person who deals in goods of a kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself as having such knowledge or skill.

U.C.C. § 2-104(1). See *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

46. See Bixby, *supra* note 10, at 550.

47. Most cases which have come before the courts, have involved defects which were not visible to the purchaser on inspection.

Included in such defects . . . might be a roof not properly installed, or one affording poor and insufficient protection from the elements, or a foundation which gave way to the weight of the structure . . . or the use of insufficient supporting timbers for an upper floor The construction of a chimney with combustible material as a lining or with improper openings also might be an example. . . .

Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200, 201 (1970). For specific case examples, see note 23 *supra*. See also note 3 *supra*.

48. See Bixby, *supra* note 10, at 550. It is also too costly for a home buyer to pay a professional inspector. See Bearman, *supra* note 16, at 545 n.15. Likewise, a "builder-vendor is much more capable of distributing the cost of his mistakes than is the innocent home buyer." *Gable v. Silver*, 258 So. 2d 11, 17 (Fla. 1972). Today, home buyers can join associations to protect themselves, such as the Home Owners Warranty Corp. (HOW). Nelson, *Why Builders Should Know HOW*, 8 REAL ESTATE REV. 46 (1978).

As a practical matter, the modern buyer of an American mass-produced development home is just as vulnerable as the automobile purchaser. Brief for Appellees at 4, *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978). This vulnerability is the same situation which brought about enactment of section 2-314 of the UCC. See Bixby, *supra* note 10, at 550-51.

49. This is similar to section 2-315 of the UCC. See Bixby, *supra* note 10, at 550-51.

50. See URBAN, *supra* note 9, at 258.

51. This is true even though the home becomes part of the realty by the law of accession. *Yepsen v. Burgess*, 269 Or. 635, 525 P.2d 1019, 1022 (1974).

resembles personalty more than realty. In fact, it seems unreasonable that all of the materials used in construction are covered by an implied warranty, but the finished product, the home, is not covered by the same warranty. Since it appears that a house, constructed with goods, bears more resemblance to personalty than to realty, a UCC analogy should be valid.⁵²

The Virginia Court also refused to hold *Mann v. Clowser*,⁵³ an earlier Virginia case, applicable to *Bruce Farms*.⁵⁴ In *Mann*, the court aligned itself philosophically with the growing number of jurisdictions that had recognized implied warranties.⁵⁵ The court held that it is implied in construction contracts that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for its intended purpose when completed.⁵⁶ In contrast, *Bruce Farms* dealt with a contract for a sale of a completed home.⁵⁷ The court stated that a contract to perform a service, a building contract, necessarily implies a covenant to perform according to prevailing standards, but a conveyance of real estate carries no such covenant.⁵⁸

Certainly, when a person contracts for a sale of a new home, he expects that the home has been constructed in a workmanlike manner and is fit for habitation, just as if he had contracted with the builder directly for construction of a home.⁵⁹ Thus, the court's distinction between a building contract and a sales contract is illogical.⁶⁰

B. *Scope of Implied Warranty*

The court in *Bruce Farms* next addressed the problems involved in de-

52. Certainly it is a harsh result when "one who [buys] a chattel as simple as a walking stick or a kitchen mop [is] entitled to get his money back if the article [is] not of merchantable quality," *Wawak v. Stewart*, 274 Ark. 1093, 449 S.W.2d 922, 923 (1970), but a purchaser of a \$37,300.00 home [the purchase price of the Coupe's home in *Bruce Farms*, Brief for Appellants at 4, *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978)], has no remedy if the home proves not to be of merchantable quality.

53. 190 Va. 887, 59 S.E.2d 78 (1950). In *Mann*, a building constructed upon the Clowers' land by Mann was defective, the footings in the foundation being improperly constructed. The court allowed recovery for the damages caused by the defective construction on the basis of an implied warranty in the construction contract.

54. ___ Va. ___, 247 S.E.2d 400, 403 (1978).

55. Brief for appellees at 2, *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978).

56. *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950).

57. ___ Va. ___, 247 S.E.2d 400, 401 (1978).

58. *Id.* at 403.

59. Brief for Appellees at 2, *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978).

60. Several jurisdictions, which have invoked an implied warranty in new home sales, have relied upon the *Mann* decision. See, e.g., *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200, 202 (1970); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

fining the scope of an implied warranty.⁶¹ First the court examined the question of to whom the implied warranty should apply.⁶² Numerous jurisdictions hold that an implied warranty in the sale of a new home only applies to the builder-vendor⁶³ of the home.⁶⁴ Since Bruce Farms, Inc., was the builder-vendor of the plaintiff's home,⁶⁵ the Virginia Court also could have limited an implied warranty to the builder-vendor.

Secondly, the problem of confining an implied warranty puzzled the court.⁶⁶ The court questioned whether an implied warranty should be confined to the sale of new homes under construction and to those newly constructed, or extended to the sale of renovated homes. These issues have been settled by case law in other jurisdictions.⁶⁷ Since the Coupes contracted for the sale of a newly completed home, the Virginia Supreme Court could have followed *Carpenter v. Donohoe*⁶⁸ which specifically extended an implied warranty to a completed home.

The court also raised the issue of whether an implied warranty theory should be limited to a single-family detached dwelling or extended to condominium units.⁶⁹ Most cases which have reached the courts involved single-family dwellings and courts applied an implied warranty.⁷⁰ Since *Bruce Farms* involved only a single-family dwelling,⁷¹ the court easily could

61. ___ Va. ___, 247 S.E.2d 400, 403 (1978).

62. *Id.* at 403.

63. Builder-vendor has been defined as "one who buys land and builds homes upon the land for purposes of sale to the general public." *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771, 774 n.10 (1972).

64. *Cochran v. Keeton*, 287 Ala. 439, 252 So. 2d 313 (1971); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970); *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975). *Cf. Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (where builder used realtor to make sale); *Weeks v. Salvick Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503 (1970) (where court said implied warranty could apply to any seller of a new residence); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (where vendor used independent contractors for actual construction).

65. *See* Brief for Appellant at 4, *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978).

66. *Bruce Farms, Inc. v. Coupe*, ___ Va. ___, 247 S.E.2d 400, 403 (1978).

67. *See, e.g., Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957) (court found implied warranty in home under construction); *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964) (court found implied warranty in completed home); and *Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971) (court found implied warranty in renovated home).

68. 154 Colo. 78, 388 P.2d 399 (1964).

69. *Bruce Farms, Inc. v. Coupe*, ___ Va. ___, 247 S.E.2d 400, 403 (1978).

70. *See* note 31 *supra*. However, in *Gable v. Silver*, 258 So. 11 (Fla. 1972) the court held a builder-vendor of condominiums liable for breach of an implied warranty.

71. *See* Brief for Appellant at 4, *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978).

have sidestepped the condominium question by limiting its holding to the facts of the case.

Lastly, the court questioned the extension of an implied warranty to cover materials and fixtures used in new home construction.⁷² In *Vernali v. Centrella*,⁷³ the Connecticut Court decided that a warranty exists by implication to the materials used in construction. In *Hartley v. Ballou*,⁷⁴ a North Carolina Court found that an implied warranty covered all fixtures in a new home.⁷⁵ Once again, the Virginia Court's dilemma had been resolved previously elsewhere. As Connecticut did in 1970 and North Carolina did in 1974, the Court could have held a warranty applicable to all materials and fixtures used to construct the Coupes' home in *Bruce Farms*.⁷⁶ Since all of these issues had been dealt with earlier, the Virginia Supreme Court could have applied the case law of neighboring jurisdictions to reach a conclusion. This would not have been an unusual practice.⁷⁷

The type and duration of the implied warranty were two major issues faced by the court in *Bruce Farms*.⁷⁸ The Virginia Supreme Court stated that courts which have adopted the modern rule of implied warranty have not invoked a uniform standard.⁷⁹ Jurisdictions have spoken in terms of an implied warranty of habitability,⁸⁰ workmanlike manner,⁸¹ reasonable workmanship,⁸² workmanlike construction,⁸³ and fitness for an intended use.⁸⁴ However, in spite of the differences in terminology, each court has

72. *Bruce Farms, Inc. v. Coupe*, ___ Va. ___, 247 S.E.2d 400, 403 (1978).

73. 28 Conn. Supp. 476, 266 A.2d 200 (1970).

74. 286 N.C. 51, 209 S.E.2d 776 (1974).

75. Other jurisdictions have allowed recovery for defects in various items. *Gable v. Silver*, 258 So. 2d 11 (Fla. 1972)(air conditioner); *Schipper v. Levitt & Sons Inc.*, 44 N.J. 70, 207 A.2d 314 (1965)(boiler).

76. The defect in the Coupes home was the brick veneer, which could be considered a construction material. See Brief for Appellant at 4, *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978).

77. See, e.g., *Surf Realty Corp. v. Standing*, 195 Va. 431, 78 S.E.2d 901 (1953)(where the court held an architect to a reasonable standard of skill and care and relied upon Iowa and Massachusetts law).

78. 247 S.E.2d at 403.

79. *Id.*

80. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Hanavan v. Dye*, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972); *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972).

81. *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App. 1969); *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776 (1974).

82. *Theis v. Heuer*, 149 Ind. 52, 280 N.E.2d 300 (1972); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967).

83. *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964).

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

held the builder-vendor liable for breach of an implied warranty for a particular defect.⁸⁵

Virginia could have selected any one or a combination of standards and, hence, the issue should not have posed even the slightest problem to the court. Virginia already has established a definition of implied warranty in construction contracts.⁸⁶ A standard "co-extensive" with it would have been the most logical choice.⁸⁷ This type of implied warranty would be termed a combination of good workmanship and fitness for an intended use.⁸⁸ Certainly, such a standard would be in accord with other jurisdictions.⁸⁹

The duration of an implied warranty is open to the court's discretion. Some authorities have proposed a fixed statutory period,⁹⁰ but most courts have applied a "reasonable" duration.⁹¹ "Reasonableness" is probably the best solution to the problem, since an implied warranty, by its nature, should be flexible to the needs of the plaintiffs in each case.⁹² First, the different geographical and climatic conditions within Virginia have various inconsistent effects on new housing. Therefore, a fixed limitation would not be a feasible solution.⁹³ Second, different parts of the construction have different durational expectancies.⁹⁴ In addition, some latent defects may take years to surface, while others may become visible shortly after construction.⁹⁵ Greater protection for both the builder-vendor and the home

85. See note 31 *supra*. See also Comment, 53 N.C.L. Rev. 1090, 1045 (1975).

86. Mann v. Clowser, 190 Va. 887, 59 S.E.2d 78 (1950); Hall v. MacLeod, 191 Va. 665, 62 S.E.2d 42 (1950).

87. Brief for Appellees at 18, Bruce Farms, Inc. v. Coupe, No. 770453 (Va. August 31, 1978).

88. *Id.* Such a standard would hold the builder-vendor liable for defects in construction which a reasonable builder would not have made. Also it would hold a builder-vendor liable if the home was not fit for habitation.

89. Other jurisdictions have used a combination of terms. See, e.g., Gable v. Silver, 258 So. 2d 11 (Fla. 1972); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973); Waggoner v. Midwestern Dev. Inc., 83 S.D. 57, 154 N.W.2d 803 (1967).

90. See Bearman, *supra* note 16, at 575-78 (proposes a one year duration); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Prop.*, 53 GEO. L.J. 633 (1965)(proposes a five year duration). See also MD. [Real Property] CODE ANN. § 10-204 (1974)(a one year statutory limitation).

91. See, e.g., Klos v. Gockel, 87 Wash. 2d 567, 554 P.2d 1349 (1976) (*en banc*); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975).

92. See Comment, 10 TULSA L.J. 445, 448 (1975).

93. *Id.*

94. See Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975).

95. See 10 TULSA L.J. 445, 448 (1975). See also, Waggoner v. Midwestern Dev. Inc., 83 S.D. 57, 154 N.W.2d 803 (1967)(took five years for the defect to become apparent); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968)(defect immediately apparent).

buyer would result from a case-by-case determination of the extent of duration of a particular implied warranty.⁹⁶

Another concern addressed by the court was the proper measure of damages to be awarded upon breach of an implied warranty.⁹⁷ This has long been a concern of the judicial system.⁹⁸ Again, the most equitable solution would appear to be a case-by-case determination, depending upon the particular defect of the home.⁹⁹ As stated in *Mann*,¹⁰⁰ the proper measure of damages depends ultimately upon what is required to place the plaintiffs in the position they would have occupied had the agreement been honored.¹⁰¹

IV. CONCLUSION

The Virginia Supreme court has not followed the modern trend. Instead, the court decided in *Bruce Farms* that the common law doctrine of *caveat emptor* is still a viable force in Virginia.¹⁰² However, conditions have radically changed since the origin of the general common law rule of *caveat emptor*.¹⁰³ Since World War II houses have been mass-produced throughout the United States.¹⁰⁴ The average buyer of a mass-produced home today is

96. Since Virginia has a five year statute of limitations on injuries to property, perhaps a five year duration could be stipulated as an outside limitation. See VA. CODE ANN. § 8.01-250 (Repl. Vol. 1977).

97. *Bruce Farms, Inc. v. Coupe*, No. 770453 (Va. August 31, 1978) at 6.

98. See RESTATEMENT OF CONTRACTS § 346 (1932).

99. *Tavares v. Horstman*, 542 P.2d 1275, 1282 (Wyo. 1975).

100. 190 Va. 887, 59 S.E.2d 78 (1950).

101. Two alternative solutions are available according to *Mann*. First, the reasonable cost of construction and completion in accordance with the contract may be awarded. However, if such cost is "grossly and unfairly out of proportion to the good to be attained," the court might choose to award the difference between the value that the product contracted for would have had and the value of the performance that was received. *Id.* at 86. See also, *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776, 785 (1974) (where in dictum the court said that an action would lie for rescission, or for damages measured by the difference between the actual fair market value and the fair market value as warranted).

102. "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly," VA. CODE ANN. § 1-10 (Repl. Vol. 1973). Interestingly, England has changed the common law of *caveat emptor*. See *A Conveyancer's Letter*, 85 L.J. 219 (1939); *Jennings v. Tavener*, [1955] 2 All. E.R. 769. See note 42 *supra*.

103. See Bixby, note 10 *supra*.

104. See Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52A CORNELL L.Q. 835, 837 (1967). In 1971, 656,000 homes were sold; 1972, 718,000; 1973, 620,000; 1974, 501,000; 1975, 544,000; 1976, 639,000; 1977 through March, 198,000. U.S. BUREAU OF THE CENSUS, CONSTRUCTION REPORTS (1977). In Virginia alone, the number of homes authorized in 1970 were 39,986; 1971, 64,864; 1972, 78,437; 1973, 70,560; 1974, 45,062; 1975,

not in a position, by skill or training, to discover latent defects.¹⁰⁵ As stated in *Humber v. Morton*:¹⁰⁶

[t]he *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 the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.¹⁰⁷

The sellers and buyers of realty today are not on an equal footing. Thus, since the original rationale underlying *caveat emptor* is inapplicable,¹⁰⁸ the rule itself should be discarded.¹⁰⁹

Perhaps the most important reason for the Virginia Court's decision not to invoke an implied warranty was fear that, in so doing, they would be legislating.¹¹⁰ Such a concern, however, did not inhibit courts in other jurisdictions.¹¹¹ A Michigan Court concluded "the doctrine of *caveat emptor* to be a common law court-imposed doctrine" and not that of the legislature.¹¹² Further, an Arkansas Court stated that judicial modification of a common law rule to achieve justice in light of modern economic and technological advances is not legislating.¹¹³ Thus, it may be argued that the court is the best governmental branch to change that which evolved under common law.

Clearly, today, the seller is experienced and the average buyer is inexperienced in the field of real estate transactions. To apply the doctrine of *caveat emptor* to an inexperienced buyer making the largest purchase of his lifetime,¹¹⁴ is a denial of justice.¹¹⁵ Furthermore, it has been held that

35,028; 1976, 40,760; 1977, 63,564. Shernock and Serow, THE COLGATE DARDEN GRADUATE SCHOOL OF BUSINESS ADMINISTRATION REPORT (July, 1978).

105. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698, 710 (1966).

106. 426 S.W.2d 554 (Tex. 1968).

107. *Id.* at 562. See 2 JAEGER, WILLISTON ON CONTRACTS § 926A (1963).

108. See note 9 *supra*.

109. *Tavares v. Horstman*, 542 P.2d 1275, 1279 n.4 (Wyo. 1975).

Perhaps it is best summed up by Justice Holmes who stated, "[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past." 16 BAYLOR L. REV. 263, 277 (1964) (quoting HOLMES, COLLECTED LEGAL PAPERS, p. 187).

110. *Bruce Farms, Inc. v. Coupe*, ___ Va. ___, 247 S.E.2d 400, 404 (1978).

111. Most jurisdictions have abolished *caveat emptor*, see note 31 *supra*. The argument against judicial legislating was also used by the courts when they abolished *caveat emptor* in personalty. See *Wawak v. Stewart*, 274 Ark. 1093, 449 S.W.2d 922 (1970).

112. *Weeks v. Slavick Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503, 506 (1970).

113. *Wawak v. Stewart*, 274 Ark. 1093, 449 S.W.2d 922, 925 (1970).

114. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698, 710 (1966).

115. *Id.*

the law should be based on the current concepts of what is right and just. The common law is adept at keeping abreast of "changing needs and mores" and "current requirements" in modern society.¹¹⁶ For instance, Virginia did not hesitate to recognize the need for consumer protection in personalty sales, and, as the trend indicates, the times warrant protection for the buyer in new home sales.

The Virginia General Assembly's previous reluctance to legislate in this area may forebode future procrastination.¹¹⁸ In *Thomas v. Cryer*,¹¹⁹ a case which is factually similar to *Bruce Farms*, the Maryland Court left the decision of an implied warranty to its legislature. Apparently, Maryland's General Assembly did not definitively resolve the issue until July 1, 1976¹²⁰ — over seven years later. On March 15, 1977, the Court of Special Appeals of Maryland in *Krol v. York Terrace Building, Inc.*,¹²¹ finally interpreted the 1976 "housekeeping" amendment¹²² as recognizing an implied warranty of habitability in the sale of new homes.¹²³ If nothing else, judicial estab-

116. See *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200, 203 (1970).

117. *Carney v. Sears, Roebuck & Co.*, 309 F.2d 300 (4th Cir. 1962); *Kroger Grocery & Baking Co. v. Dunn*, 181 Va. 390, 25 S.E.2d 254 (1943). As Justice Cardozo has noted: [a] court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 151 (1921)(quoted in *Humber v. Morton*, 426 S.W.2d 554, 561-2 (Tex. 1968)).

118. See *Wawak v. Stewart*, 274 Ark. 1093, 449 S.W.2d 922, 926 (1970).

119. 251 Md. 725, 248 A.2d 795 (1969) (per curiam) (exterior brickwork on plaintiff's new home crumbled and peeled).

120. MD. CODE ANN. § 10-203(a)(Cum. Supp. 1976).

121. 35 Md. App. 321, 370 A.2d 589 (1977).

122. See note 120 *supra* and accompanying comments.

123. In *Krol*, *supra* note 121, at 594, the court stated:

[i]t is clear that the extended phrase beginning with "at the time" applies to all four warranties set forth in § 10-203(a) and not, as the form of the revision might suggest, only to the warrant of habitability.⁵ When that is established, it is apparent that the Legislature would hardly have intended these implied warranties, *all* of which were expressly intended to apply to hidden and latent defects,⁶ to be applicable only "at the time of the delivery of the deed . . ." Such an interpretation would lead to an absurd consequence and we are admonished whenever possible to avoid absurd statutory consequences.

Section 10-203 of The Maryland Code on its face appears to recognize implied warranties in the sale of new homes. Analysis of case and statutory development, however, indicates a slow and turbulent implementation of implied warranty protection in Maryland. Cf. *Worthington Const. Corp. v. Moore*, 266 Md. 19, 291 A.2d 466 (1972), *Smith v. Millwood Const. Corp.* 260 Md. 319, 272 A.2d 19 (1971), and *Thomas v. Cryer*, *supra* note 119, with *Krol v. York Terrace Bldg., Inc.*, *supra* note 121. The cases infer a distinction between the case where the purchaser contracts individually for construction of a home with the builder-vendor and the case where the purchaser buys a home in a tract development.

lishment of an implied warranty by Virginia's Supreme Court in *Bruce Farms* would have brought the subject to the attention of the General Assembly for such action as it deemed proper.

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