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# Implied Warranties in the Sale of New Homes

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# IMPLIED WARRANTIES IN THE SALE OF NEW HOMES

The buyer of a new home today who discovers that his purchase is seriously impaired by latent construction defects[1] may also find that the doctrine of *caveat emptor*[2] forecloses any remedy based on the theory of implied warranties of quality and fitness for purpose.[3] Although *caveat emptor* initially developed to regulate the sale of chattels in accordance with the commercial standards of the seventeenth and eighteenth centuries, the maxim also fulfilled the need for a convenient and simplistic rule to resolve disputes between buyers and sellers of real property.[4] Today, however, the general public is demanding more protection and more quality with respect to the sale of new homes.[5] Originally, the applicability of *caveat emptor* was based on the premise that both seller and buyer were in equal bargaining positions.[6] With respect to the sale of new homes today, the purchaser has little choice but to rely on the integrity and professional competence of the builder-vendor. The ordinary purchaser has neither the ability nor the money to inspect and discover latent defects in a new house.[7]

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1. Note that the purchaser in this situation will normally enter into a buying contract as distinguished from a building contract with the builder-vendor. For this reason the purchaser cannot sue the builder-vendor in his capacity as a builder. *See* Bearman, Caveat Emptor *in Sales of Realty—Recent Assaults upon the Rule,* 14 VAND. L. REV. 541, 543 n.7 (1961). The scope of this note is limited to the liability of one who builds a new house upon a lot and then sells both the lot and the new house to a purchaser who later brings suit on a theory of implied warranty because of defects in the house. As will be seen, case law indicates that the rule of *caveat emptor* has been most susceptible to attack on the theory of implied warranty when the house was sold by a builder-vendor. *See* Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose,* 37 MINN. L. REV. 108, 118 (1953). Implied warranty would not be applicable in the sale of used houses because "in the sale of second hand housing the seller is often so clearly not a merchant or specially skilled seller that the buyer is not entitled to rely on the seller's special skill or judgment." Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 65, 154 N.W.2d 803, 807 (1967). "No such right arises on the resale of used housing since the vendor usually has no greater skill with respect to determining the quality of a house than the purchaser." *Id.*

2. "The motto *caveat emptor* stood for the charming proposition that, since the buyer had had his chance to inspect the merchandise at the counter, it was his tough luck if it turned out to be a lemon." Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835 (1967).

3. *See, e.g.,* Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 987 (1959).

4. An analysis of *caveat emptor,* which for centuries stood as a paramount factor in the law of sales, is not within the scope of this note. *See* Hamilton, *The Ancient Maxim* Caveat Emptor, 40 YALE L. J. 1133 (1931), for a detailed historical analysis of the social and economic influences that gave rise to this "maxim" of law.

5. Bearman, *supra* note 1, at 542.

6. *See* Hamilton, *supra* note 4, at 1186. American judges believed that *caveat emptor,* when judicially employed to "sharpen wits, taught self-reliance, made a man—an economic man—the buyer and served well in its two masters, business and justice." *Id. See also* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).

7. *See* Hamilton, *supra* note 4, at 1135; Note, *Implied Warranty of Fitness for Habitation in the Sale of Residential Dwellings,* 43 DENVER L. J. 379 (1966); Note, *Implied Warranties in the Sale of Newly Completed Homes,* 1969 WIS. L. REV. 980.

With regard to the sale of new houses, American courts have been hesitant to accept the argument that the theory of implied warranty should prevail over the well-established maxim of *caveat emptor*. The weight of authority has held that since a house is an improvement on real estate it should therefore be subject to the same laws that govern real estate transactions, including *caveat emptor*.[8] Despite the growing tendency in recent decades to restrict the application of *caveat emptor* to the sale of chattels[9] the maxim has nevertheless continued to be of major significance in the area of real property law.[10]

Prior to World War II there were few cases involving the application of the doctrine to the quality and condition of real property.[11] Since *caveat emptor* had previously been applied to the passage of title to real property as well as to the sale of chattels, these few cases had little difficulty extending the rule to any issue concerning the quality or condition of real property.[12] The use of *caveat emptor* to deny recovery based on implied warranty has been challenged, however, by the influx of cases that have grown out of the housing boom following World War II.[13]

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8. In the absence of express warranties, the weight of authority in the United States has followed *caveat emptor* to the exclusion of the theory of implied warranty. *See, e.g.*, Druid Homes, Inc. v. Cooper, 272 Ala. 415, 131 So. 2d 884 (1961); Voight v. Ott, 86 Ariz. 128, 341 P.2d 922 (1959); Allen v. Reichart, 73 Ariz. 91, 237 P.2d 818 (1951); Whiton v. Orr Constr. Co., Inc., 109 Ga. App. 267, 136 S.E.2d 136 (1964); Walton v. Petty, 107 Ga. App. 753, 131 S.E.2d 655 (1963); Tudor v. Heugel, 132 Ind. App. 579, 178 N.E.2d 442 (1961); Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966); Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959); Note, *Implied Warranties in the Sale of New Houses*, 26 U. PITT. L. REV. 862, 863 (1965).

9. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Macpherson v. Buick Motors Co., 217 N.Y. 382, 111 N.E. 1050 (1961); Prosser, *Fall of the Citadel, (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). *See also* UNIFORM COMMERCIAL CODE §2-314(1), which imposes a warranty that the goods will be "merchantable" and §2-315, which provides for an implied warranty of fitness for a particular purpose. *See* FLA. STAT. §§672.314, -.315 (1969).

10. The maxim was initially applied most frequently with respect to those cases in which there was a dispute concerning the title to real property. *See e.g.*, Goodwin v. Schmidt, 149 Fla. 85, 5 So. 2d 64 (1941) (concerning tax sales); Fletcher v. Rickey, 114 Fla. 563, 154 So. 147 (1934) (concerning an administrator's sale); Korabeck v. Childs, 98 Fla. 576, 124 So. 24 (1929) (concerning mortgage foreclosure sale); Wilkins v. Deen Turpentine Co., 84 Fla. 457, 94 So. 508 (1922) (concerning a guardian's sale); 4 S. WILLISTON, CONTRACTS §926, at 2603 (rev. ed. 1936).

11. Prior to 1945 the homebuilding industry had not yet experienced the impact of mass production techniques that had previously invaded the marketplace of chattels. *See* Bearman, *supra* note 1, at 542.

12. *E.g.*, Lewy v. Clark Ave., Inc., 128 N.Y. Misc. 16, 17, 217 N.Y.S. 185, 186 (2d Dep't 1926). There seemed to be some legal presumption that if the rule of *caveat emptor* was to apply to the passage of title of real property, then it would certainly apply in those cases in which there was a dispute concerning the quality and condition of the property. *But see* 4 S. WILLISTON, CONTRACTS §926, at 2603 (rev. ed. 1936), in which Mr. Williston says: "Still more clearly there can be no warranty of quality or condition implied in the sale of real estate."

13. *See* Bearman, *supra* note 1, at 542 n. 6. Statistics reveal that the annual value of private residential construction rose from less than $2 billion in 1945 to about $15 billion in 1950 and to about $18 billion by September 1959. The estimated number of building

The English case of *Miller v. Cannon Hill Estates, Ltd.*[14] was the first notable instance in which the doctrine of implied warranty was treated as a possible exception to the maxim of *caveat emptor* in the sale of new homes. Relying on the theories of express and implied warranties, the plaintiff in *Miller* brought an action for damages against the builder-vendor of his new house because the house proved to be uninhabitable.[15] In dicta the court said that where a house is purchased while it is in the process of being constructed, the law will imply a warranty that the house will be built in a workmanlike manner, with proper materials, and upon completion will be fit for human habitation. The *Miller* court reasoned that implied warranty should be available only when the home is purchased while it is in the process of being constructed, as distinguished from a home purchased after construction has been completed. In this latter situation the court felt that the purchaser would have adequate opportunity to inspect and demand warranties, while in the former situation his purchase would be based on a reliance that the house when completed would be fit for habitation.[16]

The theory of implied warranty, as the basis for an action by the purchaser of a new house against the builder-vendor, was first successfully employed in American courts in the late 1950's and early 1960's. However, this early success was limited.[17] These jurisdictions adopted the English rule and restricted the purchaser's right to rely on the builder-vendor's skills to those cases in which the purchase was made prior to completion of the house.[18]

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permits in Florida for new uniform housing units rose from about 47,000 in 1960 to 112,000 in 1968. *See* FLORIDA STATISTICAL ABSTRACT 194-95 (1969).

14. [1931] 2 K.B. 113.

15. *Id.* Ultimately, the court awarded damages to the plaintiff based on the reasoning that the defendant had breached an *express* warranty.

16. It appears that the dictum of *Miller v. Cannon Hill Estates, Ltd.* represents the present state of the law in England. *See* Henderson v. Raymond Massey Builders, Ltd., [1964] 43 D.L.R.2d 45; Jennings v. Tavernce, [1955] 2 All E.R. 769; Perry v. Sharon Devel. Co., Ltd., [1937] 4 All E.R. 390; Samuels, *Warranties for new Houses,* 111 SOLICITORS J. 22 (1967).

17. Initially, American judges were content to follow the distinction established in *Miller v. Cannon Hill Estates, Ltd.* and allow recovery based on the theory of implied warranty only when the new house was purchased prior to completion. *See, e.g., Glisan v. Smolenske,* 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A:M Sunrise Const. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Lutz v. Bayberry Huntington, Inc., 148 N.Y.S.2d 762 (Sup Ct. Nassau County 1956); 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).

18. Note, *Implied Warranties in the Sale of New Homes,* 26 U. PITT. L. REV. 862, 864 (1965). "To grant warranty protection to one who purchases a house a few days before completion and to deny the same remedy to one who purchases a few days after completion is, in reality, to recognize a meaningless distinction. It cannot be contended that the former purchaser places more reliance on the skill and judgment of the builder-vendor than does the latter. Since latent defects may be more difficult to ascertain in a completed than in an uncompleted house, implied warranty protection may be denied to the buyer needing it the most. In addition, courts following the English rule must cope with the problem of determining when a house is 'completed' for the purpose of cutting off implied warranty liability." *Id.*

Purchasers who acquired their houses after completion were expected to rely on some unique element of expertise that the courts assumed existed in the average home buyer. The purchaser of the completed house had only the alternatives of inspecting and discovering latent defects before he purchased the house, employing a professional to perform such inspections, or demanding express warranties that the house would be fit for habitation. These alternatives failed to take into consideration just how little the average home buyer knows about the complexities involved in designing and constructing a house, the probable financial position of the average home buyer, and the fact that both express warranties and professional inspectors would result in higher costs. The practical result of the adoption of the English rule was to create a gap between the ability of the average home buyer to judge the quality, materials, and workmanship of his new house and the legal presumption that the courts were giving to his competence.[19]

Despite the hesitancy of most American jurisdictions to recognize the doctrine of implied warranty as a theory of recovery for purchasers of completed homes, a trend is developing in a number of states toward permitting a more liberal application of the theory.[20]

The Supreme Court of Colorado, in *Carpenter v. Donohue*,[21] permitted an action against a builder-vendor based on the theory of implied warranty. The trial court had determined that the house had been constructed in a manner that had violated several building code provisions. In holding that the builder-vendor was liable to the purchaser for damages caused by latent defects, the Colorado supreme court extended its holding in *Glisan v. Smolenske*[22] to include homes that were completed before purchase.[23]

Similarly, in the case of *Waggoner v. Midwestern Development, Inc.*[24] the Supreme Court of South Dakota found the builder-vendor liable despite the fact that the home was fully constructed when purchased. The court held that "where in the sale of a new house the vendor is also a builder of houses for sale there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed."[25]

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19. *See* note 6 *supra*.

20. *E.g.*, Wawak v. Stewart, Ark. , 449 S.W.2d 922 (1970; Carpenter v. Donohoe, 143 Colo. 178, 388 P.2d 399 (1964); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Rothberg v. Olenik, Vt. , 262 A.2d 461 (1970); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969).

21. 154 Colo. 78, 388 P.2d 399 (1963). The builder-vendor had completed construction of the house at the time he sold it to the purchaser.

22. 153 Colo. 274, 387 P.2d 260 (1963) (adopting the English rule).

23. Carpenter v. Donohoe, 154 Colo. 78, 83, 388 P.2d 399, 402 (1963).

24. 83 S.D. 57, 154 N.W.2d 803 (1967).

25. *Id.* at 68, 154 N.W.2d at 809. Several jurisdictions have held that implied warranties do not merge in a deed. *See, e.g.*, Wawak v. Stewart, Ark. , 449 S.W.2d (1970); Carpenter v. Donohoe, 154 Colo. 178, 388 P.2d 399 (1963); Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A:M Sunrise Const. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Waggoner v.

In an action to recover damages to a new house, caused by a defective fireplace, the Supreme Court of Texas held that the theory of implied warranty was applicable.[26] The court stated that the rule of *caveat emptor* "as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser, but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work."[27]

A more recent case dealing with the problem is *House v. Thornton*,[28] decided by the Supreme Court of Washington. In allowing the theory of breach of implied warranty to be used to rescind a sales contract for a new house, the court held: "We apprehend it to be the rule that, when a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it."[29]

Consideration should be given to the position that Florida courts have taken regarding the maxim *caveat emptor*. Generally, Florida case law has employed *caveat emptor* in three areas of real property law: the law governing the passage of title in a conveyance of real property,[30] the law governing the legal relationship between landlord and tenant,[31] and the law pertaining to the rescission of contracts for realty on the theory of fraudulent misrepresentation.[32] Florida courts have not as yet reached the question of implied warranties in the sale of new homes. *Sorkin v. Rovin*,[33] the only reported case in Florida dealing with the problem, was dismissed on procedural grounds. The question remains in Florida whether *caveat emptor* will be extended to foreclose implied warranties in the sale of new homes.

It has been contended that adoption of the remedy of implied warranty would adversely affect the stability of the new house market. The use of implied warranties with respect to the sale of new chattels, however, has not had the effect of destroying the stability of the market place for chattels,

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Midwestern Dev. Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

26. Humber v. Morton, 426 S.W.2d 554 (Tex. 1968).

27. *Id.* at 562.

28. 76 Wash. 2d. 428, 457 P.2d 199 (1969).

29. *Id.* at 436, 457 P.2d at 204. For more recent decisions that allow the purchasers of new houses to employ the theory of implied warranty against a builder-vendor, *see, e.g.*, Wawak v. Stewart, Ark. , 449 S.W.2d 922 (1970); Rothberg v. Olenik, Vt. , 262 A.2d 461 (1970).

30. Cape Sable Corp. v. McClurg, 74 So. 2d 883 (Fla. 1954); Fletcher v. Rickey, 114 Fla. 563, 154 So. 147 (1934); Wilkins v. Deen Turpentine Co., 84 Fla. 457, 94 So. 508 (1922); Watson v. Jones, 41 Fla. 241, 25 So. 678 (1899); Leuders v. Thomas, 35 Fla. 518, 17 So. 633 (1895).

31. Sampson v. Stanley Corp., 75 So. 2d 186 (Fla. 1954); Brooks v. Peters, 157 Fla. 141, 25 So. 2d 205 (1946); Butler v. Maney, 146 Fla. 33, 200 So. 226 (1941); Zubowicz v. Warnock, 149 So. 2d 890 (2d D.C.A. Fla. 1963); Wiley v. Dow, 107 So. 2d 166 (1st D.C.A. Fla. 1958).

32. Davis v. Dunn, 58 So. 2d 539 (Fla. 1952); Williams v. McFadden, 23 Fla. 143, 1 So. 618 (1887); Beagle v. Bagwell, 215 So. 2d 24 (1st D.C.A. Fla. 1968); *see* Comment, Caveat Emptor *in Real Estate Transactions*, 6 U. FLA. L. REV. 251 (1953).

33. 227 So. 2d 492 (3d D.C.A. Fla. 1969).

and there is no logical reason to assume there would be any different effect with regard to the market place for new houses.[34] Moreover, under the theory of implied warranty the purchaser would always have the burden of proving the house was defective when sold and could only recover if he were the first occupant of a new house.[35]

Although the theory of implied warranty should not drastically affect the position of the *legitimate* builder-vendor,[36] the doctrine could be very effective in reducing the number of those undesirables within the industry who have no intention of standing behind the quality of their work.[37] While the legitimate builder-vendor will not fret over the cost of a few mistakes, the "purveyor of shoddy work" may find the risks too high. It should also be noted that the legitimate builder-vendor is much more capable of distributing the cost of his mistakes than is the innocent home buyer.[38]

Undoubtedly, the law regarding the liability of a builder-vendor of new houses is changing. The above cases indicate a growing trend away from *caveat emptor* and toward the theory of implied warranty. The movement brings the law much closer to the realities of the market for new homes than does the anachronistic maxim of *caveat emptor*. "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."[39]

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34. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).

35. Note, *supra* note 18, at 866. *See also* Waggoner v. Midwestern Dev. Inc., 83 S.D. 57, 65, 154 N.W.2d 803, 807 (1967). "No such right arises on the resale of used housing since the vendor usually has no greater skill with respect to determining the quality of a house than the purchaser."

36. Interviews with builder-vendors in the area of Gainesville, Florida, indicate that most are willing to stand behind the quality of their work for at least one year. However, these builder-vendors emphasized they do this out of good "business sense," and not because of any requirement of law.

37. Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968).

38. Note, *supra* note 18, at 865.

39. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).