Fairfield
UNIVERSITY

North East Journal of Legal Studies

Volume 3 *Spring 1995* Article 2

Spring 1995

Liability Without Privity: Developments in the Implied Warranty of Habitability

Patricia M. Pattison

Daniel]. Herron

Follow this and additional works at: https://digitalcommons.fairfield.edu/nealsb

Recommended Citation

Pattison, Patricia M. and Herron, Daniel]. (1995) "Liability Without Privity: Developments in the Implied Warranty of Habitability," *North East Journal of Legal Studies*: Vol. 3 , Article 2.
Available at: https://digitalcommons.fairfield.edu/nealsb/vol3/iss1/2

This item has been accepted for inclusion in DigitalCommons@Fairfield by an authorized administrator of DigitalCommons@Fairfield. It is brought to you by DigitalCommons@Fairfield with permission from the rights-holder(s) and is protected by copyright and/or related rights. **You are free to use this item in any way that is permitted by the copyright and related rights legislation that applies to your use. For other uses, you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself.** For more information, please contact digitalcommons@fairfield.edu.

43. "U.S. Panel Rejects Restrictions on Health Workers With HIV," The Philadelphia Inquirer, July 31, 1992, at A3.

44. Edwards v. Lamb, 69 N.H. 599, 45 A. 480 (1899).

45. Tarasoff v. Regents of Univ. of California, 13 Cal. 3d 177, 529 P. 2d 533, 118 Cal. Rptr. 129 (1974), affirmed, 17 Cal. 3d 425, 551 P. 2d 334, 131 Cal. Rptr. 14 (1976).

46. Plowman v. Dept. of the Army, 698 F. Supp. 627 (D.C.E.D. Va. 1988).

47. California Health & Safety Code § 199.25 (1989).

48. Comment, "AIDS: Establishing a Physician's Duty to Warn," 21 Rutgers Law Journal 645 (1990).

49. Peterman, "Estimating the Risks of Transfusion - Associated Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infections," 27 Transfusion 371 (1987).

50. Stevens, "Negligence Liability for Transfusion - Associated AIDS Transmission," 12 The Journal of Legal Medicine 221 (1991).

51. Doe v. United States, 737 F. Supp. 155 (D.R.I. 1990); Jeanne v. The Hawkes Hospital of Mount Carmel, Civil No. 87CV-03-1669 (Ohio, Franklin Cty, Ct. Comm. Pleas, March 8, 1990).

52. Rasmussen v. South Florida Blood Service, 500 S.2d 533 (Fla. 1987).

LIABILITY WITHOUT PRIVITY: DEVELOPMENTS IN THE IMPLIED WARRANTY OF HABITABILITY

by

Patricia M. Pattison*
Daniel J. Herron**

"The assault upon the citadel of privity is proceeding in these days apace."[1] This statement, originally made by Cardozo, has been widely quoted, especially by William Prosser. Concerning products liability, Prosser noted in 1960 that the assault was well developed;[2] in 1966 he concluded that the citadel had fallen.[3]

The citadel of privity is again under assault. This time it relates to liability for defective housing. Specifically, this paper will (I.) review the background and origin of the implied warranty of habitability, (II.) identify seven factors which court decisions have weighed and utilized in defining and refining the warranty, (III.) analyze the heart of the implied warranty development--the privity issue, (IV.) compare the application of the warranty with the development of products liability, and conclude by speculating on possible new directions for the development of the warranty.

* Professor, College of Business Administration, University of Wyoming, Laramie, Wyoming.

** Associate Professor, Richard T. Farmer School of Business Administration, Miami University, Oxford, Ohio.

I. Background

The doctrine of caveat emptor in the housing industry is dying.[4] In the past twenty-five years, nearly all jurisdictions have replaced or at least minimally modified it with either an implied warranty of habitability or some modification of it.[5] Unfortunately, neither builders nor purchasers are able to predict what the court-created warranty requires or offers. The piecemeal birth of the warranty has resulted in a ghost child who assumes different shapes and names depending upon the jurisdiction of its birth. It is not the purpose of this section to closely examine each inconsistency, but merely to state the general rule or trend.

The first case directly touching upon the warranty of habitability issue in this country appears to be a 1957 case from the Ohio court of appeals.[6] The plaintiffs, in this case the homeowners (and initial-purchasers), alleged that the contractors-defendants failed to construct the home in a workmanlike manner since sewage and water flooded the home's basement. The court focused on the fact that the sale of the house took place prior to the completion of the house.

This remained an important concept since the court went to great lengths to note

> In this opinion we will not go into a discussion of the duty of the seller of a completed bouse to the buyer, with every varying circumstance surrounding such sale. Nor will we discuss the legal questions of caveat emptor and express warranty, except to say only that the vendor of a completed house, in respect of which there is no work going on and no work to be done, does not generally, in the absence of some express bargain or warranty, undertake any obligation with regard to the condition of the house...[7]

The Ohio court,stating that "...we have found but few cases bearing upon the question. We have found none in this state directly touching it",[8] cited to and focused on established English precedents holding that "...upon the sale of a bouse in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner."[9]

Seven years later the Colorado Supreme Court would wrestle with the same dearth of legal precedents as the Ohio appellate court. There the Court also relied upon established English precedent in adopting the implied warranty citing to the same

English cases explained in the Ohio decision.[10] However, the Colorado court expanded the English decisions. While the Ohio court, like the English courts, premised the implied warranty as existing in a sale occurring before the house was fully constructed, the Colorado court encompassed not only houses still under construction but also newly finished houses. The court reasoned:

> 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.[11]

This well-reasoned Colorado opinion provides the starting point for most jurisdictions' subsequent adoption and modification of the implied warranty of habitability.

Consequently, a summary of the various court decisions reveals generally: When a builder-vendor sells a home to an initial purchaser there is created an implied warranty of habitability. However, in any specific circumstance it would be unwise to exclusively rely upon this general rule because of its many and varied exceptions. Following is a general discussion of seven factors which most courts consider in their analyses of the applicability of the implied warranty.

II. Factors

Builder-vendor

Most jurisdictions have specifically limited liability to a builder vendor.[12] A builder-vendor has been defined as "one who buys land and builds homes upon that land for purposes of sale to the general public."[13] One court explained why the builder-vendor should be the responsible party:

> The applicability of the implied warranty is based upon the premise that, with respect to the sale of new homes, the purchaser has little choice but to rely upon the integrity and professional competence of the builder vendor. The public interest dictates that if the construction of a new house is defective, its repair cost should be borne by the responsible builder-vendor who created the defect and is in a better economic position to bear the loss, rather than by the ordinary purchaser who justifiably relied upon the builder's skill.[14]

The definition of builder-vendor has been further refined by some courts to also include that the builder-vendor be engaged in that profession. Consequently, the sale is commercial rather than casual or personal in nature.[15] This limitation has been placed to protect those vendors who have no greater skill relevant to determining the quality of a house than the purchaser.[16] As with the UCC "merchant", any person who holds himself out as having particular skill and knowledge in his trade should be held to a higher degree of responsibility.

Courts in a few jurisdictions have chosen to expand the number of persons potentially liable for breach of the implied warranty. Some have held vendors, who were not also the builders, liable.[17] Vendors of the real estate were held liable although an independent contractor had coustructed the defective house. One court explained its reasoning by noting that the vendor had "placed the house in the stream of commerce and had exacted a fair price for it. Its liability is not found upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects."[18]

Another court found a builder who was not the vendor liable. The court could see no difference between a builder or contractor who constructs a home and a builder-developer. It doesn't matter whether the builder constructs the residence on land he owns or land the purchaser owns. It is the structure and all its intricate components and related facilities that are the subject matter of the implied warranty. Mere builders must be as accountable for their workmanship as are builder developers.[19]

Home

Although the majority of jurisdictions agree that the implied warranty attaches to the sale of new housing,[20] some questions as to what is "new housing" have arisen. Early in the development of the implied warranty, several states, relying on the English precedents, distinguished between sales made while the homes were still under construction and sales of completed homes.[21] The earlier decisions limited recovery to cases where the home was under construction at the time of sale, following what is commonly referred to as the "Miller Rule."[22] However, as reasoned by the Colorado Supreme Court, most jurisdictions have reversed their earlier decisions,[23] finding no sound rationale for the distinction.

Some courts, however, have substituted the word "construction" for "housing" when finding an implied warranty.[24] The result is warranty protection which extends to apartment buildings,[25] grain elevators[26] and condominiums.[27] It has been argued

that the extension is unwise and unsubstantiated when considered with the purpose of the warranty itself.[28] Relatively unknowledgeable buyers are those the warranty is supposedly designed to protect. In contrast, purchasers of larger constructions should have greater expertise or the funds to purchase expert advice.

Since the imposition of the unqualified implied warranty is based upon the theory that it is the ordinary home buyer, relatively ignorant of the business of buying a home, who needs this statutory protection, the unqualified warranty is implied only in purchases of one- or two-family homes. Anything larger than a two-family dwelling is often an apartment house, and these are commonly purchased by corporations or individuals with enough wealth to afford competent inspection or knowledge of the realty business.[29]

Initial Purchaser

With a few exceptions most state courts have limited recovery to initial purchasers. A Missouri court explained that the contractual nature of the implied warranty implicitly limits the right of action to the first purchase:[30]

> Because the warranty is implied by virtue of the contemplated sale to the first purchaser and arises by reason of the purchase, it theoretically accrues in him. The practical aspects of the contractual defenses also lead to this conclusion. The first purchaser is the only one with whom the builder may negotiate an allocation of the risk. Furthermore, the builder is in a better position to know the condition of the home at the time of sale, and thus whether defects were latent. This is not true if the builder is sued by a subsequent vendee.[31]

In California a court noted that this initial purchaser is the one who most needs the warranty protection.[32] The purchaser of a new building, unlike the buyer of an older building has had "no opportunity to observe how the building has withstood the passage of time. Thus he generally relies on those in a position to know the quality of the work to be sold, and his reliance is surely evident to the construction industry."[33]

The Implied Warranty Itself

There are two general premises upon which most jurisdictions agree. First is the fact that the warranty is an implied warranty; one that is created by law and which exists regardless of the intent of the parties. Because home purchasers rely on the

knowledge and judgment of their vendors, the warranty springs from the vendors' duty not to take advantage of their superior positions.[34] Second, negligence is not a relevant issue. In one of the earlier cases holding that a new homeowner was entitled to recover on an implied warranty of fitness for habitation, the court also held that fault or negligence on the part of the defendant was not required in order for the plaintiff to recover.[35] The fact that the defendant was the vendor of the real estate was sufficient to make him liable. In a more recent decision another court agreed that "[o]n an implied warranty, one may be held liable for damages even when be has exercised all reasonable or even possible care.[36]

Some courts have described the warranty as one of "fitness for habitation"[37] while others have required "workmanlike construction."[38] The definition of "fit for habitation" has caused some concern for the courts. The most extensive discussion of habitability is found in the Illinois case Goggin v. Fox Valley Construction Company.[39] The court set down what is considered to be the basic parameters of habitability.[40] They include:

(1) It is possible for a new home to be in substantial compliance with building codes and still be uninhabitable.

(2) The primary function of a new home is to shelter its inhabitants from the elements. If a new bome does not keep out the elements because of a substantial defect of construction, such home is not habitable within the meaning of the implied warranty of habitability.

(3) Another function of a new home is to provide its inhabitants with a reasonably safe place to live, without fear of injury to person, health, safety, or property. If a new home is not structurally sound because of a substantial defect of construction, such a home is not habitable within the meaning of the implied warranty of habitability.

(4) If a new home is not aesthetically satisfying because of a defect of construction, such a defect should not be considered as making the home uninhabitable.

In another case the dispute also rested upon the determination of the type of defect wbich reuders a new home uninhabitable. The plaintiffs attempted to show that their premises were rendered uninhabitable by noise from an air conditioning system.[41] Evidently the noise was undetectable during normal conversation sounds, but

disturbed them in the still of the night. The court rejected their arguments stressing the fact that the test of breacb of the warranty is an objective one; i.e., what reasonable people would expect. If "the premises met ordinary, normal standards reasonably to be expected of living quarters of comparable kind and quality"[42] they are deemed habitable. There is no warranty to protect certain individuals who are hypersensitive.

The question "What is workmanlike construction?" has not received the same amount of attention as the issue of habitability. Evidently the courts have had little difficulty in assessing it. However, there is one noteworthy case in which a court found a breach of the "implied warranty of proper construction and sound workmanship."[43] This case is mentioned because in it the court extended the meaning of workmanship to include the concept of design. The builder had installed a septic tank which failed to function properly. Apparently there was no defect in the material or workmanship, but nevertheless the court found a breach of warranty because of a "defect in the design from the time the septic tank was being installed."[44]

A court's choice of terminology (habitability or workmanlike construction) could determine the buyer's ability to recover from his seller. A buyer who would win a suit based on habitability could lose if the court recognized only the warranty of workmanlike construction. As an illustration, consider a situation in which a builder drilled a well in a workmanlike manner, but found no water fit for human consumption.[45] In this particular case the buyer recovered damages because the court defined the warranty as fitness for habitation, but he would have lost had only workmanlike construction been required.

On the other hand, consider the situation of the home buyer who receives an improperly constructed fireplace. Obviously, he could recover damages under the warranty of workmanlike construction, but in today's homes fireplaces may be more decorative than necessary. It might appear that buyers receive the most protection in states wbere the courts say that both warranties are implied.[46] Then, however, the buyers might have the burden of proving that both warranties were breached. One plaintiff, caught in the quandary of words, lost his suit because he alleged only poor workmanship and did not also allege that the home was not fit for human habitation.[47]

Types of Defects

There has been a wide variance in the type of defect for which the courts have allowed recovery. Generally, the courts have agreed that the defect must be a latent or hidden defect which would not be apparent to the buyers upon reasonable inspection.

If the party asserting the implied warranty has a reasonable opportunity to discover the defect and did not do so, the seller has a valid defense.[48]

While some courts have allowed recovery for structural defects only, most have included site or lot defects. A Pennsylvania court, reasoning that the purchaser of real estate justifiably relies on his seller's expertise and superior opportunity to choose a suitable site, became the first to hold a builder-vendor liable for latent site defects not involving damage to a dwelling.[49] This case along with many others to follow,[50] involved a well which produced no water fit for human consumption. The Pennsylvania court found that potable water supply is within the scope of the builder-vendor's implied warranty because without it a house is rendered uninhabitable. This rule stands true even when the quality of the water is not the result of poor drilling techniques.[51] Other defects included defective septic tanks,[52] water seepage into homes,[53] cracked foundations and concrete work,[54] defective air conditioning,[55] floors,[56] fireplaces,[57] electrical systems,[58] roofs,[59] heating,[60] insulation,[61] and plumbing.[62]

Duration of the Warranty

Obviously a purchaser will not be able to discover the defects in his new home until he has occupied the house for a reasonable length of time. The difficult decision facing the courts has been "What constitutes a reasonable time?" As can be expected, the courts have been reluctant to limit the warranty to a specific period. One of the earlier decisions dealing with the duration of the builder's liability was handed down by the Supreme Court of Rhode Island. In it the court stated:

> ....where there is a sale of a new house by a vendor who is also the builder thereof, there is an implied warranty of reasonable workmanship and habitability surviving the delivery of the deed. This is not to hold that the builder is required to construct a perfect house. Whether the house is defective is determined by the test of reasonableness and not perfection, and the duration of such liability after the taking of possession is to be determined by standards of reasonableness.[63]

In this statement there are two ideas which courts have consistently agreed upon. First, the duration of liability is to be determined by standards of reasonableness[64] and second, a builder is not required to construct a perfect house.[65] Yet, the "standard of reasonableness" test doesn't really tell a builder when his liability will stop.

It has been suggested that the courts can extend the reach of Article 2 of the Uniform Commercial Code to cover the building industry.[66] Article 2, providing implied warranty protection for items such as cars, appliances and other personal property has a four year statute of limitations (which by agreement may be reduced to no less than one year).[67] When compared with a $1,000 appliance, a four-year warranty limitation on an $80,000 new home hardly seems appropriate. Not only do the personal property items cost significantly less, they also have a much shorter economic life span. In spite of this difference, at least one state has limited the warranty on new housing to a one year period.[68]

Although it is unrealistic to expect a builder to insure against defects for the total expected life of the house, it is also unrealistic to expect a new house buyer to be satisfied with a one year warranty on such a large purchase. Considering variations in weather conditions, a latent defect may take several years to become apparent. One commentator has suggested that a ten year period of liability should be more than sufficient.[69] Several courts, recognizing that the various components which go into the construction of a house have different life expectancies, refuse to set a specific time limit for a warranty on an entire house.[70]

Warranty Disclaimers

Some sophisticated builders who are aware of the doctrine of implied warranty of habitability have included warranty disclaimers in their sales contracts. Of all the issues involved in this type of litigation this is the most controversial and inconsistent. The courts don't even agree if there ever could be an effective disclaimer, much less what would be required to constitute it.

In Utah, a builder successfully disclaimed all implied warranties by including an "as is" provision in the real estate contract.[71] The provision, which specified that the purchasers "accepted the property in its present condition," was held to be controlling and precluded the purchasers from asserting that the builder had impliedly warranted that his homes were constructed in a good workmanlike manner.

In a contrasting opinion, a Rhode Island court stated that the plaintiff's agreeing to taking the premises "in the same condition in which they now are" did not constitute a disclaimer.[72] Although the wording of this attempted disclaimer was nearly the same as in the Utah case supra, the court was reluctant to accept it as an effective disclaimer because it didn't use language which specifically referred to its effect on warranties. The court said "to effectuate the policies underlying the implied warranties of habitability and reasonable workmanship, the court will construe exclusionary

provisions of doubtful meaning strictly against those parties raising such provisions as defenses.[73]

A Missouri court, in Crowder v. Vandendeale,[74] presented a good discussion of the requirements of an effective disclaimer.[75] First, it recognized the potential vitality of traditional contract defense when employed under the proper circumstances. According to the court, the parties have a right to make their own bargain as to economic risk; but since a disclaimer varies implied warranty terms, there exists a heavy burden of proof to demonstrate that in fact the bargain was actually made.

Second, the court stated that one seeking the benefit of a disclaimer must prove that there was a conspicuous provision which fully disclosed its consequences. Third, the disclaimer must have in fact been voluntarily agreed upon. The builder must bear the weight of this burden of proof because by asserting the disclaimer he is trying to show that the buyer gave up protection given to him by public policy. Courts will not imply that this protection was waived just because boilerplate clauses are included in a contract.

Courts have not been able to agree if an express warranty given by a builder automatically negates the implied warranties. The court in Richman v. Watel found it did not.[76] The court said that because the breach of an implied warranty in housing is considered to be a tort rather than a contract concept (a developing concept which will be discussed below), the express written one year warranty did not limit or exclude the implied warranty of fitness.[77]

In Colorado, a court agreed that if the express warranty contained no words of limitation, then the builder had not abrogated or limited his common law implied warranties.[78] However, in Arkansas, it was held that implied warranties are not applicable when there is an express warranty.[79] The court stated that it reached this conclusion by analogy to pre-Commercial Code sales contract cases where it was held that if an express warranty was present it was exclusive.[80]

III. The Privity Issue and Subsequent Purchasers

Prosser described a warranty as a "...freak hybrid born of the illicit intercourse of tort and contract."[81] The action for breacb of warranty was originally a tort action, closely resembling the tort of deceit. hi the late eighteenth century, courts, for procedural convenience, determined that a contract action could also be maintained.

As a result, the original tort form of the action, as well as the contract form, still survives today.

This duality is significant today because, depending upon a particular court's choice of contract or tort, several aspects of a case such as the survival of actions, the measure of damages, the statute of limitations and the requirement of privity of contract will likely vary. Prosser concluded, "...the concept of warranty has involved so many major difficulties and disadvantages that it is very questionable whether it has not become rather a burden than a boon to the courts in what they are trying to accomplish."[82]

The truth of his conclusion is revealed when one examines the warranty of habitability court decisions. As indicated earlier, in the decisions in which privity was the controlling issue, most courts viewed the warranty as sounding in contracts; therefore privity is required.[83] Moreover, in many instances the courts have also listed practical reasons for the privity requirements:

(1) The first purchaser is the only one with whom the builder may negotiate an allocation of the risk.[84] If the builder had lowered the purchase price because of defects in the structure he would have double liability if a subsequent purchaser were also permitted to recover.

(2) A builder is in a better position to know the condition of a home at the time of sale rather than at a later date.[85]

(3) Real estate transactions require a written contract or deed. Each subsequent purchaser may require from his vendor any warranties he wishes to have on improvements.[86]

(4) There are significant differences between manufactured products and homes that analogies are not appropriate.[87]

(5) There are several other means of protection for the home buyer which will enable him to enter the housing market on an equal footing with the builder.[88] Examples are: "astute consumer appraisal of potential builders, inspections where possible, support of HOW builders, and government warranties where either VA or FHA financing is utilized."[89]

In contrast, several courts have now disregarded privity arguments and extended warranty protection to subsequent purchasers.[90] In 1976 an Indiana court, with little commentary, held that a builder's implied warranty of fitness for habitation runs not only in favor of the first owner, but extends also to subsequent purchasers.[91] However, this implied warranty is limited to latent defects which are not discoverable by the subsequent purchasers by reasonable inspection and which become manifest only after the purchase.

The Wyoming Supreme Court, acknowledging that the Indiana court had furnished a "reasonably workable rule,"[92] added its own reason for extending the warranty:

> The purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work. With that object in mind, any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving of recovery is incomprehensible. Let us assume for example a person contracts construction of a home and, a month after occupying, is transferred to another locality and must sell. Or let us look at the family which contracts construction, occupies the home and the head of the household dies a year later and the residence must, for economic reasons, be sold. Further, how about the one who contracts for construction of a home, occupies it and, after a couple of years, attracted by a profit incentive caused by inflation or otherwise, sells to another. No reason has been presented to us whereby the original owner should have the benefits of an implied warranty or a recovery on a negligence theory and the next owner should not simply because there has been a transfer. Such intervening sales, standing by themselves, should not, by any standard of reasonableness, effect an end to an implied warranty or, in that matter, a right of recovery on any other ground, upon manifestation of a defect. The builder always has available the defense that the defects are not attributable to him.[93]

Also relying upon the Indiana decision, the South Carolina Supreme Court abolished the privity requirement for liability.[94] The rule it created was essentially identical to those in Indiana and Wyoming. Three justifications for its decision were set forth:

(1) Because latent construction defects can surface several years after the initial sale, there is no sound basis for the reasoning that only first owners need warranty protection.

(2) Prospective purchasers rely on the builder's expertise.

(3) Because of their limited knowledge purchasers cannot discover latent construction defects.[95]

Mississippi has also experienced a transformation in overruling well-established precedents in abolishing the privity requirement. In a lengthy, well-reasoned decision, the Mississippi Supreme Court has ruled

> The current trend in other jurisdictions extends protection to remote purchasers who have no contractual relationship or privity with the builder-vendor. For example, where a remote purchaser can prove negligence on the part of the builder vendor which results in foreseeable injury or loss to the remote purchaser, a remote purchaser has been entitled to recovery for damages. (citations omitted) And, the privity barrier has also been removed in recent cases based on the implied warranty theory. (citations omitted) In light of this new substantial trend of authority, we think it worthwhile to reexamine our past rulings on this issue.[96]

In reexamining its position, the Mississippi Court opined that there is no reasonable justification not to extend the same protection to a subsequent purchaser as to the initial purchaser; consequently, the Court abolished the privity requirement.[97]

Although privity was not the central issue, in a Texas Court of Civil Appeals decision,[98] dicta indicated that privity requirements also have been eliminated. The court made it clear that the sale of a house carries with it an implied warranty of habitability, and that a breach of such warranty gives rise to a cause of action in tort rather than contract. Since privity of contract is not relevant in a tort action, warranties should extend to subsequent purchasers. Along this same line, the Supreme Court of Arkansas has found that a house is a "product" for purposes of the Arkansas strict liability statute and the District of Columbia District Court has not precluded condominiums from falling under the same analysis.[99] Therefore the implied warranty of habitability was extended to subsequent purchasers for a reasonable length of time. The Arkansas court, quoting another case in justifying its decision, succinctly stated,

> In this era of complex marketing practices and assembly line manufacturing conditions, restrictive notions of privity of contract between manufacturer and consumer must be put aside and the realistic view of strict liability adopted.[100]

IV. Products Liability Compared

Several courts which have extended the warranty protection to subsequent purchasers indicated that they did so because they could see no significant reason to differentiate between strict liability for manufactured products and real estate improvements. This section of the paper will first review the policy reasons for creating strict liability and then discuss whether the same reasoning is applicable to improved real estate.

Prosser listed three reasons why courts have accepted strict liability for products.

(1) The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.

(2) The supplier, by placing the goods upon the market, represent to the public that they are suitable and safe for use; and by packaging, advertising or otherwise, he does everything he can to induce that belief. He intends and expects that the product will be purchased and used in reliance upon this assurance of safety, and it is in fact so purchased and used. The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that be has made no contract with the consumer.

(3) It is already possible to enforce strict liability by resort to a series of actions, in which the retailer is first held liable on a warranty to his purchaser, and indemnity on a warranty is then sought successively from other suppliers, until the manufacturer finally pays the damages, with the added cost of repeated litigation. This is an expensive, time consuming and wasteful process, and it may be interrupted by insolvency, lack of jurisdiction, disclaimer, or the statute of limitations, anywhere along the line. What is needed is a blanket rule which makes any supplier in the chain directly liable to the ultimate user and so short-circuits the whole unwieldy procedure.[101]

A comparison of these reasons (for establishing strict liability for defective products) and the reasons the courts have stated for creating implied warranties of habitability reveals no substantial differences. As with products, there is certainly a public interest in protecting consumers from defects in housing. Consumers are certainly no less helpless when buying a house than when buying a product.

California very early recognized the application of strict liability concepts within the pruview of the implied warranty of habitability. Applying dicta from the landmark California strict liability case of *Greenman v. Yuba Power Products, Inc.*,[102] the California court reasoned that if injury results from defective workmanship, then strict liability may apply even though the "product" is a home.[103]

The builder, much like the supplier, places his housing upon the market and represents that it is suitable and safe for use. Why should he be permitted to avoid responsibility just because he had no contact with a subsequent purchaser? Also, as with product liability, what is the sense in requiring a subsequent purchaser to sue his vendor, and on up the line, if the defect is ultimately the responsibility of the builder? As Prosser stated, it is "an expensive, time consuming and wasteful process..."[104]

There are a few weak arguments set forth attempting to show why strict liability is appropriate for products, but not housing. One argument is that products are mass marketed, housing is not.[105] Through mass-marketing it is argued that suppliers attempt to insulate themselves behind a wall of intermediaries. In contrast, builders contract directly with the original purchaser. The argument concludes with the statement that a builder-vendor may not have been reasonably expected to anticipate a change in ownership.

This argument is simply untenable. Reasonable builders would anticipate change in ownership. Anyway, what difference does it make? If the home has a latent defect which eventually manifests itself, why should it matter who the builder expected to own it? It is the latent defect which gives rise to the liability, not the status of the owner. Moreover what difference should it make if a builder attempts to insulate himself from liability by a wall of intermediaries or first purchasers? Again, the liability arises from the builder's defect/negligence, not the status of the owner.

Other attempted distinctions have no more strength than the argument above. For example, one court emphasized that material and workmanship which may go into a home are of infinite variety.[106] An original purchaser may have negotiated for lesser quality. That is true; but isn't this also true of products? Some products sell for lower

prices because of inferior materials or workmanship. But, manufacturers are still potentially liable for latent defects.

By way of illustration: would a consumer reasonably expect his new mower to explode just because it was the less expensive model? Obviously not. Would a subsequent purchaser of a home expect his walls to cave in because his home was the less expensive model? Again, obviously not.

V. Conclusion

Courts have recognized that the purchase of a home is usually the largest single purchase of a lifetime. Purchasers are generally helpless in the transaction because they lack the training and experience to recognize the possible latent defects. To remedy the situation, in the past twenty years forty-one jurisdictions have court-created warranties of habitability. Generally, the warranties state that when a builder-vendor sells a home to an initial purchaser there exists an implied warranty of habitability. Because it is court created, the rule varies quite extensively from jurisdiction to jurisdiction. Consequently, many courts have placed artificial limitations upon the warranty.

One such limitation is the requirement that a plaintiff must be an initial purchaser in order to recover. However, this limitation has come under rigorous scrutiny; states such as Mississippi, South Carolina, and Wyoming have reviewed this limitation and have found it wanting. As the Mississippi Supreme Court noted, it seems that the trend has shifted. When scrutinized under a reasonableness test, there can be no justification to preclude a subsequent purchaser from a cause of action; the privity requirement serves no purpose. There appears to be no sound reasoning for the limitation other than the fact that many courts see the warranty as one based on contract.[107]

Yet, some courts, like the District of Columbia, have moved the area of implied warranty of habitability out of contract law and into the tort area; thus, rules governing tort actions, including strict liability,[108] become applicable. Consequently, a comparison of the development of strict products liability and the development of the warranty of habitability reveals that the policy considerations for both are very similar. If the similarity in development continues, courts may follow the D.C. example and soon discard the privity requirements, thus allowing recovery to subsequent purchasers.

ENDNOTES

1. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

2. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer) 69 YALE L.J. 1099 (1960).

3. Prosser, The Fall of the Citadel (Strict Liability to the Consumer) 50 MINN. L. R. 791 (1966).

4. For an exhaustive history of and the rationale behind the doctrine of caveat emptor see *Cochran v. Keeton* 47 Ala. App. 194, 252 So. 2d 307 (1970); Hamilton, The Ancient Maxim - Caveat Emptor, 40 YALE L. J. 133 (1931); Bearman, Caveat Emptor in Sales of Realty: Recent Assaults Upon the Rule, 14 VAND. L. REV. 769, fn. 2.

5. Comment, Peterson v. Hubschman Construction Company: The Implied Warranty Comes of Age in Illinois New Housing, 13 JOHN MARSHALL L. REV. 769, fn. 2.

6. *Vanderschrier v. Aaron*, 140 N.E.2d 819 (Ohio App., 1957)

7. *Id.* 821

8. *Id.*

9. *Id.*, citing to *Perry v. Sharon Development Co., Ltd.*, 4 All. E.L.R. (1937); see generally, also, "Right of the Purchaser in Sale of Defective House," 4 WESTERN RESERVE LAW REV. 357 (Summer 1953).

10. *Carpenter v. Donohue*, 388 P.2d 402 (Colorado Sup. Ct., 1964) citing to *Miller v. Cannon Hill Estates*, Ltd., 2 K.B. 113 (1931) and *Perry v. Sharon Development Co., Ltd., supra.*

11. *Id.* 402.

12. Annot., 25 *A.L.R.* 3d 383, 413-419 (1969).

13. *Elderkin v. Gaster*, 447 Pa. 118, 288 A. 2d 771, 774 (1972); followed, *Philadelphia Electric Company v. Hercules, Inc.*, 762 F.2d 303 (3d Cir. 1985) stating

> ...In *Elderkin* the court abolished the rule of caveat emptor as to the sale of new homes by a builder-vendor and, in accordance with a national trend, adopted a theory of implied warranties. See generally 6A Powell on Real Property chap. 84A..Id. 312

For a judicial discussion of Pennsylvania's Implied Warranty of Habitability, see *Pugh v. Holmes*, 405 A.2d 903-910 (1979).

14. *Sousa v. Albino*, 388 A. 2d 804, 805 (R.I. 1978).

15.*Klos v. Gockel*, 87 Wash 2d 567, 554 P. 2d 1349, 1352 (1976). Also see *Hartley v. Ballou*, 286 N.C. 51, 62, 209 S.E. 2d 776, 783 (1974). Courts have been reluctant to extend the implied warranty beyond the scope of the building itself, *e.g.*, a septic tank system has been included within the warranty's embrace (see *Tavares v. Horstman*, 542 P.2d 1275 (Wyo. 1975) and *Arvai v. Shaw*, 345 S.E. 2d 715 (So. Car. 1986) as well as the settling of a basement (see *Brown v. Fowler*, 269 N.W.2d 907 (S.D. 1979); yet, a seawall has not (see *Conklin v. Hurley*, 428 So.2d 654 (Fla. 1983).

16.*Sousa v. Albino, supra* 388 A. 2d at 805.

17.*Smith v. Old Warsaw Dev. Co*, 479 S.W. 2d 795, (Mo. 1972); *Lane v. Trenholm*, 267 S.C. 497, 229 S.E. 2d 728, 731 (1976).

18.*Id.*

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

20.*Tavares v. Horstman*, 542 P. 2d 1275, 1276 (Wyo. 1975). See also *Columbia Western Corporation v. Vela*, 592 P.2d 1294 (Ariz. 1979)

21.See *Jeanguneat v. Jackie Hames Constr. Co.*, 576 P. 2d 761, 763-64 (Okl. 1978); *Elden v. Simmons*, 631 P. 2d 739 (Okla. 1981); *Bridges v. Ferrell*, 685 P. 2d 409 (Okla. App. 1984).

22.*Miller v. Cannon Hill Estates, Ltd.* 2 K.B. 113 (1931); *cf.* fn.10 *supra*.

23.*Jeanguneat v. Jackie Hames Constr. Co., supra* 576 P. 2d at 763-64.

24.*Pollard v. Saxe & Yalles Dev. Co.*, 12 Cal. 3d 347, 115 Cal. Rptr. 648, 525 P. 2d 88 (1974); *Carpenter v. Donohoe*, 154 Colo. at 78, 388 P. 2d at 399; however, see *East Hilton Drive Homeowners' Assoc. v Western Real Estate Exchange, Inc.*, 186 Cal. Rptr. 267 (App. 1982) which basically held that since the homes in question (condominiums) had been built four years prior to the vendor purchasing them for resale and that despite the homes having been unoccupied for the previous four years, the vendor could not be considered a vendor of "new" construction and thus no warranty would be implied.

25.*Pollard v. Saxe & Yalles Dev. Co.*, 12 Cal. 3rd at 347, 115 Cal. Rptr. 648, 525 P. 2d at 88.

26.*Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co.*, 247 Minn. 17, 143 N.W. 2d 622 (1966).

27.*David v. B & J Holding Corp.* 349 So. 2d at 676 (Fla. 1977); *Gable v. Silver*, 258 So. 2d 11 (Fla. 1972).

28.Comment, *supra* note 5, at 788.

29.Bearman, Caveat Emptor in Sales of Realty-Recent Assaults Upon the Rule, 14 VAND. L. REV. 541, 575 (1961).

30.*Crowder v. Vandendeale*, 564 S.W. 2d 879 881 (Mo. 1978) modified on other grounds in *Sharp Brothers Contracting Company v. American Hoist and Derrick Co.*, 703 S.W. 2d 901 (Mo. 1986). See also: *R.W. Murray Co. v. Shatterproof Glass Corporation*, 697 F. 2d 818, 824-825 (8th Cir. 1983); *San Francisco Real Esate Investors v. J. A. Jones Construction Company*, 524 F. Supp. 768 (S.D. Ohio 1981 citing to *Mitchem v. Johnson*, 218 N.E. 2d 594 Ohio (1966)) stating that Ohio requires that privity of contract must exist before an action based on the implied warranty will lie.

31.*Id.*, 564 S.W. 2d 879, 881.

32.*Pollard v. Saxe & Yalles Development Co., supra* 112 Cal. 3d 347, 115 Cal. Rptr. 648, 525 P. 2d at 91.

33.*Id.*

34.*David v. B & J Holding Corp., supra* 349 So. 2d at 678.

35.*Smith v. Old Warsaw Development Company, supra* 479 S.W. 2d at 795.

36.*Chandler v. Bunick*, 279 Or. 353, 569 P. 2d 1037, 1039 (1977).

37.*Shannar v. Butler Homes, Inc.*, 102 Ariz. 312 428 P. 2d 990 (1967); *Gable v. Silver*, 258 So. 2d 11, 18 (Fla. 1972); *Bethlahmy v. Bechtel*, 91 Idaho 55 (1966) 415 P. 2d at 704; *Theis v. Heuer*, 289 N.W. 2d 303, 304 (Ind. 1972); *Weeks v. Slavick*, 180 N.W. 2d 503, 504, 24 Mich. App. 621 (1970); *Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co.*, 143 N.W. 2d 622, 625, 274 Minn. 17 (1966); *Smith v. Old Warsaw Development Co.*, 479 S.W. at 416; *Garcia v. Hynes & Howes Real Estate, Inc.*, 331 N.E. 2d 634 637 (1975); *Harris v. Buckeye Irrigation Co.*, 642 P. 2d 885, 888 (Ariz. App. 1982).

38.*Pollard v. Saxe & Yalles Development Company, supra* 525 P. 2d at 90-91; *Crawley v. Terhune*, 437 S.W. 2d 743, 745 (Ky. 1969); *Norton v. Burleaud*, 342 A. 2d 629, 630 (N.H. 1975); *Centrella v. Holland Construction Corp.*, 370 N.Y.S. 932, 875 (1975); *Hartley v. Ballou*, 209 S.E. 2d at 783; *Mitchell v. Johnson*, 218 N.E. 2d 594, 599 (1966); *Rothberg v. Olemeh*, 262 A. 2d 461 (Vt. 1970); *San Francisco Real Estate Investors v. J.A. Jones Construction Company*, 524 F. Supp. 768 (S.D. Ohio 1981).

39.*Goggen v. Fox Valley Construction*, 48 Ill. App. 3d 193, 654 N.E. 510 2d (1977).

40.*Id.* at 511.

41 *Putnam v. Roudenbush*, 352 So. 2d 908 (Fla. 1977).

42 *Id.* at 910.

43 *Coney v. Steward*, 562 S.W. 2d 619 (Ark. 1978).

44 *Id.* at 620.

45 *Elderkin v. Gaster*, 447 Pa 118, 121-122, 288 A. 2d 771, 773 (1972).

46 *Cochran v. Keeton*, 252 So. 2d 313 (Ala. 1971); *Carpenter v. Donohoe*, 388 P. 2d at 402; *Vernali v. Centraella*, 266 A. 2d 200, 201 (Conn. 1970); *Jones v. Gatewood*, 381 P. 2d 158 (Okla. 1973); *Yepsen v. Burgess*, 525 P. 2d 1019, 1022 (Ariz. 2974); *Elderkin v. Gaster*, *supra* 288 A. 2d at 772; *Paudla v. J.J. Deb-Cin. Homes*, Inc., 298 A. 2d 529-531 (R.I. 1973): *Casavant v. Campopiano*, 327 A. 2d 831, 833 (R.I. 1974); *Rutledge v. Dodenhoff*, 175 S.E. 2d 793-795 (1970); *Waggoner v. Midwestern Development, Inc.*, 154 N.W. 2d 803-809 (1967); *Number v. Morton*, 426 S.W. 2d 554, 555 (Tex. 1968); *House v. Thorton*, 457 P. 2d 99-204 (Wash. 1969); *Tavares v. Horstman*, *supra* 542 P. 2d at 1282.

47 *Goggen v. Fox Valley Construction*, *supra* 654 N.E. 2d 511.

48 *Putnam v. Roudenbush*, *supra* 352 So. 2d at 771.

49 *Elderkin v. Gaster*, *supra* 288 A. 2d at 771.

50 *Forbes v. Mercado*, 283 Or. 291, 583 P. 2d 552 (1978); *Jeanguneat v. Jackie Hames Construction Co.*, 576 P. 2d 761 (Okl. 1978); *Krol v. York Terrace Building, Inc.*, 35 Md. App. 321, 370 A. 2d 589 (1977); *McDonald v. Mianecki*, 159 N.J. Super 1, 386 A. 2d 1325 (1978).

51 *Elderkin v. Gaster*, *supra* 288 A. 2d at 773.

52 *Theis v. Heuer*, 289 N.E. 2d at 301; *Norton v. Burleaud*, 342 A. 2d at 630; *Yepsen v. Burgess*, 525 P. 2d at 1022; *Rutledge v. Dodenhoff*, 175 S.E. 2d at 793; *Tavares v. Horstman*, 542 P. 2d at 1277; *Chandler v. Bunick*, 279 Or. 353, 569 P. 2d 1037 (1977); *Coney v. Steward*, 562 S.W. 2d 619 (Ark. 1978); *Lane v. Trenholm Building Co.*, 229 S.E. 2d (S.C. 1976); *Arvai v. Shaw*, 345 S.E. 2d 715 (So. Car. 1986).

53 *Wawak v. Steward*, 449 S.W. 2d at 923; *Bethlahmy v. Bechtel*, 415 P. 2d at 700-701; *Garcia v. Hunes & Howes Real Estate, Inc.*, 331 N.E. 2d at 635; *Hanavan v. Dye*, 4 Ill., App. 3rd 576, 281 N.E. 2d 398 (1972); *Crawley v. Terhune*, 437 S.W. 2d at 745; *Norton v. Burleaud*, 342 A. 2d at 630; *Hartley v. Ballow*, 209 S.E. 2d at 595; *Jones v. Gatewood*, 381, P. 2d at 158; *Waggoner v. Midwestern Development, Inc.*, 154 N.W. 2d at 809.

54 *Carpenter v. Donohoe*, 388 P. 2d at 402; *Barnes v. MacBrown and Company, Inc.*, 342 N.E. 2d at 621; *Smith v. Old Warsaw Development Co.*, 479 S.W. 2d at 799; *House v. Thornton*, 457 P. 2d at 203; *Belt v. Spencer*, 585 P. 2d 922 (Colo. 1978); *Crowder v. Vandendeale*, 564 S.W. 2d 879 (Mo. 1978) (see also fn. 25 re: this case).

55 *Putnam v. Roudenbush*, 352 So. 2d at 908; *Gable v. Silver*, 258 So. 2d at 11.

56 *Centrella v. Holland Construction Corp.*, 370 N.Y.S. at 832; *House v. Thorton*, 457 P. 2d at 199; *Matuhunas v. Baker*, 569 S.W. 2d 791, (Mo. 1978); *Richman v. Watel*, 565 S.W. 2d 101 (Tex. 1978).

57 *Vernali v. Centraella*, 266 A. 2d at 200; *Humber v. Morton*, 426 S.W. 2d at 554.

58 *Cochran v. Ketton*, 252 So. 2d at 307; *Padula v. J.J. Deb-Cin. Homes, Inc.*, 298 A. 2d 529.

59 *Casavant v. Campopiano*, 327 A. 2d at 831; *Weeks v. Slavick*, 180 N.W. 2d at 503.

60 *Sousa v. Albino*, 288 A. 2d 804 (R.I. 1978).

61 *David v. B & J Holding Corporation*, 349 So. 2d at 676.

62 *Schipper v. Levitt & Sons, Inc.* 208 A. 2d at 314.

63 *Padula v. J.J. Deb-Cin. Homes, Inc.*, 298 A. 2d 529, 532 (R.I. 1973).

64 *Smith v. Old Warsaw Development Co.*, 479 S.W. 2d at 801; *Mautlunas v. Baker*, 569 S.W. 2d at 791; *Jeanguneat v. Jackie Hames Construction Co.*, 576 P. 2d at 764; *Waggoner v. Midwestern Development, Inc.*, 154 N.W. 2d at 809.

65 *Smith v. Old Warsaw Development Co.*, 479 S.W. 2d at 801; *Mautlunas v. Baker*, 569 S.W. 2d at 791; *Jeanguneat v. Jackie Hames Construction Co.*, 576 P. 2d at 764; *Waggoner v. Midwestern Development, Inc.*, 154 N.W. 2d at 809.

66 Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 FORDHAM L. REV. 447, 454 (1971).

67 U.C.C. Section 2-725.

68 Md. Code Art. 21, Section 10-203.

69 McNamara, supra note 96 at 142.

70 *Tavares v. Horstman*, 542 P. 2d at 1282; *McDonald v. Mianecki*, 386 A. 2d at 1335-1336; *Carey v. Steward*, 562 S.W. 2d at 620.

71.*Tibbitts v. Openshaw*, 18 Utah 2d 442, 415 P. 2d 160 (1967); this approach, i.e. "'as is", which may effectively waive the implied warranty, has been supported in Wyoming by *Schepps v. Howe*, 665 P. 2d 504 (Wyo. 1983) and in Texas by *Diamond v. Meacham*, 699 S.W. 2d 950 (Tex. App. 1985).

72.*Casavant v. Campopiano*, 327 A. 2d at 833-834.

73.*Id.*

74.*Crowder v. Vandendeale*, 564 S.W. 2d at 879 (modified on other grounds in *Sharp Brothers Contracting Company v. American Hoist and Derrick Company*, 703 S.W. 2d 901 (Mo. 1986).

75.*Id.* at 881.

76.*Richman v. Watel*, 565 S.W. 2d at 102.

77.*Id.*

78.*Hoagland v. Celebrity Homes, Inc.*, 572 P. 2d 493, 494 (Colo. 1977); *Nastri v. Wood Bros. Homes, Inc.*, 690 P. 2d 158 (Ariz. 1984).

79.*Carter v. Quick*, 563 S.W. 2d at 463.

80.*Id.*

81.Prosser, *supra* note 2.

82.*Id.* 1127.

83.*Miles v. Love*, Kan. App. 2d 630, 573 P. 2d 622 (Kan. 1977); *San Francisco Real Estate Investors v. J.A. Jones Construction Company*, 524 F. Supp. 768 (S.D. Ohio 1981), *Mitchem v. Johnson*, 218 N.E. 2d 594 (Ohio 1966).

84.*Crowder v. Vandendeale*, 564 S.W. 2d 879, 882 (Mo. 1978) modified on other grounds in *Sharp Brothers Contracting Company v. American Hoist and Derrick Company*, 703 S.W. 2d 901 (Mo. 1986).

85.*Id.*

86.*Oliver v. City Builders, Inc.*, 303 So. 29 466, 469 (Miss. 1974) (see fn. 96 below; while this case has effectively been overruled by subsequent action in the Mississippi Supreme Court, its rationale still holds for the sake of illustration only).

87.*Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A. 2d 599, 601 (1977).

88.Comment, The Case Against Strict Liability Protection for New Home Buyers in Ohio, 14 AKRON L. REV. 103, 106 (1980).

89.*Id.* 118.

90.The first case to consider the issue of a builder's liability to a second owner is *Steinberg v. Coda Roberson Construction Co.*, 79 N.M. 123, 440 P.2d 798 (1968), a 1968 New Mexico case which held that since the cause of action sounded in the tort of negligence, then the issue of privity was immaterial.

91.*Barnes v. Mac Brown and Co. Inc.*, 342 N.E. 2d 611 (1976).

92.*Moxley v. Laramie Builders, Inc.*, 600 P. 2d 733, 737 (Wyo. 1979).

93.*Id.*; see also *Western Equipment Co., Inc. v. Sheridan Iron Works, Inc.*, 605 P. 2d 806 (Wyo 1980) and *Phillips v. ABC Builders, Inc.*, 611 P. 2d 821 (Wyo. 1980).

94.*Terlinde v. Neely*, 721 S.E. 2d 768 (1980); see also *Arvai v. Shaw*, 345 S.E. 2d 715 (So. Car. 1986).

95.*Id.*, 721 S.E. 2d 768.

96.*Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670, 671 (Miss. 1983); the court used the following rationale in its decision:

> ...The purchase of a home is quite frequently the most important and expensive investment that a family makes. Yet, most purchasers simply do not have the knowledge of expertise necessary to discover many defects. Tcts. They must instead rely upon the honesty and expertise of the builder...
>
> Under such a scenerio, it is rather obvious that the courts must fashion some legal framework in which to protect innocent purchasers. Accordingly, we have already recognized that a first purchaser should be able to recover damages from the builder...
>
> But, our past decisions have unfortunately denied this same protection to second or subsequent purchasers. Yet, we know of no reasonable justification for this distinction. The existing law permits a wrong without a remedy... *Id.* 671-672.

With this opinion, the Mississippi Court effectively overruled *Brown v. Elton Chalk, Inc.*, 358 So.2d 721 (Miss. 1978), *Hicks v. Grenville Lumber Company, Inc.*, 387 So. 29 94 (Miss. 1980), and *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974). See also Justice Walker's strongly-worded dissent in the Keyes case.

97.For similar arguments establishing the standing of subsequent purchasers to sue the builder based on negligence, see *Elden v. Simmons*, 631 P.2d 739 (Okla. 1979); *Hermes v. Staiano*, 437 A.2d 925 (App. Div. 1981); *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982); *Cosmopolitan Homes, Inc. v. Weller*, 663 p.2d 1041 (Colo. 1983). One of the most

wide-sweeping cases is *Oates v. Jag, Inc.* 311 S.E.2d 369 (1984), rev'd, 333 S.E.2d 222 (North Car. 1985) holding that the tort of negligence will lie for the third owners of a house when shown that the builder failed to comply with building code provisions and used inferior building materials. The North Carolina Supreme Court relied extensively on a pair of Florida cases recognizing the right of remote purchasers of condominiums to sue the builder for defects; see, *Simmons v. Owens*, 363 So.2d 142 (Fla. App. 1978) and *Navajo Circle, Inc., v. Development Concepts Corp.*, 373 So.2d 689 (Fla. App. 1979).

98.*Richman v. Watel*, 565 S.W.2d 101 (Tex. Civ. App. 1978); *Blagg v. Fred Hunt Co., Inc.*, 612 S.W.2d 321 (Ark. 1981); *Towers Tenant Association, Inc., v. Towers Limited Partnership*, 563 F. Supp. 566 (D.C. 1983).

99.*Richman v. Watel*, 565 S.W. 2d 101 (Tex. Civ. App. 1978); *Blagg v. Fred Hunt Co., Inc.* 612 S.W. 2d 321 (Ark. 1981); *Towers Tenant Association, Inc., v. Towers Limited Partnership*, 563 F.Supp. 566 (D.C. 1983). The D.C. Court relies upon *Berman v. Watergate West, Inc.*, 391 A.2d 1351 (D.C. 1978) which held "...the District of Columbia Court of Appeals concluded that products liability principles apply to the sale of newly constructed homes and cooperative units. As a result, the Court held that plaintiff had a viable cause of action grounded in breach of implied warranty/strict liability in tort." *Towers Tenant Assoc., supra* at 574.

100.*Blagg, supra*, at 323-324.

101.Prosser, *supra* note 2 at 1122-1124.

102.377 P.2d 897 (1963); this case lays out the prototypical strict liability standards using the facts of an injury resulting from an allegedly faulty power tool; these standards were later codified in Section 402A of the Second Restatement of Torts.

103.*Kriegler v. Eichler Homes, Inc.*, 73 Cal. Rptr. 749 (1969).

104.Prosser, *supra* p. 1124.

105.*Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378A. 2d 599, 601 (1977).

106.*Oliver v. City Builders, Inc.*, 303 So. 2d 466, 468 (Miss. 1974); (see fn. 96 *infra*; while this case has been overruled, it is used here for illustrative purposes only).

107.For a detailed listing of jurisdictions recognizing negligence as a remedy, see Robert L. Cherry, *Builder Liability for Used Homes Defects*, 18 REAL ESTATE LAW JOURNAL 115-141 (1989).

108.See, California: *Kriegler v. Eichler Homes, Inc., supra*; District of Columbia: *Berman v. Watergate West, Inc., supra*; New Jersey: *Hermes v. Staiano, supra*; Arkansas: *Blagg v. Fred Hunt Co., supra*.

FOR LOVE OR MONEY: NONPROFIT SURVIVAL IN A FOR PROFIT WORLD

by

Nancy I. Lasher*
Ronald C. Goldfarb**

> Once upon a time, the process of budgeting for most nonprofit organizations was very simple. My favorite illustration is the story of how one Ivy League university set its budget in the years right after World War II. The university was run by one vice-president and two deans...The vice-president and senior deans would meet with the president early in the summer at his summer home... Somewhere between the first and second martini, the president and his two chief administrators would settle the budget for the year and decide on the amount of any tuition increase needed to keep the university happily in the black.

Times, of course, have changed.[1]

Variously known as charitable, eleemosynary or nonprofit associations, small community based organizations whose mission it is "to help the less fortunate" are deeply imbedded in the American psyche. Such organizations sprang up fast and furiously as the Industrial Revolution sped forward in this

* Assistant Professor of Accountancy/Law, Trenton State College

** Assistant Professor, Dept. of Accounting and Legal Studies, Middlesex County College