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Implied Warranties In The Sale Of New Houses

*Bethlahmy v. Bechtel*¹

Defendant, a home builder, and plaintiff entered into a contract for the sale of a new house which defendant was then in the process of building. The defendant voluntarily made representations about the house and the building site, but neglected to inform plaintiff that an unsealed irrigation pipeline ran underneath the house. About three months after taking possession, plaintiff discovered water seeping into the house and spreading over a considerable portion of the tiled basement floors. Defendant believed the water had escaped from the drainage pipe underneath the garage, and steps were taken by him to alleviate the situation. His attempts to remedy the situation, however, proved futile. As a result of defendant's failure to cure the defect, plaintiff gave prompt notice of his rescission of the contract of sale and tendered possession of the property. Upon defendant's failure to make restitution, suit was instituted for rescission and restitution. The lower court held for the defendant, but the Idaho Supreme Court reversed, holding alternatively that the defendant could be liable either on the basis of constructive fraud for nondisclosure of a condition known to him² or for breach of an implied warranty of fitness for habitation.

The court's recognition of an implied warranty on the particular facts of this case — namely, where the house was unfinished at the

1. 91 Idaho _____, 415 P.2d 698 (1966).

2. The court reasoned that since defendant dealt from a position of superior knowledge, there existed a confidential relationship which imposed on the defendant a legal duty to disclose all defects known to him.

time of the sale and the vendor was in the business of building and selling houses — conforms with a majority of the modern decisions which have considered this problem.³ However, the Idaho court, in dictum, indicated it would recognize an implied warranty of fitness for habitation in the sale of all new houses, regardless of the state of completion, where the builder is also in the business of selling houses. Such a position, if adopted by the court as a holding in a subsequent case, would place Idaho at the opposite end of the continuum from those states still following the once universal doctrine of *caveat emptor* in the sale of realty.

One of the first cases to articulate the doctrine of *caveat emptor*, the *bezar stone* case,⁴ used the following language in referring to the seller of personalty: “. . . although he knew it to be no bezar-stone, it is not material; for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action. . . .”⁵ The commercial environment of that period was one in which “. . . dealing with strangers was largely done at fairs which were held periodically at the larger towns. To these fairs came traveling merchants with their ideas of business morality derived from the Oriental bazaars in which no trust was given or expected. . . .”⁶

Caveat emptor began to lose its force in the sale of chattels during the late 17th century when a tort action for breach of warranty was recognized.⁷ By 1815, the importance of *caveat emptor* in the sale of goods had diminished very extensively as is indicated by the declaration of an English judge:

I am of opinion, however, that . . . the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply.⁸

The scope of the buyer's protection extended thereafter to a general recognition that the law implied a representation by the seller of goods that the product would be fit for ordinary uses.⁹ In 1894, this warranty was codified in Section 14(2) of the English Sale of Goods Act,¹⁰ which was included almost verbatim in the Uniform Sales Act. The present warranty of merchantability in the Uniform Commercial Code¹¹ all but eliminates *caveat emptor* in the sale of chattels.

3. See, e.g., appendix to *Staff v. Lido Dunes, Inc.*, 47 Misc. 2d 322, 262 N.Y.S.2d 544, 553 (1965).

4. *Chandler v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603).

5. *Id.* at 5, 79 Eng. Rep. at 4.

6. Seavey, *Caveat Emptor As of 1960*, 38 TEXAS L. REV. 439, 441 (1960).

7. See Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 118 (1943).

8. *Gardiner v. Gray*, 4 Camp. 144, 171 Eng. Rep. 46, 47 (K.B. 1815).

9. See Prosser, *supra* note 7, at 120-22.

10. SALE OF GOODS ACT 1893, 56 & 57 Vict., c. 71, § 14(2).

11. “Unless excluded or modified . . . a warranty that 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.” UNIFORM COMMERCIAL CODE § 2-314.

In areas other than the sale of goods, however, courts have been reluctant to impose implied warranties. Recovery in service contracts, for example, will be denied unless the aggrieved party proves that the services were not performed in accordance with the established trade or professional standards governing the party rendering the services.¹² Additionally, until 1931, the courts had firmly refused to establish an implied warranty of habitability in the sale of realty.¹³

The first case to recognize an implied warranty in the sale of real estate was *Miller v. Cannon Hill Estates, Ltd.*¹⁴ Shortly after being shown a model house in the defendant's housing development, the plaintiff purchased one of the homes. The contract had been signed before construction had been completed. Subsequently, during an unusually wet winter, plaintiff, finding serious dampness penetrating the house, was forced to leave the premises. The court, granting relief to the plaintiff in his suit for rescission, indicated that a house which is not yet complete when the contract of sale is signed carries with it an implied warranty of fitness for habitation.¹⁵ In reaching this decision, Judge Swift differentiated between such a house and one which was complete at the time of purchase:

[I]f one buys an unfurnished [but finished] house, there is no implication of law, and there is no implied contract that the house is necessarily fit for human habitation. That must be good sense, because a man who buys an empty house may not necessarily need it as a dwelling-house; he may be buying something which is almost in a state of ruin, knowing that he will have to restore it and pay a considerable amount of money for restoring it. . . . [I]f he wants to buy a house which is fit for habitation, then he must expressly stipulate that the house shall be fit for habitation. He can always get an express warranty that an unfurnished house is fit for habitation, if he is prepared to pay the price which attaches to an unfurnished house which has such a warranty, rather than the price which a vendor is willing to take for an unfurnished house without such a warranty.¹⁶

Miller has often been cited as the leading authority for the distinction between finished and unfinished houses, and its rule, generally, has been strictly applied. Unfortunately, this distinction often

12. See, e.g., *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954); *Rollins Engine Co. v. Eastern Forge Co.*, 73 N.H. 92, 59 A. 382 (1904). *Contra*, *Broyles v. Brown Engineering Co.*, 151 So. 2d 767 (Ala. 1963). Other areas in which there has been a judicial reluctance to impose implied warranties include: furnishing of blood plasma in connection with a transfusion (found to be a service contract rather than a sale), *Balkowitsch v. Minneapolis War Memorial Blood Bank, Inc.*, 132 N.W.2d 805 (Minn. 1965), noted in *Sales and Service Warranties in Blood Transfusions*, 26 Md. L. Rev. 182 (1966); supplying materials incidental to contracts for work and labor, *Stammer v. Mulvaney*, 264 Wis. 244, 58 N.W.2d 671 (1953); lease of an unfurnished apartment, *Hughes v. Westchester Development Corp.*, 77 F.2d 550 (D.C. Cir. 1935).

13. Since habitation is the normal use of a house, the warranty of habitability is merely a warranty of merchantability applied to real estate.

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

15. The court also found an express warranty in the transaction.

16. [1931] 2 K.B. at 120.

leads to hair-splitting decisions in which the resulting uneven treatment of plaintiffs seems to conflict with the policy which supports the imposition of the warranty. For example, a buyer who signs the contract when the house is complete with the exception of water taps, bath grates, and a slight amount of plaster is protected by an implied warranty of quality and fitness in the contract,¹⁷ whereas a buyer who signs a contract only a short while after completion of the house takes it at his own risk.¹⁸

Two primary theories have been relied on by the courts in support of this distinction. The first is the *Miller* rationale that the obvious intention of the parties in the sale of an uncompleted house is that the contractor will provide a house fit for the purchaser to inhabit. However, the intention of one who purchases a completed house is thought to be unclear, and therefore such a purchaser should not be entitled to a warranty of fitness for habitation since he may not be intending to inhabit the home at all.¹⁹

The second theory is applied in situations in which there is a contract for the sale of land together with an agreement to build. The theory is that there are in fact two severable contracts, one for the sale of the land and the other to construct the house. In such a case the implied warranty that the house shall be constructed in workmanlike manner attaches to the latter contract.²⁰ However, where the purchaser buys land and a completed house, there is no contract to construct to which the warranty can attach; the deed is considered the final execution of the contract to convey, and the rights of the parties are determined entirely by the deed.²¹

The present trend of decisional law persists in adhering to the traditional distinction expressed in *Miller*, notwithstanding a barrage of legal arguments aimed at ending its apparent arbitrariness.²² One author has gone so far as to encourage extension of the warranty to the sale of used houses.²³

The transparent artificiality of the completed/uncompleted house distinction is revealed by a critical analysis of the reasoning supporting the distinction. *Miller* declared that the clear intention of a pur-

17. *Perry v. Sharon Dev. Co.*, [1937] 4 All E.R. 390. *Accord*, *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957), where all that remained to complete the house was the installation of doorknobs, electrical fixtures, bathroom water connections, and completion of the driveway.

18. *E.g.*, *Rappich v. Altermatt*, 106 Ohio App. 282, 151 N.E.2d 253 (1957).

19. *See* notes 14 and 16 *supra* and accompanying text.

20. *E.g.*, *Weck v. A:M Sunrise Const. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962). *See* *Kandalis v. Paul Pet Const. Co.*, 210 Md. 319, 123 A.2d 345 (1956); *Minemount Realty Co. v. Ballentine*, 111 N.J. Eq. 398, 162 A. 594 (1932).

21. *E.g.*, *Levy v. C. Young Const. Co.*, 46 N.J. Super. 293, 134 A.2d 717 (App. Div. 1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958); *Harmon National Real Estate Corp. v. Egan*, 137 Misc. 297, 241 N.Y.S. 708 (1930).

22. *See* *Bearman, Caveat Emptor in Sales of Realty — Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); *Dunham, Vendor's Obligation As to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953); *Notes, Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings*, 43 DENVER L.J. 379 (1966); *Implied Warranties in the Sale of Realty*, 18 MD. L. REV. 332 (1958); *Implied Warranties in the Sale of New Houses*, 26 U. PITT. L. REV. 862 (1965); 12 RUTGERS L. REV. 529 (1958).

23. *See* *Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 648 (1965).

chaser of an uncompleted house is to live in it, but that such intention is not clear when a person buys a completed house ready for habitation. This, of course, is not true. One who purchases a new house one day after it is completed, for instance, is more than likely intending to live in it. While arguably the intention of the purchaser of a completed house may be slightly more in doubt, it is suggested that the degree of the difference in uncertainty is itself uncertain and is an entirely inadequate basis for the distinction. Rather than burdening the unaware and usually unsophisticated buyer with the responsibility of procuring an express warranty, it would seem more reasonable that the seller should have the burden of expressly disclaiming all such warranties as is required of a seller of goods.²⁴

The second ground of reasoning, the separation of the building contract from the contract for sale of the real property, reaches an undesirable result since the underlying purpose of this separation is to assure the buyer that the house will be built according to the builder's specifications. A purchaser buying a new but complete house relies just as heavily on the builder's having built according to the specifications as does a purchaser of an uncompleted house; merely because the former is able to inspect the house during construction, while the latter cannot, should not bar recovery for a latent defect which would be no more discoverable in one instance than in the other.²⁵

The *Bethlahmy* court, by recognizing that an implied warranty of workmanship and habitability should be imposed, regardless of the stage of completion of the house at the time of purchase, has joined a growing minority of jurisdictions which no longer apply caveat emptor in the sale of realty.

Louisiana has codified the civil law doctrine of redhibition, which permits damages or rescission of a sale where the article sold is defective.²⁶ The "implied warranty" exists unless the defect is such that the buyer might have discovered it by simple inspection,²⁷ and it applies to the sale of realty whether or not the house was completed before the contract for sale was signed.²⁸

In *Carpenter v. Donohoe*,²⁹ Colorado became the first common law jurisdiction to reject the finished house/unfinished house distinction. The Donohoes purchased a completed house which Carpenter had built and offered for sale. Within four months after the Donohoes had occupied the house, the walls began to crack. The condition progressively worsened and became so serious that living in the house

24. UNIFORM COMMERCIAL CODE § 2-316; cf. *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

25. See *Schipper v. Levitt and Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

26. LA. CIV. CODE ANN. arts. 2520-48 (1952). Article 2520 defines redhibition as "the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice."

27. LA. CIV. CODE ANN. art. 2521 (1952).

28. See, e.g., *Sterbcow v. Peres*, 222 La. 850, 64 So. 2d 195 (1953); *Bayou Rapides Lumber Co. v. Davies*, 221 La. 1099, 61 So. 2d 885 (1952); cf. *Lorasco v. Custom Built Homes, Inc.*, 144 So. 2d 459 (La. App. 1962).

29. 154 Colo. 78, 388 P.2d 399 (1964).

became hazardous to the Donohoe family. Donohoe sued for fraudulent concealment and breach of warranty. On the issue of implied warranty, the court discussed the *Miller* distinction:

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.³⁰

The court stated its holding in the following terms:

[T]he implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that the builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation.³¹

In *Schipper v. Levitt and Sons, Inc.*,³² a tort action based on an injury resulting from a defective water heater, the defendant builder contended that since the house was already completed before the purchaser agreed to buy it, there was no implied warranty of workmanship and habitability. The New Jersey court, indicating that sound judicial reasoning demanded an implied warranty, at least where the vendor was the builder, notwithstanding the fact that the house was complete, declined to follow defendant's reasoning in this situation because a serious risk of personal injury, rather than merely defective equipment, was present. The decision represents an extension of the tort concept of absolute liability:

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 as they were step by step in *Henningsen and Santor*. We consider that there are no meaningful distinctions between *Levitt's* mass production and sale of homes and the mass production and sale of automobiles and that pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles of *Henningsen and Santor* should be carried over into the realty field, at least in the aspect dealt with here.³³

30. *Id.* at 81, 388 P.2d at 402.

31. *Id.*

32. 44 N.J. 70, 207 A.2d 314 (1965).

33. *Id.* at 81, 207 A.2d 325. In reaching its decision, the *Schipper* court traced the law of absolute liability:

[T]hat law has moved from *MacPherson* (216 N.Y. 382, 111 N.E. 1050 (1916)), where negligence principles were applied to sustain liability, to *Henningsen* (32 N.J. 358, 161 A.2d 59 (1960)), where a breach of an implied warranty

Although this decision was limited to tort liability in a mass produced house, it seems likely that New Jersey will recognize an implied warranty in sales of all new houses.

Maryland has strictly applied the traditional common law doctrine of caveat emptor in the sale of realty.³⁴ As indicated earlier, this rule is both unreasonable and unfair. The commercial world has changed since the bazaar era of the early 1600's, and the law must adapt itself to the change. The question remains, however, as to how this change should be accomplished. The appeal for voluntary action of the builders themselves to provide express warranties has proven fruitless.³⁵ FHA and VA requirements are minimal and do not result in the desired warranty.³⁶ Notwithstanding the decisions discussed above, the courts in general have been very reluctant to do away with caveat emptor in the sale of realty. The reasoning behind this reluctance is illustrated by *Levy v. C. Young Construction Co.*,³⁷ where the plaintiff purchased a newly constructed house and subsequently found defects in the construction of the foundation, which required extensive repairs to the sewer pipes. The court rejected the doctrine of implied warranty:

Were plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability.³⁸

The court was correct in noting that problems would arise were such a warranty imposed on the builder-vendor, but the consideration stated here should be of little consequence in view of the fact that it also exists in the sale of chattels, in which area the law of implied warranty has never been more far-reaching and protective.

The legislature, rather than the court, is probably in the best position to formulate and resolve the legitimate problems arising from the recognition of an implied warranty of habitability in the sale of realty.

of merchantability was the basis for holding Chrysler liable for injury caused by a defective automobile, to Santor (43 N.J. 52, 207 A.2d 305 (1965)), where strict liability was applied to hold the manufacturer of a defective rug liable to a customer who purchases it from a retail dealer.

Id. at 80, 207 A.2d at 324. See also Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

34. See *Gilbert Construction Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957), noted in *Implied Warranties in the Sale of Realty*, 18 MD. L. REV. 332 (1958).

35. See Dunham, *Vendor's Obligation As to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953). The National Association of Home Builders rejected a warranty of workmanship and quality of materials and accepted instead a weak and, for all practical purposes, useless Home Owner's Service Policy.

36. See Note, *Implied Warranties in the Sale of Realty*, 18 MD. L. REV. 332, 338 n.18 (1958), setting out the FHA form which covered Gross's purchase in *Gilbert Const. Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957).

37. 46 N.J. Super. 293, 134 A.2d 717 (App. Div. 1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958). The present validity of this decision is doubtful in light of the subsequent decision in *Schipper*.

38. *Id.* at 295, 134 A.2d at 719.

Of primary importance to the vendor is the length of time for which he would be subject to liability under the warranty.³⁹ Any prescription would of necessity be arbitrary (and would most likely represent a political compromise), but a reasonable time could be determined. The designated length of time should afford the purchaser protection from defects which do not manifest themselves immediately, but the scope of the warranty should not be so broad as to subject the vendor to liability for defects which are the results of normal wear and tear.

Another problem involves the relationship of the parties. To whom shall the builder-vendor of a house be held liable? Where the plaintiff is suing on contract theory for damage to the property, privity of contract between the builder-vendor and the current vendee would seem essential;⁴⁰ but where personal injury is involved, privity should be unnecessary since the suit would be in tort, not on the contract.⁴¹ The various reasons advanced for the lack of a privity requirement in suits by persons injured by chattels against the manufacturer have recently been summarized:⁴²

(1) The manufacturer should be responsible for the defects which cause injuries to those who could foreseeably be expected to use the product since the manufacturer is in the best position to comprehend the intricacies of his product;

(2) The manufacturer should have the responsibility of making the product reasonably safe since the consumer has no control over the precautions the manufacturer takes in making his product;

(3) The life and health of the consumer is best insured by placing liability on the manufacturer;

39. Several writers have suggested various limits: Bearman, *Caveat Emptor in Sales of Realty — Recent Assault Upon the Rule*, 14 VAND. L. REV. 541, 576 (1961), suggests a one year period from the time the deed is delivered or the vendee takes possession, whichever occurs first, on the ground that one year represents a full seasonal cycle which would bring out any defects at the time of the sale. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 652 (1965), proposes a five year limit from the date of sale, regardless of when the defect is discovered by the buyer. One student note, *Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings*, 43 DENVER L.J. 379, 385 (1966), suggests that a longer period should be established for a defect arising from failure to meet building code requirements (such as the failure to construct a proper foundation) than for a defect which arises from unforeseen circumstances (such as water seeping into a basement due to a rising water table). Another, *Implied Warranties in the Sale of Realty*, 18 MD. L. REV. 332, 337 (1958), suggests a one year limit from the date of delivering of deed to the buyer.

The Louisiana statute provides for a one year limitation dating from the sale. LA. CIV. CODE ANN. arts. 2534, 2546 (1952).

The UNIFORM COMMERCIAL CODE permits the plaintiff to bring an action for breach of implied warranty of merchantability within four years from the seller's tender of delivery. UNIFORM COMMERCIAL CODE § 2-725.

40. It is a basic rule of contracts that an essential element of a cause of action on a contract, or based on contractual theory of liability, is privity of contract, in the absence of a third party beneficiary situation. See 2 S. WILLISTON, CONTRACTS § 347, at 794 (3d ed. 1959).

41. See W. PROSSER, TORTS § 97, at 681 (3d ed. 1964). In *Schipper v. Levitt and Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), the New Jersey court allowed tort recovery in the absence of privity where the original vendee lived in the house for two years and then leased to one of the plaintiffs.

42. Note, 44 N.C.L. REV. 236 (1965).

(4) The risk of loss is more easily borne by the manufacturer since he can protect himself by procuring insurance, and then spread the cost of that insurance among his customers.

It is submitted that these policy reasons are equally applicable in the sale of realty as in the sale of chattels and, therefore, that lack of privity should not bar a suit based on an implied warranty of fitness for habitation.

A third problem is the degree of defect needed to constitute a breach of warranty. This issue continues to cause difficulty in the sale of goods area in which the design of automobiles is one current problem.⁴³ A minimal rule in the real estate field would be to allow rescission where the defect or combination of defects renders the house unfit for normal human habitation and to allow an action for damages resulting from a defect which resulted from less than reasonable workmanship.

Where the house is completed prior to sale, the fourth problem arises. To what extent should a buyer of a completed house be protected? In the sale of chattels, if the buyer inspects the goods before agreeing to buy, the UCC eliminates implied warranties "with regards to defects which an examination ought in the circumstances to have revealed."⁴⁴ Such a rule applied to real estate sales would retain some distinction between finished and unfinished houses, but the distinction would become logically supportable on a realistic and just basis.

The final major problem concerns the legal effect of disclaimers which builders might write into the contracts. Once again, borrowing from the law of sales of chattels would probably yield the best starting point. The UCC demands that the buyer's attention be drawn to the exclusion of warranties and that the seller make it clear that there is no implied warranty.⁴⁵ Some disclaimers should be prohibited altogether; for example, disclaimer of liability for personal injury should not be permitted.⁴⁶ In addition, the builder-vendor should be permitted to disclaim liability only if he sustains the burden of proving that the buyer actually knew of the disclaimer and that the buyer not only understood the general qualitative nature of what he was giving up but also had some reasonably accurate idea of the likelihood of occurrence and potential severity of the disclaimed risk.⁴⁷

CONCLUSION

As the purchaser's gamble has been removed in the acquisition of chattels, so must it be removed in real estate transactions. The absurdity of implying a warranty only in sales of uncompleted new homes is exceeded only by the absurdity of the continued application

43. See Note, *Manufacturer's Liability for an "Uncrashworthy" Automobile*, 52 CORNELL L.Q. 444 (1967); 80 HARV. L. REV. 688 (1967).

44. UNIFORM COMMERCIAL CODE § 2-316(3) (b).

45. UNIFORM COMMERCIAL CODE § 2-316(3) (a). Cf. UNIFORM COMMERCIAL CODE § 2-302; *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960).

46. See *Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 654 (1965).

47. Cf. *Franklin, When Worlds Collide: Liability and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 1008 (1966).

of caveat emptor in the sale of realty which is the position still followed in many jurisdictions, including Maryland. Regretfully, only a few jurisdictions have realistically approached the problem and overcome the force of stare decisis by recognizing an implied warranty in the sale of completed as well as uncompleted new homes. Many problems and questions of significant difficulty will arise as this position is adopted. Yet, as Professor Jaeger states: "It would be much better if this enlightened approach were generally adopted . . . for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years."⁴⁸ Too many times an unsophisticated buyer of a new house has accepted an inferior product and suffered the consequence of having no remedy for damages which have resulted from subsequently appearing defects. There is no logical reason why a buyer should be given protection when he purchases even the cheapest chattel, yet be totally without protection when he acquires a new house, which is likely to be the largest single investment he will ever make.

48. 7 S. WILLISTON, CONTRACTS § 925(A), at 818 (3d ed. 1963).