Denver Law Review

Volume 43 | Issue 3 Article 7

April 2021

Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings

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IMPLIED WARRANTY OF FITNESS FOR HABITATION IN SALE OF RESIDENTIAL DWELLINGS

ONE of the oldest doctrines in the field of law is the rule of caveat emptor in real estate sales. Under this doctrine there are no implied warranties either of title or quality.[1] However, in recent years this doctrine has come under attack. The purpose of this note is to examine the reasons for the doctrine of caveat emptor, discuss its status today, and discuss some of the problems that arise when the doctrine is abandoned in the sale of homes.

I. REASONS FOR THE DOCTRINE OF CAVEAT EMPTOR

Several reasons have been advanced in support of the doctrine. First, it has been stated that the vendor and purchaser are dealing at arm's length; therefore, the purchaser has the opportunity to inspect and require an express warranty if he so desires.[2] Second, it has been said that there could be no certainty or stability in the real estate field if caveat emptor did not apply.[3] The third reason given is that a deed made in full execution of a contract of sale merges the terms of the contract therein, thereby cutting off any liability of the seller.[4]

The first reason has been criticized on the ground that it simply does not recognize the realities of the situation.[5] Most defects that would be covered under an implied warranty would be latent and hence not discoverable upon inspection, even assuming that the purchaser had the ability to make a proper inspection. With the advent of the mass-production home builder, it is highly unlikely that a purchaser could convince such a builder to give him an express warranty because of the superior bargaining power of the builder-vendor in this situation.[6]

The second reason, upon close analysis, is no reason at all be-

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[1] 7 WILLISTON, CONTRACTS § 926, at 797 (3d ed. Jaeger 1963); Bearman, *Caveat Emptor in Sales of Realty — Recent Assaults on the Rule*, 14 VAND. L. REV. 541, 542 (1962); 51 ILL. B.J. 498, 499 (1963).

[2] Hill Sand & Gravel Co. v. Pallottine Fathers House of Studies, Inc., 220 Md. 526, 154 A.2d 821, 825 (1959); Fegas v. Sherrill, 218 Md. 472, 147 A.2d 223, 227 (1958); see Miller v. Cannon Hill Estates, Ltd., [1931] All E.R. 93 (K.B.).

[3] Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717, 719 (1957), wherein it is stated that "an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises."

[4] Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963).

[5] Bearman, *supra* note 1, at 545; see Haskell, *The Case For an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 651 (1965).

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

cause exemption from liability should not be granted merely because the extent of the liability will cause uncertainty. Chaos has not resulted in the field of chattel sales,[7] although implied warranties are in effect in nearly all states with respect to such sales.[8]

The fallacy of the third reason was recognized by the Colorado Supreme Court in *Glisan v. Smolenske*[9] where the court held that the delivery of the deed constitutes only part performance of the sales contract, and other matters, including implied warranties, remain obligatory.

II. EROSION OF THE DOCTRINE OF CAVEAT EMPTOR

The first exception to the caveat emptor rule was made by dictum in an English case, *Miller v. Cannon Hill Estates, Ltd.*[10] In that case the plaintiff entered into an agreement with the defendant for the purchase of a lot and house that was under construction at the time of the agreement. After completion of the house, the plaintiff occupied it but was forced to leave under medical advice because a serious dampness penetrated the house. The court found an express warranty under which it held the defendant liable. However, the court went on to say, by dictum, that when one is purchasing a house that is completed at the time of the sale there is no implied warranty of fitness for habitation, since the purchaser has ample opportunity to inspect the house and discover any defects that may be present, and if the purchaser wants a warranty, he may obtain an express one.[11] But, the court said the case is quite different when one contracts to purchase a house that is in the process of construction at the time of the agreement, since it is clear that the purchaser is buying the house to live in and has no opportunity to inspect; therefore, there should be an implied warranty that the house will be fit for habitation.[12]

The dictum in the *Miller* case, that there is an implied warranty when the house is purchased in the process of construction, has become the rule in England[13] and in some jurisdictions in the United States.[14] However, most jurisdictions still cling to the traditional

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[7] *Id.*, 207 A.2d at 326.

[8] UNIFORM COMMERCIAL CODE §§ 2-314, 315.

[9] 153 Colo. 274, 387 P.2d 260 (1963).

[10] [1931] All E.R. 93 (K.B.).

[11] *Id.* at 96.

[12] *Ibid.*

[13] Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390 (C.A.): The court had trouble with the reasoning found in the *Miller* case but applied the rule to a substantially completed house. Jennings v. Tavener, [1955] 2 All E.R. 769 (Q.B.).

[14] Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jose-Balz Co. v. DeWitt, 93 Ind. App. 672, 176 N.E. 864 (1931); Minemount Realty Co. v. Ballentine, 111 N.J. Eq. 398, 162 Atl. 594 (Ct. Err. & App. 1932); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958).

rule of no implied warranties in the sale of real property.[15] The only statutory authority on the point is in Louisiana, which has adopted the doctrine of redhibition, in effect establishing an implied warranty in the sale of real property as well as chattels.[16]

This distinction between finished and unfinished houses is unsound. The fundamental principle underlying the doctrine of implied warranty is reliance. The home buyer,

> is admittedly unskilled in the mysteries of house construction and must therefore rely heavily upon the superior skill and training of his builder-vendor. Inspection will be of little use . . . in protecting the vendee, both because of the expense and because the defects are usually hidden. Though the vendor-vendee relationship may not be technically a fiduciary one, the trust placed in the vendor coupled with the relative helplessness of the vendee make it one.[17]

Therefore it follows that if the purchaser is relying upon his vendor's skill it makes little sense to distinguish between finished and unfinished houses.

The unreasonableness of this situation was first recognized in the Colorado case of *Carpenter v. Donohoe*[18] where the court extended the doctrine of implied warranty to a completed house. In that case plaintiffs brought suit against their builder-vendor for damages suffered when the completed house they purchased from the builder-vendor developed severe cracks in the foundation, making the house unsafe for occupancy. After discussing the cases applying the implied warranty doctrine to unfinished houses, the court went on to say:

> 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

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[15] *E.g.,* Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Allen v. Reichert, 73 Ariz. 91, 237 P.2d 818 (1951); Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963); Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963) (which distinguished *Weck, supra* note 14); Tudor v. Heugal, 132 Ind. App. 579, 178 N.E.2d 442 (1961) (which did not mention *Jose-Balz Co. v. DeWitt, supra* note 14); Staff v. Lido Dunes, Inc., 47 Misc. 2d 322, 262 N.Y.S.2d 544 (Sup. Ct. 1965); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959).

[16] LA. CIV. CODE ANN. arts. 2520-48 (1952).

[17] Bearman, *supra* note 1, at 574. The argument of reliance was first raised by Waesche, J., dissenting in Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 296, 134 A.2d 717, 720 (1957), *aff'd on other grounds,* 26 N.J. 330, 139 A.2d 738 (1958). Judge Waesche stated:

> Since the defendant was in the business of erecting houses to sell, it represented that it possessed a reasonable amount of skill necessary for erection of a house. This representation was impliedly made to whomever purchased from the defendant a house erected by it for the purpose of selling. Such a representation is indispensable to effectuate the sale of a house erected by a developer for the purpose of selling. Otherwise there would be no sales. A person in the business of building houses to sell is fully aware that a purchaser relies upon such an implied representation. Since the defendant impliedly represented that it possessed a reasonable amount of skill requisite for the erection of a house, it follows that it also impliedly represented that the house was erected in a proper and reasonably workmanlike manner.

[18] 154 Colo. 78, 388 P.2d 399 (1964).

> on an implied warranty and the latter cannot is a distinction without a reasonable basis . . . .
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> We hold that the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation.[19]

New Jersey has followed Colorado in the case of *Schipper v. Levitt & Sons, Inc.*[20] In that case the defendant builder-vendor, a well-known mass developer of homes specializing in planned communities, contracted with the purchaser prior to completion. In 1958 the purchaser moved in and occupied the house until 1960 when he leased it to the plaintiff. The sixteen-month-old son of the plaintiff was injured by hot water from the bathroom faucet. The cause of the injury was alleged to have been the failure of the builder-vendor to include in the hot water system a mixing valve to prevent excessively hot water from flowing from the faucets. The plaintiff brought suit on breach of warranty and negligence. The court found that the defendant was negligent, and in addition, found the defendant liable either on the basis of breach of an implied warranty or on strict liability, considering both remedies equally applicable.[21] The fact that the contract was entered into prior to completion of construction was not considered significant by the court; the court was primarily concerned with imposing an implied warranty in the sale of new houses. Although the suit here was for bodily injury, the court will certainly include economic injury within the protection of the warranty. In discussing implied warranty the court states:

> When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional advisor of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder-vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is forseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic

[19] *Id.* at 83, 388 P.2d at 402.

[20] 44 N.J. 70, 207 A.2d 314 (1965).

[21] *Id.*, 207 A.2d at 325.

position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.[22]

It can be seen, therefore, that the underlying reason for the application of implied warranties to the sale of houses is the reliance of the purchaser upon the builder-vendor's skill and knowledge that the house was constructed properly. As was pointed out by the court in the *Schipper* case, the purchaser has no recourse but to rely. Therefore, if the trust which the purchaser has placed in the builder-vendor is abused by him when he builds a house with defects, it would be manifestly unjust to absolve the builder-vendor of liability.

III. Problems Arising From the Application of Implied Warranties

By extending the doctrine of implied warranty several problems are created. The first problem concerns the nature of the seller. Should a person who is not engaged in the business of selling real estate be bound under a theory of implied warranty? It will be recalled that in both *Carpenter* and *Schipper* the sellers were builder-vendors. It has been argued that the doctrine should be extended to a seller who is merely a private owner selling his residence on the ground that the question ultimately becomes one of whether or not the purchaser has received what he has bargained for.[23] Considered in this light it makes no difference whether the seller is a professional or an amateur.[24] However, this argument fails to consider that the basic principle underlying the doctrine of implied warranty is the reliance of the purchaser upon the seller.[25] In the case of the amateur seller there should be very little reliance upon him because he has no expert knowledge or skill. Both the seller and purchaser stand on equal footing. Neither party is in any better economic position to bear the risk of loss, as is the case with a builder-vendor. If the seller misrepresents the property the purchaser may bring an action for fraud or misrepresentation. It appears, therefore, that liability should be limited under the doctrine to builder-vendors. This conclusion is in accord with the application of implied warranties to chattels.[26]

A closely related problem to that discussed above is whether the doctrine should be limited to sales of new property only, or whether it should be extended to include sales of used property. In both *Carpenter* and *Schipper* the homes were new. Since it was concluded

[22] *Id.*, 207 A.2d at 325-26.

[23] Haskell, *supra* note 5, at 649.

[24] *Ibid.*

[25] Authorities cited note 17 *supra.*

[26] Uniform Commercial Code § 2-314(1).

above that the doctrine should apply to builder-vendors only, extending the doctrine to used property will have little effect because most used property is sold by private owners. In a case decided after *Carpenter,* the Colorado Supreme Court expressly refused to extend the doctrine to used houses.[27] However, where the seller of the used property has actual knowledge of any defects, it would not be unreasonable to require him to warrant that there are no defects to the best of his knowledge other than the ones he has disclosed.

It is suggested that there should exist an implied warranty running against the builder even though the house has been sold if, had the house not been sold, the original purchaser would have had a cause of action. This suggestion is based upon the belief that the builder-vendor should not be relieved of his liability merely because his purchaser has sold the house. Also, the element of reliance is present since the second purchaser is influenced by the fact that the house is relatively new and therefore relies upon the builder for the assurance that the house is suitable for habitation.

The next problem involves the relationship of the parties. Should there be privity of contract between the person suffering the injury and the one who is held liable for the injury? In *Carpenter* there was privity; however, it will be recalled that in *Schipper* there was no privity. In that case the court stated:

> [I]t seems hardly conceivable that a court recognizing the modern need for a vendee occupant's right to recover on principles of implied warranty or strict liability would revivify the requirement of privity, which is fast disappearing in the comparable product liability field, to preclude a similar right in other occupants likely to be injured by the builder vendor's default.[28]

It may be argued that the doctrine of privity should be retained because if it is not, the vendor will be subjected to liability for a never-ending period. However, this problem can be eliminated by the establishment of a statute of limitations. The setting of a time limit within which an action must be brought presents a difficult problem. The Louisiana Civil Code has a one-year statute of limitations, beginning with the date of the sale, on all actions of implied warranty, both real and personal property.[29] The Uniform Commercial Code has a four-year statute of limitation for actions based upon breach of implied warranty.[30] A suggestion has been made that the statutory period should be one year, beginning at the time the deed is delivered or the vendee takes possession, whichever occurs first, on the ground

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[27] H.B. Bolas Enterprises, Inc. v. Zarlengo, 400 P.2d 447 (Colo. 1965).

[28] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 328 (1965).

[29] LA. CIV. CODE ANN. arts. 2534, 2546 (1952).

[30] UNIFORM COMMERCIAL CODE § 2-725.

that one year represents a full seasonal cycle which should bring out any defects existing at the time of the sale. Defects which appear later are more likely to be due to ordinary wear and tear.[31]

The question ultimately resolves itself into a policy decision in which conflicting interests must be balanced. The period must not be unduly long because it would place an intolerable burden upon the builder-vendor and could likely lead to chaos in the field. However, the period must be of sufficient length to enable the purchaser to discover the defects within the time allowed. A possible solution would be to have varying statutes of limitation for different defects. For example, a longer period could be established for a defect arising from the failure to meet building code requirements, such as the failure to construct a proper foundation, than for a defect which arises from an unforeseen circumstance, such as water seeping into a basement due to a rising water table. The decision is legislative in nature and should be made by the legislature rather than by the judiciary.

Another difficult problem raised is the establishment of the standard to be used to determine if the warranty has been breached. In the *Schipper* case the court said, "in determining whether the house was defective, the test admittedly would be reasonableness rather than perfection."[32] In the field of chattels the Uniform Commercial Code uses the test of whether or not the article will pass in trade without objection,[33] meaning the goods must be of a comparable quality to that generally accepted in that line of trade.[34] Either or both of these tests would be a suitable standard, since they are flexible and can be applied to individual cases with little difficulty.

A buyer should not be protected as to defects that upon examination should be discovered. This is the Code rule with respect to chattels.[35] The difficulty arises as to the degree of competence that is to be the standard to which the buyer is to be held. A reasonable suggestion has been made that the buyer be held at least to the standard of competence and skill which he in fact possesses; otherwise, the buyer should be held only to that knowledge that would be gained from an inspection by a reasonable nonexpert.[36]

Once it has been determined that the seller is liable under an implied warranty, the amount of damages to be awarded the buyer must be computed. There are two logical possibilities as to what

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[31] Bearman, *supra* note 1, at 576.

[32] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 326 (1965).

[33] UNIFORM COMMERCIAL CODE § 2-314(2)(a).

[34] UNIFORM COMMERCIAL CODE § 2-314, comment 2.

[35] UNIFORM COMMERCIAL CODE § 2-316(3)(b).

[36] Haskell, *supra* note 5, at 651.

should be used as the measure of damages: (1) Damages awarded shall be the amount necessary to correct the defect; (2) Damages awarded shall be the difference between the value of the property without the defect and the value of the property with the defect. It is submitted that if the property is capable of repair, the cost of the repairs should be used. If the property cannot be repaired so as to bring it back to the condition that was bargained for because of physical impossibility or disproportionately high cost of repair, then the second method should be used as the means of measuring damages. In this way the purchaser will be returned to the position for which he bargained.

The application of the doctrine of implied warranty does not bar one from also asking for relief under the traditional doctrine of fraud or misrepresentation. It has been held that there need be no election between the two remedies since both are based upon an affirmance of the contract.[37] The significance of this holding occurs in a jurisdiction which does not recognize the doctrine of implied warranty. One may bring an action under both theories, thereby allowing the court to apply the doctrine in that jurisdiction if it so chooses; but, if the court refuses, one may still recover on the basis of fraud, assuming sufficient proof thereof has been offered.

CONCLUSION

It appears that the trend is toward applying implied warranties to sales of real property, and this trend is justified.[38] As Professor Jaeger states in *Williston on Contracts,* "it would be much better if this enlightened approach were adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."[39] As a result of the extension of the doctrine by the courts, legislation may be required to solve some of the problems, particularly the problem involving the statute of limitations; builders may be forced to disclaim warranties or include limited express warranties to limit their potential liability; but in any event, liability may be avoided by building a house that is suitable for habitation, which is ultimately the desired result.

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

[38] See Bearman, *supra* note 1; Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose,* 37 MINN. L. REV. 108 (1953); Haskell, *supra* note 5; Note, 51 CORNELL L.Q. 389 (1966); 5 DE PAUL L. REV. 263 (1956); 51 ILL. B.J. 498 (1963); 18 MD. L. REV. 332 (1958); 12 RUTGERS L. REV. 528 (1958); Note, 26 U. PITT. L. REV. 862 (1965); 34 WASH. L. REV. 171 (1959); 4 W. RES. L. REV. 357 (1953).

[39] 7 WILLISTON, CONTRACTS § 926a, at 818 (3d ed. Jaeger 1963).