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Contracts - Caveat Emptor - Implied Warranty of Habitability

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AUTHOR'S NOTE: In *San Antonio Independent School District v. Rodriguez,*[51] the Supreme Court has held that education is not among the rights afforded explicit or implicit protection under the Constitution. In *Rodriguez,* denial of equal protection of the law was asserted because the state used an ad valorem property tax as the basis of school spending. Poor persons alleged that this basis discriminated against them. The Court found that although interest in education is very high, it is not a fundamental federal right. Therefore, the state action in this case was not subjected to the stringent compelling state interest test, but to the rational basis test which is the traditional standard of review.

Although the propositions advanced regarding the Court's concern for the protection of fundamental rights are no longer meaningful concerning a fundamental right to an education, they nevertheless remain useful when viewed in regard to those rights which are declared to be fundamental.

CONTRACTS—CAVEAT EMPTOR—IMPLIED WARRANTY OF HABITABILITY —The Pennsylvania Supreme Court has held that a builder-vendor impliedly warrants that a house is constructed in a reasonably workmanlike manner and fit for habitation.

Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972).

The Elderkins agreed to purchase from Gaster a lot and house to be constructed thereon. The water supply was to be provided by a private well drilled on the lot. It was undisputed that Gaster, a builder-developer, had adequately constructed the house and the well; but it was also undisputed that the well had never produced water of a quality suitable for human consumption. The Elderkins discovered the contaminated nature of the water after they had taken possession of the premises, and refused to release the remaining balance in the construction fund unless and until the builder would provide them with an adequate supply of unpolluted water. Gaster sued the Elderkins for the balance of the construction fund, whereupon the Elderkins brought suit in equity praying that the builder be required to supply them with

51. 411 U.S. 1 (1973).

potable water. The Elderkins maintained that the builder-vendor of a house impliedly warrants that the house has been constructed in a reasonably workmanlike manner, that the dwelling is habitable, and that Gaster's failure to supply a source of potable water breached this implied warranty of habitability. Although finding that it was not Gaster's duty to supply the homebuyers with a source of unpolluted water, the trial judge nevertheless ordered Gaster to re-drill the well to the deepest water-bearing stratum on the property.[1] This order, however, did not assure the Elderkins that the deeper well would furnish unpolluted water, and they appealed the trial court's decision.

Upon appeal, the Supreme Court of Pennsylvania reversed.[2] The court first established that the rule of caveat emptor,[3] as applied to new houses, is an anachronism patently out of harmony with modern homebuying practices.[4] After detailing the attack on the doctrine of caveat emptor in the past decade by a number of American jurisdictions,[5] the court held that a builder-vendor impliedly warrants a house has been constructed in a reasonably workmanlike manner and is fit for the purpose intended, *i.e.,* habitation.

While most of the cited cases supporting the theory of implied warranty of reasonable workmanship and habitability were concerned with structural defects rendering the house unfit for habitation,[6] the court noted that there were several cases[7] in which the implied warranty of habitability was found to have been breached not because of structural defects, but because of the unsuitable nature of the site selected for the building.[8] The court was thus able to conclude that while the builder

1. Elderkin v. Gaster, 56 Del. Co. Rep. 467 (Pa. C.P. 1969), *rev'd,* 447 Pa. 118, 288 A.2d 771 (1972).
2. *Id.*
3. Caveat emptor (let the buyer beware) is a maxim which warns the buyer to examine, test, and judge for himself.
4. Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968).
5. Carpenter v. Donahoe, 154 Colo. 78, 388 P.2d 399 (1964); 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).
6. Courts used the construction contract theory that one who contracts to perform work is bound to do so in a reasonably efficient manner as the vehicle to transplant the mercantile idea of implied warranty to the real property field. Under the construction contract theory the contractor's obligation refers to the method or process of performing the work rather than the quality of the end product.
7. Mulhern v. Hederich, 163 Colo. 275, 430 P.2d 469 (1969); Waggoner v. Midwestern Dev. Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).
8. The cases cited by the court could also be interpreted as representative of the proposition that the implied warranty was breached not by faulty selection of a homesite, but by failure to correct some natural defect in the homesite in the course of construction. In House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969), the Washington Supreme Court held a breach of implied warranty of habitability where the foundation cracked as a

had constructed the house properly in the instant case, he had still breached the implied warranty of habitability by selecting a site incapable of furnishing unpolluted water. The Supreme Court of Pennsylvania thus laid to rest the three hundred year old common law doctrine of caveat emptor as applied to the sale of new houses.

The phrase caveat emptor was coined in the seventeenth century by Lord Coke, who wrote: "Note that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty in deed or in law; but the common law bindeth him not, for caveat emptor."[9]

It was not long before the discrepancy between the civil and common law became apparent, and in certain areas, the courts took steps to correct it. Caveat emptor did not carry its weight over into the law dealing with the building and construction of houses, and builders were required to perform the work in a workmanlike manner.[10] The rule, however, was applied to the sale of a completed house.[11] Thus, as the law stood in the nineteenth century, a person contracting for the construction of a house was assured the building would be completed in a reasonably workmanlike manner, but the purchaser of a completed home had no such assurance and was bound in his transaction by the rule: "Let the buyer beware."

It was not until this century that a case arose which fell squarely between these two fact situations: a buyer had purchased a house still under construction and wanted damages for failure to complete it in a workmanlike manner. In *Miller v. Cannon Estates,*[12] the English court held the vendor on an implied warranty that the house was to be built in an efficient and workmanlike manner and fit for habitation. The court summarized its rationale for implying the warranty of habitability:

> The whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him

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result of a builder's failure to correct the soil's tendency to shift. Such a case might more properly be cited for the proposition that the builder failed to guard against the natural condition of the location rather than that the selection of the site was improper.

9. Co. Litt. (1633) a;L 3 c.13.

10. Duncan v. Blundell, 171 Eng. Rep. 749 (K.B. 1820). This principle was also cited in the Pennsylvania case of Raab v. Beatty, 96 Pa. Super. 574 (1929), but the court in *Elderkin* noted this case fell short of recognizing an implied warranty of habitability and was insufficient for their purposes.

11. *See* cases cited note 10 *supra.*

12. [1931] 2 K.B. 113.

> to come into as a dwelling house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling.[13]

The *Miller* court created the distinction that the warranty of habitability would not be implied in the purchase of a completed home, but only homes purchased in the course of construction. The court apparently reasoned that the buyer of a completed home could adequately protect himself by inspection of the completed product. A later English case abolished this complete-incomplete distinction, and extended the warranty to cover the whole house and not just the part unfinished at the time of the contract.[14]

The doctrine of caveat emptor remained strong in American real estate law long after the first English assault on the rule. The growing body of case law implying warranties of fitness in the purchase of personal property and the post-war building boom (utilizing mass production methods for the production of homes) created a clamor for buyer protection similar to that enjoyed in the purchase of chattels.[15] The English mutation appeared on American shores in *Vandeschrier v. Aaron*,[16] in which the Ohio Supreme Court relied on the English precedents for the proposition that there was implied into the bargain a warranty that the completed house would be constructed in an efficient and workmanlike manner and fit for human habitation.[17]

Following this decision, the status of the law regarding a doctrine of implied warranty became increasingly confused and inconsistent throughout the United States. Decisions as to whether or not to imply the warranty of habitability turned on the existence of such a warranty in the construction contract itself,[18] when the sales contract was signed,[19] whether title had passed before or after the house was completed,[20]

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13. *Id.* at 121.
14. Jenkins v. Tavener [1955] 2 All E.R. 769 (Q.B.); *See also* Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390 (C.A.).
15. One commentator has noted:
> There are few areas in the law today in which the expectations of the general public differ so widely from the rule of law as that of the purchase of a new home. The buyer, used to protection in the purchase of smaller items, expects the law will protect him with equal vigor in a purchase of a new home.

Bearman, *Caveat Emptor In Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961) [hereinafter cited as Bearman].
16. 103 Ohio App. 340, 140 N.E.2d 819 (1957).
17. *Id.* at 341-42, 140 N.E.2d at 821.
18. Hoye v. Century Builders, 52 Wash. 2d 830, 329 P.2d 474 (1958).
19. Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).
20. Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963).

and whether the purchaser had an architect prepare or assist in the plans.[21] And of course some courts refused to recognize an implied warranty of habitability under any circumstances.[22]

The rapidity which the courts have moved away from the rule of caveat emptor is noteworthy, for the law has not traditionally progressed with such speed. Caveat emptor, which had remained strong and unchallenged for over two hundred years, was discarded by an increasing number of jurisdictions over the course of a single decade.[23] The reasoning used by the courts, however, has not been exemplary. Wanting to move forward with sensible decisions relevant to the modern situations,[24] yet unwilling to completely discard the common law tradition of caveat emptor, the courts have relied on their ability to make fine legal distinctions and to torture precedents to reach the desired result of limiting the doctrine's effectiveness. A noteworthy characteristic of decisions in this area is a stringing together of precedents by the courts, with remarkably little original reasoning.[25]

As noted above, the American courts which endorsed the English precedent of *Miller* based their decisions more on a construction contract rationale, rather than on the reasoning developed in *Miller,* that is, that the purchaser should get what he paid for. The use of construction contract theory allowed the American courts to retain the artificial distinction between the purchase of a completed and an uncompleted house. Now that the courts have begun to repudiate this distinction,[26] perhaps they will discard the construction contract theory and tell exactly what they are doing rather than manipulate common law doctrine to reach the decision of modern public policy demands.

The death knell struck for caveat emptor by the Pennsylvania court in *Elderkin* is clearly a public policy decision seeking to bring the law of the Commonwealth abreast of modern homebuying practices. The homebuyer, accustomed to protection in the purchase of smaller items, expects the law to protect him with equal vigor in the purchase of a

21. Fuchs v. Parsons Constr. Co., 166 Neb. 188, 88 N.W.2d 648 (1958).
22. Note, *Implied Warranty of Habitability,* 49 J. URB. L. 195 (1971).
23. This development is exhaustively covered in Jaeger, *The Warranty of Habitability,* 46 CHI.-KENT L. REV. 123 (1969).
24. The New Jersey Supreme Court has said:
> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected . . . .

Schipper v. Levitt & Sons, 44 N.J. 70, 77, 207 A.2d 314, 325 (1965).
25. Vandeschrier v. Aaron, 103 Ohio App. 340, 342, 140 N.E.2d 819, 825 (1957).
26. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

new home.[27] The *Elderkin* decision, which shifts responsibility from one party to another in an area that has important social and economic consequences, is open to the charge that the court is pronouncing public policy, a task best left to the legislature. While this may be the case, absent legislative action on the subject, the courts may look for guidance to areas in which the legislatures have acted.

If the courts are to act in this area, as they have already shown they intend to do, one justification for their decisions may be found in analogy to the Uniform Commercial Code. Since the doctrine of caveat emptor formerly applied to personal property, it is suggested the courts may look to section 315 of the Uniform Commercial Code,[28] which provides a warranty of fitness where the vendor has reason to know the purpose for which the product is intended, and where the buyer relies on the skill and judgment of the vendor. Reading this as a legislative determination that responsibility for the fitness of a product rightfully belongs with the vendor, the court would thus answer those critics who would suggest it is usurping the function of the legislature in a decision such as *Elderkin,* while at the same time finding a workable rationale for the implied warranty of habitability.

The analogy to the Uniform Commercial Code would not be inappropriate, since similar policy considerations are involved in protecting the homebuyer and the buyer of chattels. The dangers inherent in defective workmanship, the reliance on the skill and integrity of the vendor, and the right of the purchaser to receive what he has paid for are as relevant in the home purchase as in the purchase of goods. The bargaining situation in which the buyer is expected to protect himself by dickering and inspection of the product is a thing of the past, as much in the purchase of mass-produced homes as in the purchase of personal property. All of these factors were taken into consideration by the legislature in adopting the Uniform Commercial Code, and they are available for use by the courts in their attempts to protect the homebuyer.

There remains a large grey area of unanswered questions in the wake of the *Elderkin* decision. They are questions which await resolution either by future courts or by legislative action. It is uncertain how far

27. Bearman, note 15 *supra.*
28. PA. STAT. ANN. tit. 12A, § 2-315 (1959):
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.

the courts will go in their implication of warranties. For instance, how long does the vendor remain liable? The purchaser of a home often considers it a lifetime investment. Is he entitled to a lifetime guarantee?[29]

While the Pennsylvania Supreme Court has decided that a house must also be a home, builders will want more certainty than this decision leaves them.

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CONSTITUTIONAL LAW—RIGHT TO APPOINTED COUNSEL—INDIGENT MISDEMEANANT—The United States Supreme Court has held that absent a knowing and intelligent waiver, no person can suffer a "loss of liberty" regardless of the categorization of the criminal offense or the maximum imposable punishment unless he has been represented by counsel at his trial.

Argersinger v. Hamlin, 407 U.S. 25 (1972).

John Richard Argersinger, an indigent, was convicted of carrying a concealed weapon, an offense which could be punished by a maximum of six months imprisonment, a fine of $1000, or both. In a trial before a judge he was convicted and sentenced to serve 90 days. Petitioner instituted a habeas corpus proceeding in the Supreme Court of Florida contending that he was unrepresented by counsel and as a layman, he was incapable of establishing adequate defenses to the charge.[1] The court denied the writ holding that, at most, the right to appointed counsel in a state criminal prosecution is no more extensive than the corresponding right to a jury trial.[2] Since petitioner would not have been entitled to a trial by jury because the maximum punishment was less than six months, fourteenth amendment due process did not require the appointment of counsel in his behalf.[3] The court recognized that there would inevitably be an expansion of the right to appointed counsel beyond the "felony standard" annunciated in *Gideon*

29. In one case, the court held the vendor liable to a second owner for faulty construction nine years after the home was completed. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

1. Agersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970).
2. *Id.* at 443.
3. *Id.* at 444.