# ARE NEW JERSEY LAWMAKERS TAKING MAXWELL'S SILVER HAMMER AWAY FROM HOMEBUILDERS? ASSESSING THE EFFECTIVENESS OF THE UPCOMING AMENDMENTS TO THE NEW JERSEY NEW HOME WARRANTY AND BUILDERS' REGISTRATION ACT[1]

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> That Court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly. . .[2]

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* J.D. Candidate, 2009, Seton Hall University School of Law; B.A. in Historical Studies, The Richard Stockton College of New Jersey (*magna cum laude*), 2005. I would like to thank Cecil Taylor, whose incredible music has not only been a constant inspiration, but reminded me many a restless night, when I pondered quitting law school and going into the music business, that I have no musical talent.

[1] Maxwell, the subject of the Beatles song, "Maxwell's Silver Hammer," slew a judge with his silver hammer just as the judge was about to pronounce him guilty of the very same offense. Thus, the killing of the judge—the human embodiment of law and justice—with a hammer stands as a nice metaphor for what New Jersey homebuilders have gotten away with under the problematic New Home Warranty and Builders' Registration Act. *See* THE BEATLES, *Maxwell's Silver Hammer*, *on* ABBEY ROAD (EMI Records 1987) (1969).

[2] Dwy v. Conn. Co., 92 A. 883, 891 (Conn. 1915) (Wheeler, J., dissenting).

This exhortation to judges, written by former Connecticut Supreme Court Justice George Wheeler, highlights the need for prescience and adaptability in the judiciary; it applies with greater force to legislatures. With one stroke of the pen, lawmakers can remedy injustices that courts simply cannot remedy quickly enough, if at all. New Jersey lawmakers demonstrated the rapidity with which a legislature can effect change when, in the twilight of 2007, they whisked the State's arguably symbolic[3] death penalty into obscurity.[4] While pulling this historic feat, however, the Legislature left a rabbit in its hat; the reprieve for death row inmates came as long-awaited amendments to New Jersey's broken New Home Warranty and Builders' Registration Act languished on a proverbial Trenton operating table in need of resuscitation. Thousands of prospective new homebuyers must now wait at least another year for *their* reprieve.

These days, average New Jersey homebuyers—for whom homes are the single most significant investments of their lives—take a leap of faith when they rely on the competency of homebuilders. Perhaps everything will work out and the idyllic image of the Beatles' Desmond and Molly Jones, with a couple of kids running in the yard, will take shape.[5] But for too many new homebuyers, Desmond and Molly Jones are, unfortunately, as far

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[3] The last time death was actually imposed in New Jersey was 1963. *See* Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, at B0, *available at* http://www.nytimes.com/2007/12/17/nyregion/17cnd-newjersey.html.

[4] *Id.*

[5] *See* THE BEATLES, *Ob-la-di, Ob-la-da, on* THE BEATLES (commonly known as "THE WHITE ALBUM") (Capitol Records 1990) (1968).

from reality as tangerine trees and marmalade skies.[6] For these homebuyers, buying a defective new home can literally be life-threatening and financially ruinous. The time has come to recognize that new homes, just like new cars, can all too often be "lemons."

## *I. INTRODUCTION*

Building home sweet home is not as easy as it used to be. The Joneses are having a hard time keeping up with the myriad of architectural deficiencies that await unsuspecting new homebuyers. Common defects that new homebuyers in New Jersey regularly encounter include: broken or improperly installed wall beams and joists; cracking foundations; homes built hundreds of feet too large or small; habitable areas prone to moisture intrusion; walls fouled by sewage from cracked pipes; and improperly installed heating systems that vent poisonous exhaust into living areas.[7] As the State Commission of Investigation ("SCI") reported in its recent exposé on new home construction in New Jersey ("report" or "SCI report"), things are getting worse for homebuyers all the time.[8]

Large, deep-pocketed corporate builders dominate the new home building landscape in New Jersey today.[9] These "production

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[6] *See* THE BEATLES, *Lucy in the Sky With Diamonds*, *on* SGT. PEPPER'S LONELY HEARTS CLUB BAND (EMI Records 1987) (1967).

[7] State of New Jersey Commission of Investigation, *The Good, the Bad and the Ugly: New Home Construction in New Jersey* 8-10 (2005), *available at* http://www.state.nj.us/sci/nci.shtm (follow full report hyperlink) [hereinafter SCI].

[8] The New Jersey Legislature created the SCI in 1968 as an independent commission charged with the responsibility of conducting investigations in connection with the "faithful execution and effective enforcement of the laws of the state," and "[a]ny matter concerning the public peace, public safety and public justice." New Jersey State Commission of Investigation, History, Missions, and Operations, http://www.state.nj.us/sci/history.shtm (last visited Mar. 11, 2008). In 2002, spurred by a flood of complaints from homeowners to the Office of the U.S. Attorney in Newark, the Commission began a nearly two-year long investigation into new-home construction practices in New Jersey. *Id.* at 2. The Commission's final report, released in March 2005, found pervasive corruption and inadequacies in the new-home construction industry, which led the New Jersey Legislature to propose amendments to The New Home Warranty and Builders' Registration Act. *Id.* Initially, the investigation's scope was limited to the new home inspection process, but "progressed to include the new-home warranty system." *Id.*

[9] SCI, *supra* note 7, at 10.

builders," as they are known, often "reward management-level employees based primarily upon the speed and volume of production at residential construction sites."[10] Thus, cookie-cutter communities with bubble-gum names that are alliterative ("Willow Woods"); fairy-tale like ("Nottingham Estates"); grandiose ("Kingwood Manor"); and downright ironic ("Nature's Walk") have cropped up across the Garden State.[11]

A typical construction chronology may go something like this:[12] Large developer purchases open space, generates publicity about impending construction among the town's citizenry, and soon thereafter unveils a plan for a sparkling (yet eerily homogenous) new home community, complete with a centerpiece geyser-like fountain. Large developer moves at break-neck pace to put signatures to parchment, convincing prospective new homebuyers that the earlier they get in the better because, after all, it is the new millennium, and death and taxes have welcomed a third member to their once exclusive household—inflated home prices.[13] In a couple of years, large developer has built home sweet homes. Desmond and Molly Jones appear to be happily ever after in the marketplace. But problems that may neither immediately manifest themselves nor be readily apparent to the average homebuyer's naked eye lurk in the background.

Desmond and Molly Jones are gazing into that spectacular fountain, but instead of seeing a white picket fence and a couple of kids running in the yard, they see a future of protracted

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[10] *Id.*

[11] American Home Guides, http://www.americanhomeguides.com/homes_for_sale/new_jersey.html (last visited Nov. 14, 2008) (providing a sample of home community names in New Jersey)

[12] The chronology was made up by the author, and is not based upon any one particular housing development or builder. Anyone who has resided in the Garden State during the last decade will no doubt recognize the sequence as surprisingly familiar, however.

[13] The average price of a new home in New Jersey in 1997 was $226,856. New Jersey Homebuilders Website, http://www.njba.org/housing/Data/avgPrices.asp (last visited Feb. 13, 2008). By the third quarter of 2007, this number had risen to $528,269. *Id.* That number is down from the peak average of $547,231 in the second quarter of 2007. *Id.* At the start of 2008, new home prices were down across the country. Vikas Bajaj, *As Inflation Rises, Home Values Slump, Data Show*, N.Y. TIMES, Feb. 26, 2008, at A4, *available at* http://www.nytimes.com/2008/02/26/business/26econ-web.html?scp=9&sq=home+prices&st=nyt (discussing new home prices at the beginning of 2008, as well as graphical representations).

litigation with a suddenly slippery and much more sophisticated adversary. The large developer who was once seemingly omnipresent when it was time to take the Jones' money is now a real nowhere man.[14] Meanwhile, Desmond's and Molly's overstretched necks are about to snap. How can this be? Surely, there is a statute on the books that can help them out. The good news—there is. The bad news — well, it is the same as the good news.

This Note will assess the pending amendments to the broken New Jersey New Home Warranty and Builders' Registration Act (the "Act") and propose common sense solutions to fit the needs and concerns of twenty-first century homebuyers.[15] It is important to note, at the outset, that amendments to the Act seem inevitable. As alluded to earlier, however, New Jersey lawmakers have dragged their feet passing the proposed amendments.[16] As homeowners continue to navigate an Act one practitioner has called "a veritable minefield of controversy, laced with trip-wires and booby traps for the unwary,"[17] the originally proposed amendments are being watered-down.[18] The people of New Jersey deserve better than what they have, and more than what they get.

Section II begins by tracking the evolution of the common-law approach to new home defects and ends with a brief analysis of the legislative purposes behind the watershed New Home

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[14] *See* THE BEATLES, *Nowhere Man, on* RUBBER SOUL (EMI Records 1987) (1967). The builder literally may be a nowhere man. *See infra* p. 275 for a discussion of the itinerant homebuilder.

[15] The aim of my proposals is to demystify the warranty process for new homebuyers while substantially strengthening their bargaining power. Under the Act as currently written, "[t]he bottom line for all too many consumers . . . [is] confusion, misinformation and, ultimately, the prospect of months of legalistic wrangling and uncertainty plus thousands of dollars in out-of-pocket expenditures to resolve and remediate problems for which they bear no responsibility." SCI, *supra* note 7, at 20.

[16] It has been more than three years since the SCI released its final report in March 2005. *See id.*

[17] Thomas Daniel McCloskey, *Navigating New Jersey's New Home Warranty and Builders' Registration Act: A Primer* (May 23, 2005), *available at* http://www.foxrothschild.com/uploadedFiles/mcCloskey_lormanNewHome_071305.pdf.

[18] For instance, the originally proposed amendments contained a home buy-back provision that would have worked similarly to new car lemon laws. The proposed provision was deleted, however, and a reimbursement plan was inserted in its stead. *See infra* Part IV.E.

Warranty Act. Section III acquaints the reader with how the Act works and highlights those provisions that have proven to be most problematic for homeowners. Section IV sets out and describes the most important amendments to the Act and attempts to anticipate the impact they will have on future homeowners and builders. Each description is followed by a further proposal of my own, which in each case is more homeowner-oriented than the proposed amendment. Finally, the conclusion reflects upon the forces that created the current homebuilding morass and looks forward to a more homebuyer-oriented future.

## *II. BACKGROUND*

There was a time when proactive protection was the only recourse that an aggrieved new homebuyer had against a builder. Absent outright fraud or manipulation, a sub-standard homebuilder could point to the doctrine of *caveat emptor* [19] and walk away from a shoddily constructed home free of liability.[20] It rarely came to this, however, because the doctrine was born in an era when it was fair to assume that buyers and sellers "dealt at arms length and occupied an equal bargaining position."[21] The homeowner was additionally protected and "[q]uality control was assured, because the builder was paid in stages as he completed each part of the house to the satisfaction of [the owner and] the architect."[22] Thus, a displeased homeowner had several alternatives to bringing suit at his disposal, including withholding payment from the builder or suing the architect for defective plans.[23]

### *A. Common-Law Remedies for Construction Defects*

During the post-World War II housing boom, however, new home construction took on a different face.[24] New homebuyers, who theretofore had traditionally bought empty land and hired

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19 *Caveat emptor* translates literally to "let the buyer beware." BLACK'S LAW DICTIONARY (8th ed. 2004).

20 Walter F. Timpone & Ann O'Flanagan, Note, *Home Owner Warranties in New Jersey*, 3 SETON HALL LEGIS. J. 203, 204 (1978).

21 *See id.* at 204.

22 McDonald v. Mianecki, 398 A.2d 1283, 1287 (N.J. 1987).

23 *See id.*

24 *See id.*

an artisan to build their homes, began turning to large developers that eschewed this traditional model for a streamlined, manufacturing-inspired process in which the land and pre-planned home were sold together in a package deal.[25] Consequently, by the mid-twentieth century, it became apparent that the basic assumptions upon which *caveat emptor* was founded no longer held true, and courts began to recognize that continuing to apply it would "manifest[] a denial of justice."[26]

New Jersey soon joined a wave of jurisdictions that quickly sounded *caveat emptor's* death knell through the common law. The first significant blow came from the Ohio Supreme Court, which recognized an implied warranty of fitness or habitability in the sale of new homes in 1957.[27] The New Jersey Supreme Court jumped on board seven years later in the seminal case *Schipper v. Levitt & Son, Inc.*[28] Alluding to Cardozo's famous opinion in *MacPherson v. Buick*,[29] the *Schipper* court concluded "that there are no meaningful distinctions between [the] mass production and sale of homes and the mass production and sale of automobiles."[30] A few years later, in *McDonald v. Mianecki* ,New Jersey "relegated [*caveat emptor*] to its rightful place in the pages of history."[31]

Today, New Jersey recognizes two significant warranties implicit in all new home sales: the warranties of habitability and

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25 *See id.*

26 Bethlahmy v. Bechtel, 915 P.2d 698, 710 (Idaho 1966).

27 *See* Vanderschrier v. Aaron, 140 N.E. 2d 819 (Ohio Ct. App. 1957). Nearly thirty years earlier, English courts first hinted that *caveat emptor* should be re-evaluated. *See* Timpone and O'Flanagan, *supra* note 20, at 204. At the time of the *Schipper* decision, the doctrine of caveat emptor had already largely faded from existence with respect to sales of goods, due mostly to the advent of the U.C.C., which had been adopted in 46 states by 1968. *Id.* at 205. U.C.C. § 2-314 provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."

28 207 A.2d 314 (N.J. 1965)

29 111 N.E. 1050 (N.Y. 1916).

30 *Schipper*, 207 A.2d at 325. *MacPherson* dealt with an automobile manufacturer that disclaimed liability for a car involved in an accident because it did not manufacture the wheel that caused the accident and because the car was purchased from a dealer, and not the manufacturer. Justice Cardozo held the manufacturer liable, however, thus strengthening a car-buyer's recourse for negligently manufactured automobiles. *See MacPherson v. Buick*, 111 N.E. 1050 (N.Y. 1916).

31 McDonald v. Mianecki, 398 A.2d 1283, 1295 (N.J. 1987).

good workmanship.[32] In order to state a cause of action under the implied warranty of habitability, a homeowner must show that the home in question is unsuitable for living.[33] To account for new home defects that do not make a home unsuitable for living, the implied warranty of good or reasonable workmanship, established by the New Jersey Supreme Court in *Arohnson v. Mandara*, implies that new home construction will be performed in a reasonably good and workmanlike manner.[34]

### *B. Statutory Remedies*

Another potential source of relief for bereaved homebuyers in New Jersey is the Consumer Fraud Act ("CFA"),[35] which proscribes fraud, deception, or omissions of material facts "in connection with the sale or advertisement of any merchandise or real estate."[36] The CFA's application is limited, however, making it an effective but often unavailable tool. Affirmative misrepresentations under the CFA require no showing of intent, but "to hold a [builder] liable for an act of omission . . . requires a finding that [the builder] acted 'knowingly.'"[37] Since it would be a stretch to imply that most homebuilders knowingly build homes with major defects, the CFA sweeps too narrowly.[38] Therefore, many New Jersey homeowners confronted with new home defects must find statutory redemption in the New Home Warranty Act, which requires no showing of intent.[39]

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[32] *See, e.g.*, Terrace Condo. Ass'n v. Midlantic Nat'l Bank, 633 A.2d 1060 (N.J. Super. Ct. Law Div. 1993).

[33] *See Aronsohn*, 484 A.2d at 681 (citing Trentacost v. Brussel, 412 A.2d 436, 442 (N.J. 1980)).

[34] 484 A.2d at 681. In *Arohnson*, the homeowners sued because their backyard patio was improperly built. Because the improperly built patio did not affect the habitability of the home, the Court fashioned the new remedy.

[35] *See* N.J. STAT. ANN. §§ 56:8-1-109 (West 2004).

[36] N.J. STAT. ANN. § 56:8-2 (West 2004).

[37] Strawn v. Canuso, 657 A.2d 420, 429 (N.J. 1995) (citing Chattin v. Cape May Greene, Inc., 581 A.2d 91, 95 (N.J. Super. Ct. App. Div. 1990).

[38] In addition, a builder may have his certificate of registration denied, suspended, or revoked if he has "[w]illfully committed fraud in the practice of his occupation," or "[p]racticed his occupation in a grossly negligent manner." N.J. STAT. ANN. § 46:3B-6 (West 2007). Thus, builders have a large incentive to steer clear of the CFA, lest they find themselves the subjects of an administrative proceeding to revoke their construction license.

[39] So long as a defect fits within one of the three warranty categories, the builder

The Act, a product of late 1970s legislative reform, came about after the New Jersey Assembly initiated a search for "far-reaching and divergent solutions" to new home construction issues in 1977.[40] Two years later, New Jersey became the first state to require new-home construction to be covered by a warranty system.[41] Broadly speaking, the twin intents of the Act were to protect new homeowners and to legislatively abandon *caveat emptor*.[42] Provisions requiring builder registration "attempt[ed] to establish a level of business and financial responsibility on the part of [new homebuilders]," while the warranty system as a whole attempted to impart consumers "with a level of assurance that certain deficiencies and defects . . . [could] be addressed and remedied."[43] Unfortunately, the Act has not always lived up to these objectives.

The SCI commented that the new home warranty program has "fail[ed] to fulfill [its] promise" in part because it has been "defeated by . . . obfuscation at the hands of [the construction] industry."[44] In addition to the problems created by the construction industry, the Act has proven unworkable on its own. For instance, disputes have arisen as to what constitutes a "major construction defect," what is covered by the warranty, and what an

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is liable. N.J. STAT. ANN. §§ 46:3B-1 et seq. (West 2007).

40 Timpone & O'Flanagan, *supra* note 20, at 222. The "far-reaching" search took New Jersey legislators to Britain, where a program that "pre-screened builders for technical competence and fairness, while providing the homes constructed by these builders with warranty coverage" became the inspiration for the New Jersey statute. *Id.*

41 *See* SCI, *supra* note 7, at 20. Several other states have enacted new home warranty statutes. *See* Randy Sutton, *Validiy, Construction, and Application of New Home Warranty Acts*, 101 ALR 5th 447 (2002).

42 Ingraham v. Trowbridge Builders, 687 A.2d 785, 789 (N.J. Super. Ct. App. Div. 1997).

43 James H. Landgraf, *Residential Construction Law*, N.J. LAW.: THE MAG., Oct. 2002, at 46-47.

44 SCI, *supra* note 7, at 5. A particularly troubling tactic employed by some home builders is defaulting in one community while reorganizing under a "different corporate or trade name and continu[ing] [to conduct] business as usual in communities elsewhere in New Jersey." *Id.* at 12. Other tactics employed by builders, according to the SCI, are bribery of construction office personnel and circumvention of "the official inspection process by issuing forged and fraudulent certificates of occupancy to unsuspecting buyers in order to speed the sale of new homes. . . ." *Id.* at 13-14.

election of remedies is under the Act.[45] In fact, the statute, which received a ringing endorsement from this Journal on the eve of its enactment[46] and "tacit approval" from the New Jersey Supreme Court shortly thereafter,[47] has fallen into such disrepute that at least one trial judge in the State now considers it "a useless piece of paper."[48]

## *III. HOW THE ACT WORKS*

The first thing to note about the Act is that participation is mandatory for builders: "No builder shall engage in the business of constructing new homes unless he is registered with the [Department of Community Affairs ("DCA")]."[49] New homes are defined as dwelling units not previously occupied.[50] Thus, a completely rehabilitated home which has been gutted, destroyed, or demolished to the foundation would not be covered under the warranty.[51] As a prerequisite to registering, the builder must either opt in to the new home warranty security fund or an approved alternate.[52] The primary purpose of the security fund or a private alternative is to pay successful homeowner litigants in those instances where a builder and/or its warranty program guarantor is not financially viable.[53] Upon sale of the home, the builder must

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45 See *infra* Part III.B for further discussion of the election of remedies clause. For further discussion of the Act's other shortcomings, see generally *infra* Parts IV-V.

46 *See* Timpone & O'Flanagan, *supra* note 20, at 227 ("The statute, then, is an example of the legislative process functioning at its best . . . . Thus it has an excellent chance of success.").

47 *Id.*

48 Homeowners for Better Building, http://www.hobb.org/index.php?option=com_content&task=view&id=1528&Iremid=197 (last visited Sept. 1, 2008) (quoting Cesard v. Horton, No. MON-L-3147 (N.J. Super. Ct. Law Div. 2006)) [hereinafter "Homeowners"].

49 N.J. STAT. ANN. § 46:3B-5 (West 2007). The DCA is charged with enforcing the Act. N.J. STAT. ANN. § 46:3B-7 (West 2007).

50 *See* N.J. STAT. ANN. § 46:3B-2 (West 2007).

51 *See* Glaum v. Bureau of Const. Code Enforcement, 533 A.2d 486, 488 (N.J. Super. Ct. App. Div. 1987).

52 N.J. STAT. ANN. § 46:3B-5; *see also* N.J. STAT. ANN. § 46:3B-8 (laying out the process and requirements for homebuilders electing to participate in an approved alternative fund).

53 N.J. STAT. ANN. § 46:3B-7 (West 2007); Landgraf, *supra* note 43, at 47. The money in the fund is also used to "pay the costs of administering the new home warranty program." *Id.* § 46:3B-7.

contribute a specified amount, currently 0.17 to 0.595 percent of the sale price of the home, to the fund.[54] The contribution percentages vary according to the number of successful claims brought against a builder within a specified period of time.[55] Thus, the contribution scheme monetarily incentivizes builders to settle claims with homeowners outside the adversary process.

### *A. The Warranty Periods*

At closing, the homeowner is given a warranty package that includes a manual explaining the warranty coverage and claims process.[56] The warranty scheme is divided into coverage periods of one, two, and ten years.[57] Warranty coverage is most expansive in the first year, when "all workmanship issues are subject to the warranty provisions."[58] The one year period covers defects "caused by faulty workmanship and defective materials due to noncompliance with . . . building standards."[59] Items typically falling in the "one year" category include problems with landscaping; masonry and carpentry; roofing and roofing systems; doors and windows; hard surface flooring; and specialty items (e.g., fireplaces).[60] The two year warranty period covers "defects caused by faulty installation of plumbing, electrical, heating and cooling delivery systems."[61] Finally, the home is warranted from "major construction defects" for ten years.[62] Thus, with the exception of plumbing and electrical defects, a home is warranted against only major defects after the first year. A major construction defect is defined by the Act as "any actual damage to the load bearing portion of the home including damage due to

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54 N.J. ADMIN. CODE § 5:25-5.4 (2007).

55 For instance, a builder who has not made a payment under the warranty program for at least ten years will pay the lowest contribution percentage, while a builder who has made a payment in the past two years must contribute .425 percent of the sale price to the fund. *See id.*

56 Landgraf, *supra* note 43, at 47.

57 N.J. STAT. ANN. § 46:3B-3b(3) (West 2007).

58 Landgraf, *supra* note 43, at 48.

59 *Id.* at 47. Applicable building standards are set out in N.J. ADMIN. CODE § 5:25-3.5 (2007).

60 McCloskey, *supra* note 17, at 5.

61 N.J. STAT. ANN. § 46:3B-3b(2) (West 2007).

62 N.J. STAT. ANN. § 46:3B-3b(3).

subsistence, expansion or lateral movement of the soil . . . which affects its load bearing function and which vitally affects or is imminently likely to vitally affect use of the home for residential purposes."[63] Defective items resulting in the "failure of the load-bearing portion of a new home" typically include "the framing members and structural elements . . . [such as] roof rafters and trusses, ceiling and floor joists, bearing partitions, [and] supporting beams."[64]

The warranty periods begin at the "first occupation or settlement date, whichever is sooner."[65] The time periods prescribed by the Act are negotiable only to the extent that an approved alternate warranty program would lengthen the warranty periods provided for in the Act.[66] Additionally, privity between the builder and subsequent purchasers is not required; the builder is liable to all owners of the home during the warranty period.[67]

There are, of course, numerous gaps in and exceptions to the Act's coverage as well. Exceptions to the warranty coverage include: any damage caused by an addition to the home, unless the addition is built by the same builder or warrantor; damage resulting from natural disasters; and "changes in the water level . . . caused by new development in the immediate area."[68] A particularly problematic gap in coverage is for a defect occurring after the first year of the warranty that "does not render the home uninhabitable . . . nor vitally affects the use of the home for residential purposes."[69] In essence, after the first year of the warranty—which the homeowner indirectly pays for through a higher purchase price[70] and which was meant to give the

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63 *Id.* N.J. STAT. ANN § 46:3B-2g.

64 McCloskey, *supra* note 17, at 5.

65 N.J. STAT. ANN. § 46:3B-2h (West 2007).

66 N.J. STAT. ANN. § 46:3B-3b(4).

67 N.J. STAT. ANN. § 46:3B-4.

68 McCloskey, *supra* note 17, at 6.

69 *Id.*

70 Currently, homebuilders must contribute a percentage of the new home sales price, ranging from 0.17 to 0.595 percent, to the new home security fund. *See* N.J. ADMIN. CODE § 5:25-5.4 (2007). The average new home sales price in New Jersey for the third quarter of 2007 was approximately $528,000. *See* New Jersey Homebuilders Website, *supra* note 13. Using $528,000 as a baseline figure, a builder who must contribute 0.17 percent of the sale price of the average new home to the warranty

homeowner an added level of protection above that afforded by the common law—the homeowner is provided with less protection than he would be under the common law implied warranty of reasonable workmanship.[71]

Two final coverage exceptions worth noting are for "negligent or improper maintenance . . . by [the homeowner]"[72] and for repair work initiated by a homeowner.[73] The former clause has been construed strictly against homeowners,[74] while the latter clause forces a proactive homeowner who wishes to remedy a defect quickly to wade through the Act's red-tape or lose the right to collect under the warranty.[75]

### *B. The Claims Process and the Election of Remedies Clause*

The claims process[76] begins when a homeowner provides the builder with written notice of a defect claim "in the hope of an informal reconciliation."[77] The builder generally has thirty days to respond to the written request, during which the builder may elect to repair the defect personally or pay for the reasonable cost of repair.[78] In the event the homeowner is displaced during the repairs, the builder is required to pay reasonable shelter

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fund will contribute approximately $898 to the security fund, while a builder who must contribute 0.595 percent will owe approximately $3,141. Furthermore, there is no reason to believe that the builder does not pass these costs directly on to the consumer. Thus, any argument levied at the Legislature's amendments or my proposals suggesting that tightening regulations will result in a higher end-cost to the consumer should remember that, in essence, consumers have been paying for an ineffective Act for years.

[71] *See supra* Part II.A.

[72] N.J. ADMIN. CODE § 5:25-3.4(a)4i (2007).

[73] *See* Fisch v. Bureau of Const. Code Enforcement, 570 A.2d 2 (N.J. Super. Ct. App. Div. 1990) (finding that homeowners were precluded from collecting under the warranty when they began to make repairs on their own).

[74] *See, e.g.*, Bridgewater Townhouse Condo. Ass'n v. New Home Warranty Program, 92 N.J. Admin. 2d (CAF) 24 (1992) (ruling that it was condominium association's duty to repair water damaged, rotting decks).

[75] *See, e.g.*, *Fisch*, 570 A.2d at 2.

[76] To see a graphical representation of the detailed, often confusing claims process, the full details of which are beyond the scope of this Note, see SCI, *supra* note 7, at Exhibit NCI-250b, Appendix at A-3.

[77] Timpone & O'Flanagan, *supra* note 20, at 225.

[78] *See* N.J. ADMIN CODE § 5:25-3.3 (2007).

expenses.[79] If the builder fails to repair the defect within the specified amount of time, the homeowner can elect to proceed to arbitration or file a complaint.[80] This is a Hobson's choice, however, because under the controversial election of remedies clause,[81] an "initiation of procedures to enforce a remedy shall constitute an election which shall bar the owner from *all* other remedies."[82] In essence, the election of remedies clause leaves the homeowner at a proverbial fork in the road.[83]

As an added penalty, courts have applied the election of remedies clause stringently "based on principles of res judicata and collateral estoppel."[84] For example, plaintiffs who encounter multiple defects cannot pick and choose which ones to arbitrate and which ones to litigate.[85] In *Konieczny v. Miccichie*, for instance, the court stated that the election of remedies clause barred the plaintiffs from submitting claims against the builder "for defects they knew about but did not submit to arbitration."[86] The clause has also barred homeowners from seeking in-court relief when they did not initiate arbitration proceedings. Thus, in *Bracken v. Princeton Estates*, homeowners were denied relief because they had submitted a counterclaim for a defective roof in an earlier arbitration proceeding initiated by the builder.[87]

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[79] *See* 13 NJPRAC § 5.54 (2d ed. 2008).

[80] N.J. STAT. ANN. § 46:3B-9 (West 2007).

[81] *See* McCloskey, *supra* note 17, at 13 ("Far and away the most important feature of the Act, and certainly one of the most provocative controversies that have been addressed by our courts, is the 'election of remedies' provision contained at § 46:3B-9.").

[82] N.J. STAT. ANN. § 46:3B-9 (emphasis added).

[83] The Act does provide, however, that "nothing contained [in the Act] shall be deemed to limit the owner's right of appeal as applicable to the remedy elected." *Id.* Thus, "to the extent that there are claims not associated with the warranty that are not covered by the warranty (such as issues pertaining to contractual performance), the homeowner may still initiate legal proceedings." Landgraf, *supra* note 43, at 48.

[84] Konieczny v. Miccichie, 702 A.2d 831, 834 (N.J. Super. Ct. App. Div. 1997).

[85] *See, e.g.*, Spolitback v. Cyr Corp., 684 A.2d 1021, 1023 (N.J. Super. Ct. App. Div. 1996) ("[P]ermitting homeowners to submit some known warranty claims to arbitration while withholding others for a civil action would tend to frustrate, if not nullify, the policies behind the election of remedies bar of the Act and the regulation, as we understand them.").

[86] *Konieczny*, 702 A.2d at 834.

[87] 795 A.2d 275 (N.J. Super. Ct. App. Div. 2002). The builder brought suit against the homeowners to recover an unpaid balance on the bill, which the homeowners were withholding because they were unhappy with the home. *Id.*

A recent appellate division opinion indicates a possible shift in favor of homebuyers, however. In *Ivashenko v. Katelyn Court Co.*, the Ivashenkos were denied a claim under the warranty for a cracked foundation wall because the crack had not progressed into a major defect.[88] Unbeknownst to the Ivashenkos, the wall had been damaged during construction when a bulldozer accidentally backed into it. When the crack worsened to the point of threatening the integrity of the dwelling, the Ivashenkos investigated the cause of the crack and learned of the bulldozer accident for the first time.[89] The Ivashenkos then filed common-law claims for, *inter alia*, negligent construction and fraud.[90] Building upon an earlier holding that a homeowner is not estopped from bringing a claim for a latent defect that exists at the time an action is brought, but that the homeowner is unaware of,[91] the panel ruled that the Ivashenkos were not precluded from bringing the common-law claims because they were unaware of all the pertinent facts surrounding the cause of the crack.[92]

Homeowners should be cautiously optimistic about *Ivashenko* for two reasons. First, the Ivashenkos lost the arbitration proceeding because they were stuck in the "wait and see" conundrum.[93] In essence, this means they were told to wait and see if the crack progressed into a major defect, and if it did, to resubmit the arbitration claim. Thus, while the Ivashenkos were permitted to change forums, they would not have been denied a second chance for relief in arbitration. Second, and perhaps more importantly, the decision may have been nothing more than an admonition of the builder's deception.

Concluding the claims process is significantly less contentious. The claims process ends if the arbitrator rules in favor of the builder.[94] If the arbitrator rules in favor of the

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88 *See* Ivashenko v. Katelyn Court Co., 949 A.2d 279, 281-82 (N.J. Super. Ct. App. Div. 2008).

89 *Id.* at 283-84.

90 *Id.* at 283.

91 *See* Spolitback, 684 A.2d at 1024 ("[P]laintiffs cannot be held to have made a preclusive choice to arbitrate issues of which they were unaware at the time they submitted known claims for resolution by that procedure.").

92 *See* Ivashenko, 949 A.2d at 284-85.

93 The "wait and see" conundrum is discussed more fully *infra*, at p. 278.

94 McCloskey, *supra* note 17, at 11.

homebuyer, the builder is required to either "remov[e] the defect[] by repair or replacement or pay[ment] [of] the reasonable cost of repair or replacement."[95]

## *IV. THE LEGISLATIVE FIX—CRITIQUING THE PROPOSED AMENDMENTS*

In a comment added to the originally proposed amendments, the Legislature notes that home defects are due "mainly to low-quality materials and inferior construction practices . . . on the part of builders."[96] The Note goes on to state that the aim of the amendments is two pronged: (1) to attempt "to address the root causes" of inferior construction practices; and (2) to "address the systemic failures to provide many of the consumer protections offered under existing laws."[97] This Note deals with homeowner relief once a defect is discovered, and hence is limited primarily to the latter prong.[98] Several measures taken by the Legislature pursuant to the first prong bear noting, however.

Under the proposed amendments each officer, director, large shareholder and partner of an entity applying for registration in the State will be required to provide a Social Security number to the DCA.[99] Each individual providing a Social Security number will be required to disclose whether he or a business he formerly worked for in the capacity of officer,

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[95] *See* N.J. ADMIN. CODE § 5:25-3.3 (2007).

[96] Assem. B. 3397, 212th Leg., 1st Sess. (N.J. 2006) (as introduced, July 4, 2006).

[97] *Id.*

[98] In a statement accompanying the proposed amendments, the Legislature reviews some attempts made to oversee the construction industry more thoroughly:

> The first prong of the approach recognizes the need to enhance the skills of those persons in the construction trades. The bill creates new licenses for certain construction trades, and a trade board to oversee these regulated professions. The licensing of construction trades will result in a labor force with enhanced skills, and lead to better compliance with construction codes. In addition to the trades licensing, the bill imposes new accountability and notice requirements upon builders, and requires that each builder designate a primary qualifying agent who must be a licensed contractor and who will be responsible for on-site supervision of all construction activities, or who will designate a primary project supervisor. These parties will be responsible for assisting the code enforcement official in all required inspections.

*Id.*

[99] *See* S. B. 1029, 2008 Leg., 213th Sess. (N.J. 2008).

director, large shareholder or partner has filed for bankruptcy.[100] Additionally, individuals providing Social Security numbers will be required to disclose criminal convictions and unsatisfied judgments against them.[101] These important amendments should help the State nab what I have dubbed "itinerant homebuilders"—homebuilders who default in one community and then reorganize under a different corporate name in another community in order to shirk responsibility under the Act.[102]

While it is difficult to quibble with these amendments, more could have been done to protect the consumer. For instance, Pennsylvania's proposed New Home Construction Consumer Protection Bill makes it a fraud for a builder "subsequent to entering into an agreement for homebuilding services, [to] change[] the name of the home building business, liability insurance information, the home builder's address or any other identifying information without advising the consumer in writing within ten days of any such change."[103] A similar provision would have complemented the new registration procedures nicely, helping homeowners track down builders who walk away from an unfinished job.

### *A. Redefinition and Expansion of Ten-Year Warranty Coverage*

Finding an acceptable definition of what constitutes a major construction defect is a difficult task due to the confusion created by the combination of the Act's obtuse language and the administrative and judicial opinions interpreting this language.[104] The decision in *Rimmer v. Bureau*[105] is paradigmatic of the problem. In the case, cracks in the foundation of the Rimmers' home caused the floor on the seaward side of the home to slope one

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100 *Id.*

101 *Id.*

102 See *supra* note 44 for a brief description of the itinerant homebuilder. Since the percentage of the sales price of a new home the builder must contribute to the fund is commensurate with the number of adverse judgments against him (N.J. ADMIN. CODE § 5:25-5.4), the itinerant builder should also find it hard to avoid paying the proper contribution percentage under the amendments.

103 H.B. 1821, 190th Gen. Assem., Reg. Sess. § 9(a)(4) (Pa. 2007).

104 *See* sources cited *infra* note 105 and note 110.

105 97 N.J. Admin. 2d (CAF) 17 (1996).

way, while the floor on the land side sloped the opposite way.[106] The Rimmers surmised that the defect would eventually cause the entire building to split up the middle.[107] The administrative law judge, while unwilling to accept the Rimmers' prediction as fact, opined that because the defect "[c]ould [not] have come to be without a problem existing deep in the structure of the building," it was covered under the warranty.[108] The DCA Commissioner reversed the decision, however, stating that the Rimmers failed to prove that the sloping, sinking floor either "vitally affect[ed] or [was] *imminently likely* to vitally affect the use of the home for residential purposes."[109]

Similarly, in *Lolli v. New Home Warranty Program*,[110] the Lollis, whose bathroom floor was sagging—and arguably in danger of collapsing into the basement—were also denied relief under the Act.[111] The administrative law judge concluded that although "[t]he facts show that the master bathroom floor has been sinking . . . [it] is not a structural element of the house," and thus denied relief.[112]

*Rimmer* and *Lolli* illustrate why the SCI report concluded that the "current statutory definition [of 'major construction defect'] requir[es] what amounts to a virtual collapse" before warranty coverage will apply.[113] The report recommended making the definition more comprehensive by expanding it "to include substantial failure to meet structural requirements."[114]

The Legislature has listened; one of the centerpieces of the amendments is the redefinition of "major construction defect" to include "any substantial failure to meet applicable structural requirements."[115] In addition, "serious construction defects" and

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106 *Id.* at 1-2.

107 *Id.* at 3.

108 *Id.*

109 *Id.* (emphasis added).

110 92 N.J. Admin. 2d (CAF) 75 (1992).

111 *See id.* (Although experts for both sides agreed that the bathroom floor was sinking, there was a dispute as to whether the defect affected a load-bearing portion of the home and whether using a whirlpool bathtub would cause the floor to collapse into the basement).

112 *Id.* at 4.

113 SCI, *supra* note 7, at 40-41.

114 *Id.* at 40.

115 S. B. 1029, 213th Leg., 1st Sess. (N.J. 2008).

"fire safety defects" have been added to the ten-year warranty period.[116] A "serious construction defect" is defined as "any defect that poses a serious safety hazard or substantially impairs the use or market value of the home."[117] A "fire safety defect" is defined as "any failure to meet the requirements of the State Uniform Construction Code governing fire rating requirements for any building component . . . or the [failure to provide] fire safety equipment or systems such as sprinklers, fire alarm systems, or emergency power or lighting systems."[118]

The new definition of "major construction defect" should make future homeowners' task of proving what constitutes a major construction defect much less painful. For example, the sloping, cracked floor in *Rimmer* and the vulnerable bathroom floor in *Lolli* would most likely qualify as substantial failures to meet structural requirements.

Furthermore, the addition of "serious construction defect" laudably recognizes that sometimes a new home need not be in danger of imminent collapse to cause a homeowner to suffer a devastating impact, financial or otherwise. For example, the homeowners in *Carchia v. Bureau*,[119] whose new home was advertised as a possible three-bedroom home, with the third bedroom being above a two-car garage, would seemingly find relief under the new amendments. In *Carchia*, the DCA Commissioner reversed a decision declaring that the builder's failure to install load-bearing components over the garage—effectively precluding the homeowners from using the space over the garage as a bedroom—constituted a major defect.[120] The Commissioner ruled that because the space was not currently being used as a bedroom, no "actual damage" had been shown, even though "[i]t is possible that . . . the garage ceiling might collapse due to overloading at some time in the future."[121] The Commissioner's reasoning was tortured and unsound because homeowners could theoretically stop using any portion of a home

116 *Id.*
117 *Id.*
118 *Id.*
119 91 N.J. Admin. 2d (CAF) 1 (1991).
120 *Id.* at 4-5.
121 *Id.* at 4.

that is in danger of collapsing. Under the new amendments, the fight over whether "actual damage" has been shown would be unnecessary, because the danger that a living area of a home could collapse would pose a serious safety hazard.

Another serious and recurrent defect[122] that should unquestionably qualify as a serious construction defect under the new amendment is moisture intrusion that leads to toxic mold growth.[123] Although this defect can be life threatening,[124] it is currently not covered under the ten-year warranty period because it does not affect a load-bearing portion of the home or put the home in danger of imminent collapse.[125] The mold would pose a serious safety hazard, and so would seemingly come under the new definition. And, because mold growth that results from moisture intrusion is a deficiency under builder performance standards, the defect would be covered under the one-year (two-year as proposed) warranty period.

One major oversight in this portion of the amendments is the lack of a provision to address what might be dubbed the "wait and see" conundrum. The conundrum arises when a homeowner is confronted with a structural defect that, while benign at first, could develop into a major defect over time. For instance, six years after purchasing his new home, the homeowner in *Sharma v. Bureau of Homeowner Protection, New Home Warranty Program*,[126] discovered a crack in a foundational support column in his garage that, if left unattended, could have caused the garage to buckle. However, the crack had not yet risen to the level of a major structural defect.[127] Amazingly, while acknowledging that the crack could potentially worsen and become a major structural defect, the administrative law judge concluded that the only relief the homeowner could get under the Act was if a major defect

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122 SCI, *supra* note 7, at 8-9 (The SCI Report lists "basements, crawl spaces and habitable areas prone to . . . toxic mold" under a category of "Rampant Defects.").

123 The mold would pose a serious safety hazard, and so would seemingly come under the new definition.

124 *See* Hazards of Toxic Mold, CBS NEWS, Mar. 4, 2005, http://www.cbsnews.com/stories/2005/03/03/earlyshow/living/home/main677872.shtml.

125 *See* N.J. ADMIN. CODE § 5:25-3.5(f)(1) (2007).

126 94 N.J. Admin.2d (CAF) 83 (1994).

127 *Id.* at 84.

developed over "the remainder of the ten year term."[128] The homeowner was therefore left in the precarious situation of either paying to fix the defect or hoping that the defect would worsen to the extent that it compromised the structural integrity of the home within the remaining warranty period.

In order to avoid unnecessary builder liability regarding speculative damage, a more prudent addition would be to allow homeowners, at their expense, to opt for a neutral home inspection to determine whether the defect will ripen into a major defect within the statutory period. If the inspector were to conclude that this would occur, the homeowner would receive an immediate payout to remedy the defect. If not, the homeowner would be, perhaps unavoidably, stuck in the current "wait and see" conundrum.

One final criticism of these changes; the definition of "serious construction defect" is, as currently proposed, worded as a rule of exclusion.[129] Thus, the door is open for homebuilders to argue that nearly any defect does not pose a *serious* safety hazard or *substantially* impair the use of the home. Homeowners should not be expected to "grin and bear" moderate or even minor safety hazards, nor should they be content with a defect that moderately affects the home's resale value. While a line needs to be drawn somewhere in order to avoid unnecessary litigation, a more sensible fix would be to determine a cut-off point, reflected by the cost of repair in relation to the percentage of the home's value, which would raise a rebuttable presumption that the defect is major. For example, using the average New Jersey new home price of $528,000[130] as the price of the home, and 5% as the cut-off, any defect requiring repairs in excess of $26,400 would be presumed to be major. Where this cut-off fails, administrative law judges would resort to the statutory language, which, while still sticky, would be a vast improvement over its predecessor.

### *B. Changes to Minor Defect Warranty Periods*

Another important change to the Act is the extension of the

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[128] *Id.*

[129] *See* S. B. 1029, 213th Leg., 1st Sess. (N.J. 2008).

[130] *See supra* note 13.

one and two-year warranty coverage periods to two and three years, respectively.[131] Not only have the minor defects periods been lengthened, but their scope has been broadened. Defective well and septic systems are included in the three-year (formerly two-year) warranty period under the proposed amendments, and most importantly, provisions covering water damage and "lot defects" have been added.[132] The proposed legislation defines a "lot defect" as "any defect in grading, paving or any other improvement or modification of the lot that is not within the scope of the definition of 'construction' as set forth in [the State Construction Code]."[133]

The extension of the minor defect warranty periods gives new homeowners—who may be less likely to acknowledge or believe that there is a problem with their brand new homes—an extra year before they are forced to "argue minor defects up the ladder."[134] In *Kershaw v. Department of Community Affairs*, for instance, the Kershaws submitted a punch-list of minor grievances—including a cut floor joist, a "bouncy" floor, and a non-functioning range fan —against the homebuilder in the third year of warranty coverage.[135] Since the grievances were submitted after the warranty period for minor defects had lapsed, the Kershaws were forced to "move up the ladder" and argue that the defects were major.[136] Under the proposed amendments, however, the Kershaws would gain an extra year to bring these claims before being forced to "argue them up the ladder."

The extension of time to bring minor defect claims seems prudent and difficult to criticize from both the builders' and homeowners' points of view. A longer extension would potentially make builders responsible for fixing normal wear and tear items. Conversely, the current one- and two-year periods are too short because new homebuyers are often hesitant to acknowledge fault with their new homes.

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131 *See* S. 1029, 213th Leg., 1st Sess. (N.J. 2008).

132 *Id.*

133 *Id.*

134 "Argue minor defects up the ladder" is my term for when a homeowner is forced to argue that a minor defect is a major defect because the statutory time period to bring minor defects has passed.

135 96 N.J. Admin. 2d (CAF) 27 (1995).

136 *Id.* at 28.

The inclusion of water damages in the minor defect category is also a much needed addition. *Bridgewater Townhouse Condominium Ass'n v. New Home Warranty Program*,[137] illustrates the problem under the current Act. In *Bridgewater*, rotting, water-damaged rear decks funneled rain water into newly constructed town homes.[138] Because the water damage did not affect a load-bearing portion of the home, the administrative law judge who heard the case held that the problem was not a major structural defect.[139] Under the water damages category, however, the case would presumably be easily resolved.[140]

### *C. Booklet Guide to New Home Warranty*

In an effort by the Legislature to arm consumers with knowledge of their rights under the Act, builders will be required to provide new homebuyers with a copy of a booklet prepared pursuant to the proposed amendments."[141] The booklet will include "a full statement of warranty coverage and the warranty claims procedure," as well as "a validated copy of the certificate of participation in a warranty program . . . and a bona fide business address to which notification of alleged defects may be directed."[142] In addition, the DCA will be required to post an electronic version of the booklet on the department's website.[143]

These amendments should help ensure that new homebuyers are sufficiently informed of their rights under the warranty program. Unfortunately, they do not go far enough. Perhaps the most attractive feature of the Act is the "good feeling" that comes with being handed a booklet at closing that purports to detail an efficient claims process.[144] As one Superior Court judge recently opined, however: "When people walk away from the closing table, they think they have some kind of a security blanket. They

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137 92 N.J. Admin. 2d (CAF) 24 (1992).

138 *Id.*

139 *Id.*

140 The severity of the problem in *Bridgewater* would probably bring the damage to the deck within the new "serious construction defect" category, since it would seem to pose a serious safety hazard. *See infra* at Part IV A.

141 *See* S. B. 1029, 213th Leg., 1st Sess. (N.J. 2008).

142 *Id.*

143 *See id.*

144 *See* McCloskey, *supra* note 17, at 4.

don't."[145] In addition, the SCI report cites confusion and misinformation as two major sources of consumer frustration with the Act.[146] My proposal attempts to minimize the confusion and misinformation by increasing consumer knowledge about the warranty program itself and, more significantly, homebuilders.

Under my proposal, homebuyers would have the option of scheduling a meeting with someone from the DCA who could explain the warranty to them in piecemeal fashion. In a further effort to ensure understanding of the warranty, homebuyers declining this option would be required to acknowledge an understanding of their rights before proceeding with any arbitration claim under the warranty. The purpose of my proposal is to arm homebuyers, especially those who proceed to arbitration without a lawyer, with a rudimentary knowledge of what procedural pitfalls to avoid and what must be proven in order to succeed on a claim under the warranty.

Increased awareness of the practices of homebuilders is also vital to strengthening consumer protection. The SCI concluded that "many prospective home-buyers are in the dark with regard to the integrity and track records of the builders to whom they will entrust what often amounts to the single largest financial investment of their lives."[147] Consumers about to invest in big ticket items today can and often do consult internet sites that provide editorial and peer reviews of products, manufacturers, and sellers.[148] Conscientious consumers should have access to a website where they can compare, contrast, evaluate, and ultimately make an informed decision about which homebuilders to choose.[149]

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145 Homeowners, *supra* note 48.

146 *See* SCI, *supra* note 7, at 20.

147 *Id.* at 18.

148 The two that come to mind as the most widely used are the feedback system of eBay.com, which gives buyers an opportunity to leave "positive" or "negative" feedback about a product and seller after each transaction, and the extensively used customer reviews section of Amazon.com. *See* http://pages.ebay.com/help/policies/feedback-ov.html (overview of eBay.com's feedback policy); http://www.amazon.com/gp/help/customer/display.html?nodeId=537774 (overview of Amazon.com's feedback policy).

149 The SCI report recommended a website for consumers that included a link to a "list of registered builders and adjudicated complaints against them." *See* SCI, *supra* note 7, at 40. My proposal is much more thorough and fleshed out than the SCI's bare bones suggestion.

Consequently, under my proposal, the DCA would set up and maintain a website listing of builders, organized by county, along with statistical information regarding the number of successful claims that have been brought against each builder under the warranty. Builders would be listed under one of three headings: less-than-satisfactory; satisfactory; or exemplary. To provide awareness about the site among prospective homebuyers, builders would be required to display the website address conspicuously on the first page of the home sales contract.

All attempts would be made to prevent unfair prejudice to builders who have come into compliance with the warranty program. One way to accomplish this would be to limit the data to a small time period, perhaps two years. Builders would also have the option of submitting, if they wish, any sort of explanation or rebuttal to any negative statistics posted about them on the website. In addition, the DCA would, at its discretion, be able to post its own comments regarding builders it feels have made substantial steps toward compliance with the warranty program. Finally, aggrieved homeowners—who would be more likely to use the forum as a sounding board to rail against homebuilders—would not be allowed to post editorials.[150]

Thus, my proposal strikes the perfect balance between providing adequate consumer information while not unduly prejudicing builders. The proposal has the added benefit of shaming builders who do not wish to see their names listed under the "less-than-satisfactory" heading into compliance. Finally, the proposal gives consumers easy access to critical consumer information, putting new homes on par with tangible consumer goods in this respect.

### *D. Modification of the Election of Remedies Clause*

The election of remedies clause, perhaps the most controversial feature of the Act, is also the single biggest procedural pitfall for unsuspecting consumers. As discussed previously,[151] courts have construed this clause narrowly,

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[150] Such websites do already exist, however. An example is khovsucks.com, which contains an amusing picture evoking the analogy of flushing money, or in this instance, a KHovnanian house, down a toilet.

[151] *See supra* Part II.B.

precluding potentially deserving homeowners from recovery based on principles of res judicata and collateral estoppel.[152] The originally proposed amendments left the clause substantially intact, adding only that the clause shall not "be deemed to limit the owner's right to file a claim based on fraud under the consumer fraud act [sic]" and that an election of remedies bars the homeowner "from all other remedies until a final judgment has been rendered."[153] The currently proposed amendments would leave the clause as it is.

The failure to amend the clause represents a missed opportunity to make the Act more homeowner oriented. Simply adding a provision that would give homeowners a small window of time after the initiation of arbitration proceedings to instead file a complaint would have pushed the ball closer to homeowners' corner. Returning to the fork-in-the-road analogy,[154] such a proposal would allow homeowners to get a brief glimpse of the road taken, and if they are surprised or intimidated by what they see, to walk away. This proposal would also bring the election of remedies provision in line with similar provisions in other New Jersey statutes.[155]

For example, the New Jersey Law Against Discrimination statute ("LAD"), which bars discrimination against individuals based on race, gender, and sexual orientation,[156] provides for

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152 *See, e.g., Bracken v. Princeton Estates*, 795 A.2d 275 (N.J. Super. Ct. App. Div. 2002) (election of remedies claim barred claim for defective roof when Plaintiffs submitted counterclaim against homebuilder who commenced action to recover balance on construction contract).

153 Assem. B. 3397, 212th Leg., 1st Sess. (N.J. 2006) (as introduced, July 4, 2006).

154 *See supra* p. 272.

155 There might still be a sliver of hope for some homeowners without the provision. In 2002, the New Jersey Appellate Court ruled in *Yaroshefsky v. ADM Builders, Inc.*, 793 A.2d 25 (N.J. Super. Ct. App. Div. 2002), a case where the homeowner and builder agreed on an approved alternate warranty program, that "[T]he policy language, under a private plan, controls, and the language in this policy does not make clear that a common-law action could not be commenced after an arbitration was initiated and withdrawn." *Id.* at 33. Thus, for homeowners and builders agreeing to use an approved alternate to the New Home Security Fund, the language of the contract must clearly alert the homebuyer that arbitration and litigation are mutually exclusive options. The most likely effect of this ruling, however, is that builders providing an approved alternate warranty program under the Act will now make it clear in their boiler-plate agreements that the election of remedies bars plaintiffs from initiating a court proceeding.

156 *See* N.J. STAT. ANN. § 10:5-3 (West 2007).

administrative and judicial remedies as complementary, not mutually exclusive, options.[157] Judges interpreting the statute have tried to strike a balance between abuse and leeway. In an attempt to curb forum shopping, they have ruled that: "Once a forum is chosen . . . while the procedure is pending another forum may not be pursued."[158] As an additional safeguard against forum switching when a proceeding is not going well, the New Jersey Uniform Administrative Procedure Rules state that upon a party's withdrawal from an administrative proceeding, the judge may, at his or her discretion, "state the circumstances of the withdrawal on the record" and "enter an initial decision memorializing the withdrawal."[159] Thus, an administrative law judge can recommend that withdrawal "not be permitted [if] 'estoppel principles' might arise."[160] Cutting the other way, however, judges have ruled that the choice of forums is not preclusive "until a final determination is rendered by one forum."[161] These precautions could easily be applied to the Act.

This proposal also makes sense from a policy perspective because New Jersey courts favor arbitration,[162] which is meant to be a quick and cheap alternative to traditional litigation.[163] The law should adapt to the reality that arbitration sometimes involves unsophisticated, unrepresented parties, and ensure that it does not condone unfair outcomes resulting from legal naiveté.

### *E. Home Repurchase Provision*

The lengthy period of time between the originally proposed amendments and the currently proposed amendments has yielded

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157 *See* N.J. STAT. ANN. § 10:5-13 (West 2007).

158 Aldrich v. Manpower Temporary Services, 650 A.2d 4, 6 (N.J. Super. Ct. App. Div. 1994).

159 N.J. ADMIN. CODE § 1:1-19.2 (2008).

160 *Aldrich*, 650 A.2d at 7.

161 *Id.* at 6.

162 *See, e.g.*, Perini Corp. v. Greate Bay Hotel and Casino, Inc. 610 A.2d 364, 369 (N.J 1992) ("[O]ur courts have long encouraged the use of arbitration proceedings as an alternative forum.").

163 "[T]he purpose of, and public policy behind, arbitration [is] to promote and encourage a voluntary, alternative method of resolving all disputes in a given legal controversy in a single forum, in an efficient, expeditious, relatively inexpensive, and less formal manner that relieves our overburdened judicial resources." Elliot-Marine v. Campanella, 797 A.2d 201, 205 (N.J. Super. Ct. App. Div. 2002).

one major casualty. As originally proposed, the amendments would have come close (too close perhaps) to a new home lemon law in New Jersey. Here is how the original amendment to this portion of the Act would have worked: if a serious construction defect were found to exist, the homeowner would have had the option of hiring a contractor of his choice to repair the defect.[164] If the chosen contractor were unable to cure the defect, the Commissioner of the DCA would purchase the home from the owner and institute a legal action against the builder on the owner's behalf.[165]

As currently proposed, the revised amendment substantially differs from the original proposal. The first glaring difference is that under the current proposal, homeowners will not be able to choose a contractor of their choice to make the repairs.[166] Instead, the original builder must make the repair or refuse or be unable to do so.[167] The Legislature's most significant revision, however, was its deletion of the home repurchase provision. In its stead is a provision authorizing the DCA Commissioner to pay a successful homeowner "an amount that shall be the cost of repairing all warranted defects."[168] While the new provision does not go far enough, there is pertinent language lessening the blow. Under the currently proposed amendments, the Commissioner would pay for repairs "even if the cost of repairing all warranted defects *exceeds the purchase price of the home* in the first good faith sale thereof or the fair market value of the home on its completion date."[169]

While the sting from the loss of the buyback provision is somewhat alleviated by allowing for a monetary award that exceeds the cost of the home, significant shortcomings remain. Most significantly, while many homeowners would rather take the

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164 *See* S. B. 1029, 2008 Leg., 213th Sess. (N.J. 2008).

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *See* S. B. 1029, 213th Leg., 1st Sess. (N.J. 2008). (emphasis added). The current Act provides that remuneration is limited to "the purchase price of the home in first good faith sale thereof or the fair market value of the home on its completion date." N.J. STAT. ANN. § 46:3B-4 (West 2007).

money and repair their homes,[170] others would prefer to walk away from their homes. Consequently, the proposed amendment would be much more attractive to the former group.

A compromise striking an appropriate balance between these two extremes would have been to give the homeowner the option of receiving money for the necessary repairs or having the commission buy back the house—with a couple of homeowner concessions. For homeowners choosing to receive money for repairs, the payment received would be determined by splitting the estimates of two independent contractors. Alternatively, homeowners electing to have the commission buy back the home would receive the lesser of the amount paid or the market value of the home. While this proposal would arguably have been too costly to the State, a provision mandating a higher contribution percentage to the fund from any builder who has constructed a home repurchased by the State would have been an effective solution that comports with the Act's already sliding scale of contribution percentages.[171]

## *VI. CONCLUSION*

New home construction quality seemed to exhibit an inverse relationship to home prices at the beginning of the new millennium.[172] The obvious explanation for this phenomenon is that favorable lending rates spurred a sharp rise in new housing demand, which builders had trouble meeting and which, in turn, led to declines in quality control.[173] With a historically drastic downturn in the housing market upon us,[174] the problem of poor-

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170 There are a number of reasons homeowners would not wish to move, including: their children's school, relationships with neighbors, proximity to work, etc.

171 *See supra* note 54.

172 *See* New Jersey Homebuilder's Website, *supra* note 13.

173 Immigrant labor may also be another cause of the problem. The SCI noted that "In recent years, the labor force in new-home construction has consisted increasingly of unskilled immigrants, many of whom are undocumented aliens who speak only their native non-English language, thus layering a communications problem onto the already challenging issue of ensuring adequate, skilled project supervision." SCI, *supra* note 7, at 11.

174 *See* Michael M. Grynbaum, *New Homes Set Record: Sales Fell 26% in '07*, N.Y. TIMES, Jan. 29, 2008, at C0, *available at* http://www.nytimes.com/2008/01/29/business/29econ.html?scp=5&sq=new+home+sales&st=nyt.

quality home construction may never be as acute as it was in the early 2000s (if only because the sheer volume of production may never rise to that level again). Yet, while the problem may ebb in the near future, the reality is that it will never go away. As long as builders are imperfect, New Jersey will need a new home warranty program with teeth. New Jersey homebuyers deserve the same level of consumer protection they get when they purchase a new car.

The homebuilding landscape has changed drastically in the thirty years that have passed since the seminal Act's creation. The Act, as Justice Wheeler would say, serves this generation badly. When the amendments arrive, they will be an important step in the right direction. Nevertheless, I cannot help but feel that sometime in the future another SCI report will be necessary. For now, however, perhaps the most important thing is that for arguably the first time since the Act's nascency in the late 1970s, the tide of change is moving in the right direction.

Perhaps the Desmond and Molly Joneses of New Jersey will again be able to build home sweet home and live happily ever after in the market place. Perhaps the rest of the nation will follow New Jersey's lead. And perhaps someday we will all find ourselves in a boat on a river, with tangerine trees and marmalade skies. Okay, two out of three wouldn't be bad.