Implied Warranties in New Home Sales–Is the Seller Defenseless

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IMPLIED WARRANTIES IN NEW HOME SALES—IS THE SELLER DEFENSELESS?

I. INTRODUCTION

The last fifty years have witnessed the rapid development of an implied warranty protection for purchasers of new homes. In seeking to better protect the new home buyer the courts have largely discarded the long-criticized common-law doctrine of caveat emptor. Ironically, this trend may only have succeeded in replacing one inequity with another. With the buyer now protected by sweeping remedies for an imperfect bargain, courts adopting a theory of implied warranty as a basis for imposing liability on vendors of new homes have described the protection in a number of ways, including fitness for habitation, F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963), fitness for habitation and workmanlike construction, Carpenter v. Donohue, 154 Colo. 78, 388 P.2d 399 (1964), workmanlike construction, Whaley v. Milton Constr. & Supply Co., 241 S.W.2d 23 (Mo. Ct. App. 1951), fitness for intended use and reasonably good and workmanlike construction, McKeever v. Mercaldo, 3 Pa. D. & C. 2d 188 (1954), and fitness for purpose and workmanlike construction, Harrison v. Heagy, 81 Dauph. Co. 7, ex sus. 82 Dauph. Co. 19 (1963). For purposes of this Note, the various denotations will be treated under the broader topic of implied warranties, unless otherwise noted.

2. Of the forty-one jurisdictions that recognize some form of implied warranty protection, thirty-seven have done so by judicial decision. See Shedd, The Implied Warranty of Habitability—New Implications, New Applications, 8 REAL EST. L.J. 291, 303-306 (1980). Two states, Maryland and Louisiana, have recognized an implied warranty by statute. Md. REAL PROP. CODE ANN. § 10-203 (Michie 1981); LA. CIV. CODE ANN. arts. 2520 et seq. (West 1952)(incorporating the civil-law doctrine of redhibiton). Only two states, Georgia and Virginia, have rejected implied warranty protection. The remaining eight—Delaware, Hawaii, Maine, Massachusetts, Montana, Nevada, New Mexico, and Wisconsin—have not yet addressed the issue. See Shedd, supra, at 303-306.


has the seller been left defenseless?

This Note examines the historical development of the implied warranty doctrine and the status of potential defenses. Conclusions drawn from this examination suggest that the vendor of new homes has, in recent years, become a virtual insurer of new home quality.

II. ORIGIN AND DEVELOPMENT OF THE IMPLIED WARRANTY

A. In General

The doctrine of caveat emptor dominated sales of new homes in both the United States and England well into the twentieth century. This common-law doctrine was premised on the transaction's arm-length nature and the parties' supposedly equal bargaining position. Presumably, the buyer had both the opportunity and the means to inspect the property prior to purchase. Thus, if the circumstances accompanying the transaction gave rise to suspicion, the buyer theoretically could negotiate an express warranty with the seller. Until the 1930s these antecedent safeguards were the buyer's only protection. A dissatisfied purchaser usually had no remedy because the seller enjoyed a near-absolute defense under caveat emptor.

Sellers also enjoyed an equally formidable defense in the common-law doctrine of merger. Under this rule, the sales contract merged into the deed accepted by the buyer. The deed's provisions governed in the event problems arose, and the frequent absence of specific contractual covenants regarding home

10. Under caveat emptor the buyer was protected from fraudulent nondisclosure. To recover damages under this theory, the buyer was required to prove that the seller was aware of the defect at the time of sale. Id. at 644.
warranties often left the purchaser without a remedy.\textsuperscript{11} Modern realty practices aggravated the obvious inequities of the merger and \textit{caveat emptor} doctrines.\textsuperscript{12} These inequities ultimately prompted courts to recognize an implied warranty as a means of protecting the new home buyer.\textsuperscript{13}

\textbf{B. In England}

An implied warranty in new home sales was first recognized in the 1931 English case of \textit{Miller v. Cannon Hill Estates, Ltd.}\textsuperscript{14} There a newly finished house was made uninhabitable by seepage. The buyer brought an action against the seller, and the court awarded the buyer damages under an express warranty theory.\textsuperscript{15} The decision’s true significance, however, is found in the following dicta:

\begin{quote}
[I]t is a matter of very little moment whether there was or whether there was not an express warranty as to the condition of the material or the nature of the workmanship which should be used in this house, because . . . it is plain from the whole of the facts of the case that the law will imply a warranty that the house which was to be built by the defendants for the plaintiff should be a house which was habitable and fit for human beings to live in.\textsuperscript{16}
\end{quote}

This sentence eventually became the supporting authority for the American adoption of the implied warranty theory.\textsuperscript{17}

The \textit{Miller} dicta was extended to cover sales of substantially completed homes in \textit{Perry v. Sharon Development Co.}\textsuperscript{18} The apparent rationale behind these decisions was that the

\begin{flushleft}
\textsuperscript{11} Note, supra note 7, at 250.  \\
\textsuperscript{12} The post-World War II housing boom led to a new class of participants in real estate sales: builder-vendors. This housing boom was the result of an increased demand for housing, a demand that also contributed to the large number of vendors who purchased new houses in haste without a proper inspection. Bearman, supra note 4, at 542.  \\
\textsuperscript{14} [1931] 2 K.B. 113.  \\
\textsuperscript{15} Note, supra note 7, at 251 n.20.  \\
\textsuperscript{16} [1931] 2 K.B. at 120.  \\
\textsuperscript{17} Shedd, supra note 2, at 294.  \\
\textsuperscript{18} 4 All E.R. 390 (C.A. 1937).
\end{flushleft}
buyer's reliance on the builder's expertise was more pronounced in the sale of an uncompleted home because the buyer was unable to make an inspection. Thus, the buyer was at the seller's mercy, a problem the implied warranty was designed to remedy. The unfairness of the English Rule, as it became known, was that the purchaser of a completed home was denied similar protection.

C. In the United States

Initially, American courts were unresponsive to the English implied warranty theory. As in England, the doctrine of caveat emptor was firmly entrenched in this country and continued to remain the near universal rule despite strong arguments from aggrieved buyers. Nevertheless, the housing boom that followed World War II added new impetus to the movement toward implied warranty protection. The drastically increased housing demand led to a significant reduction in the quality of new homes. Low quality housing flourished in the post war seller's market because home buyers were purchasing in haste with little desire or opportunity to inspect the property. Though no remedy was available at law, aggrieved buyers turned to the courts for assistance.

American courts did not begin to view the implied warranty as a plausible solution to the buyer's predicament until the late 1950s. In the landmark decision Vanderschrier v. Aaron, the Ohio Court of Appeals became the first American court to adopt the English rationale for an implied warranty. As in the En-

20. Id. at 251.
21. Louisiana, with its civil-law doctrine of redhibition, was the sole exception. See supra note 2.
22. See Jaeger, The Warranty of Habitation (pt. 2), 47 CHI.-KENT L. REV. 1 (1970); Note, Warranties in the Uniform Land Transactions Act of 1975—Progression or Retrogression for Pennsylvania? 49 TEMPLE L.Q. 162 (1975). Buyers advanced common arguments with mixed success, including: (1) negligent construction by the builder; (2) fraud or misrepresentation; and (3) failure of the builder to notify the buyer of potential harm. See Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1962); Shedd, supra note 2, at 292.
24. Id.
26. Prior to Vanderschrier, several courts had discussed the value of implied warranties, with a few judges favoring the doctrine. See, e.g., Lutz v. Bayberry-Huntington,
glish cases, Vanderschrier involved the sale of an unfinished home. The builder's failure to properly connect a sewer line had caused substantial flooding in the dwelling, rendering it uninhabitable. Lacking any American authority to justify awarding damages to the buyer, the court stated: "In the law of England, we find the rule to be that, upon the sale of a house in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner." This rule, reasoned the court, was the better measure of the buyer-seller relationship. The court went on to adopt the "unfinished house" exception to caveat emptor and awarded damages to the buyer. However, the court in Vanderschrier indicated it would adhere to the doctrine of caveat emptor when a completed house was involved.

Shortly after Vanderschrier, the Washington Supreme Court also adopted the "unfinished house" exception to caveat emptor. Other jurisdictions, however, were less receptive to the implied warranty theory, prompting many buyers to argue innovative theories designed to circumvent caveat emptor rather than force a confrontation. In Voight v. Ott, for example, the purchaser bought a new home containing a faulty heating and air conditioning system. He argued that the defective system was personalty and thus covered by implied warranties accompanying the sale of such goods. The Arizona Supreme Court disagreed and, in holding the appliances to be fixtures, upheld caveat emptor in the sale of real estate.

A major development in the evolution of the implied warranty theory came in the 1960s when courts extended the doctrine to cover sales of newly completed homes. In 1964 the Colorado Supreme Court rejected the so-called "limited warranty" of

27. 103 Ohio App. at 341-42, 140 N.E.2d at 821.
28. The courts subsequently advanced two reasons for limiting implied warranty protection to situations involving the sale of unfinished homes. First, the buyer had no opportunity for a complete inspection, and second, as a general rule one who contracts to perform in accordance with his own specifications impliedly warrants the fitness of his work. Haskell, supra note 9, at 640. See also Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).
29. 103 Ohio App. at 343, 140 N.E.2d at 821.
32. Id. at 135, 341 P.2d at 928. See Jaeger, supra note 22.
Vanderschrier and extended implied warranty protection to buyers of completed homes in Carpenter v. Donohue: 33

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 home 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. 34

The idea was by no means novel; as early as 1957 New Jersey Judge Waesche had urged most forcefully for such an extension in dissenting from Levy v. C. Young Construction Co. 35 New Jersey soon followed Colorado and extended the implied warranty to cover sales of completed new homes in Schipper v. Levitt & Sons, Inc. 36 Schipper was a landmark decision in several respects. New Jersey became the second American jurisdiction to extend the implied warranty to completed homes, 37 and the opinion’s harsh criticism of caveat emptor foreshadowed the rapid erosion of the doctrine’s predominance in home sales. 38 More importantly, however, the decision extended implied warranty protection to injured third parties not in privity with the seller. The buyer in Schipper had leased the home to another person eighteen months after its completion, and the lessee’s child was badly scalded by a hot water faucet not properly equipped with a mixing valve. In focusing on the realities of mass production, the court rejected the seller’s privity defense and permitted recovery. 39

Other major developments during the 1960s included the extension of implied warranty protection to commercial buildings 40 and to subsequent purchasers not in privity with the

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33. 154 Colo. 78, 388 P.2d 399 (1964). Although the Colorado Supreme Court awarded recovery based on fraud, it emphasized the completed home distinction made in implied warranty cases. See Note, supra note 3, at 1057 n.24.
34. 154 Colo. at 83, 388 P.2d at 402.
37. This was accomplished through implication, since the court ignored the completed home distinction. See Haskell, supra note 9, at 647-48.
38. Note, supra note 22, at 175.
39. 44 N.J. at 95, 207 A.2d at 328.
builder-vendor.41 By 1970 the implied warranty was recognized as the modern rule,42 with caveat emptor largely rejected. The scope of the warranty also continued to grow, extended by various courts to include a house’s water supply,43 septic tanks,44 air conditioning systems,45 and even side lot restrictions.46 The seller’s once strong position had been considerably diminished, and his predicament was aggravated by judicial reluctance to impose limits on the liability.47 By the early 1980s only two facts were certain: The scope of the buyer’s implied warranty protection was expanding and the seller, irrespective of fault, no longer possessed a reliable, universally recognized defense against suits brought by dissatisfied buyers. The situation was an ironic reversal of the one existing only twenty-five years before.

D. In South Carolina

South Carolina’s treatment of the implied warranty in new home sales illustrates the seller’s mounting dilemma. Prior to 1968 South Carolina recognized no implied warranty in the sale of new homes.48 Several times during that year, however, the South Carolina Supreme Court expressed dissatisfaction with the application of caveat emptor to home sales before finally recognizing an implied warranty.

Dicta in Justice Legge’s opinion in Frasher v. Cofer49 hinted at the court’s growing disenchantment with caveat emptor: “The majority [of states] exempt the vendor from liability for defects in the premises existing at the time of the conveyance, in the absence of an express warranty; but this rule has been the sub-

47. See, e.g., Sims v. Lewis, 374 So.2d 298 (Ala. 1979).
ject of much criticism...."50 Still, it was unclear at the time whether Frasher signaled the court's willingness to create an implied warranty in such a situation. A stronger indication came later the same year in Rogers v. Scyphers.51 The court again suggested in dicta that it would look favorably upon a cause of action predicated on an implied warranty:

While no implied warranty is asserted or relied on in the instant case, we have included in the foregoing citations several cases wherein liability was predicated solely on the theory of implied warranty, simply to show the trend of the law in this field. The cases included which hold the builder-vendor liable for negligence in construction...reach, we think, legally sound and just results.52

The South Carolina Supreme Court finally removed all doubt by creating an implied warranty in new home sales in Rutledge v. Dodenhoff.53 There the court held a builder-vendor liable for the defective installation of a septic tank.54 Relying on the dicta in Rogers, the court stated that "in the sale of a new home by a builder-vendor, there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation."55 Furthermore, the court rejected the builder's argument that compliance with municipal regulations precluded implied warranty liability.56 The implied warranty, reasoned the court, bound the builder absolutely for the warranted qualities; any deficiency resulted in builder-vendor liability regardless of fault.57 In the years since Rutledge, South Carolina has emerged as one of the most progressive states in protecting new home purchasers.

The supreme court did not resolve the issue of nonbuilder-vendor liability58 until six years later in Lane v. Trenholm

50. 251 S.C. at 115, 160 S.E.2d at 561.
52. 251 S.C. at 134, 161 S.E.2d at 83.
54. 264 S.C. at 410-11, 175 S.E.2d at 792-93.
55. Id. at 414, 175 S.E.2d at 795.
56. Id., 175 S.E.2d at 795.
57. Id., 175 S.E.2d at 795.
58. For a discussion of the distinctions made between builder-vendors and other
Building Co. Lane involved a buyer's suit against the developer of a subdivision for damage caused by a defective septic tank. Rejecting the developer's nonbuilder defense, the court held that the implied warranty springs directly from the sale and does not require the buyer to rely on the construction expertise of the seller. Rather, the court reasoned that because both the buyer and seller of a home can foresee the home's intended use, namely habitation, the implied warranty operates to fulfill the parties' reasonable expectation that the dwelling is suitable for that purpose. Also, the court in Lane relied extensively on South Carolina's personality law rule of caveat venditor, a rule premised on the idea that a "sound price warrants a sound commodity." The South Carolina Supreme Court extended implied warranty protection to subsequent purchasers in Terlinde v. Neely, thus eliminating privity as a seller's defense. Citing Edward's of Byrnes Downs v. Charleston Sheet Metal Co., the court indicated that the correct inquiry was not privity, but rather the foreseeability of the home's intended use:

In our mobile society, it is clearly foreseeable that more than the original purchaser will seek to enjoy the fruits of the builder-vendor's efforts. . . . By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.

In Jackson v. River Pines, Inc., however, the court de-

59. 267 S.C. 497, 229 S.E.2d 728 (1976). In Lane, the developer who constructed the home did not originally intend to sell it. Instead, the developer delegated that responsibility to the builder, who in turn executed a mortgage in favor of the developer. When the builder went out of business, however, the developer foreclosed to protect his interest and subsequently sold the home to the plaintiff.
60. Id. at 497, 229 S.E.2d at 728.
61. Id. at 503, 229 S.E.2d at 731.
63. 267 S.C. at 502, 229 S.E.2d at 730.
64. 275 S.C. 395, 271 S.E.2d 768 (1980).
66. 275 S.C. at 399, 271 S.E.2d at 770.
clined to extend implied warranty protection to sales of undeveloped land.\textsuperscript{68} Citing Lane for the proposition that an implied warranty arises from an intended use, the court reasoned that no implied warranty of fitness for a particular purpose was present in the sale of unimproved land because such a sale does not involve a clear objective.\textsuperscript{69}

Similar retrenchment was not evident in the court's next pronouncement on the subject, Brown v. Sandwood Development Corp.\textsuperscript{70} In Brown, the court held a vendor-subdivider of residential lots liable to his purchasers for damage caused by a negligently constructed drainage spillway.\textsuperscript{71} The court concluded that under the circumstances the spillway transformed the transaction into a sale of improved realty to which caveat venditor applied.\textsuperscript{72} In suggesting that a seller waives the protection of caveat emptor by taking any action sufficient to give the land an intended use, Brown marks a significant qualification of the Jackson decision. Thus, it appears that any improvement directed toward preparing land for sale as a residential lot may trigger implied warranty protection.

Brown is also significant in a second respect: it adopts the discovery rule in any action involving negligence in building construction.\textsuperscript{73} Under this rule, the buyer is held responsible for knowledge of defects only from the time he discovers or should have discovered them. When this rule is combined with the reasonableness test of Terlinde, which governs the duration of builder-vendor liability for latent defects, the limitations period of seller liability becomes uncertain, for discovery may occur at any time after purchase.\textsuperscript{74}

\textsuperscript{68} Id. at 31, 274 S.E.2d at 913.
\textsuperscript{69} Id., 274 S.E.2d at 913.
\textsuperscript{70} 277 S.C. 581, 291 S.E.2d 375 (1982).
\textsuperscript{71} Id. at 581, 291 S.E.2d at 375.
\textsuperscript{72} Id. at 585, 291 S.E.2d at 377.
\textsuperscript{73} Id. at 583, 291 S.E.2d at 376.
III. THE SELLER'S DEFENSES

A. Introduction

As prevalent case authority indicates, the implied warranty in new home sales is an uncertain doctrine, particularly from the builder-vendor's standpoint. A buyer can be assured that courts recognizing such a warranty will protect his expectations, but a builder-vendor cannot ascertain the precise extent of his liability or the efficacy of certain methods available for limiting that liability. Some commentators have suggested that the law in this area has gathered too much momentum in shifting the burden of loss from one party to the other, and that it now tends to work an injustice on the seller. The remainder of this Note will focus on this criticism in evaluating the current status of defenses most often asserted by builder-vendors in implied warranty actions.

B. Possible Builder-Vendor Defenses

1. Disclaimers

Much of the litigation over implied warranties in home sales has involved the seller's use of "as is" disclaimers. As a general rule, the courts have not enforced these provisions, but no court has held disclaimers in home sale contracts to be invalid as a matter of public policy. Thus, disclaimers in home sale contracts are potentially of some value to the cautious builder-vendor.

Numerous courts have found that disclaimers are an acceptable means of limiting vendor liability under an implied war-
ranty. In most opinions, however, the particular disclaimer in issue was held to be an ineffective bar to the buyer’s recovery because stringent requirements have been imposed on their use. Generally, a disclaimer is valid only if (1) it is clear and conspicuous; (2) it is specific about what it disclaims; (3) its wording is sufficient to inform the buyer of the importance of the rights he waives; and (4) the seller convinces the court that the disclaimer was a negotiated term clearly understood by the buyer. All doubts are resolved against the seller, and disclaimers are strictly construed.

Much of the litigation considering these requirements has focused on the disclaimer’s language, rather than the parties’ conduct, and has involved standardized (general or “boiler-plate”) disclaimer provisions. A few courts have upheld these provisions. In Tibbitts v. Openshaw, for example, the Utah Supreme Court found the following “as is” disclaimer sufficient to bar the buyer’s recovery against a builder-vendor because the buyer failed to prove that the disclaimer did not reflect the parties’ intent:

It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the property in its present condition and that there are no representations, covenants or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto.

The Texas Supreme Court upheld an equally broad disclaimer

79. See, e.g., infra notes 85-89 and accompanying text.
85. 18 Utah 2d 442, 425 P.2d 160 (1967).
86. Id. at 443-44, 425 P.2d at 161-62.
clause in G-W-L, Inc. v. Robichaux. There the court stated:

The language in the contract that states "no . . . warranties, express or implied, in addition to said written instruments" could not be clearer. The parties to a contract have an obligation to protect themselves by reading what they sign. Unless there is some basis for finding fraud, either actual or constructive, the parties may not excuse themselves from the consequences of failing to meet that obligation.

Despite these decisions, it is difficult to formulate all-purpose language immune from attack under all circumstances because the majority of courts have been less than receptive to "boilerplate" disclaimers. One court has even stated that it would be unreasonable under any circumstances to conclude that a purchaser had waived his right of recourse for latent structural defects. While no other court has gone that far, most courts do require a much higher degree of specificity in these disclaimers than is provided by standard boilerplate provisions. Several courts, for example, have indicated that failure to include the terms "warranty of habitability" or "warranty of workmanlike performance" in a disclaimer will preclude its enforcement as a waiver. One court has also held that specific disclaimer terms are not conclusive proof that a buyer has waived his right of recourse against a seller, but merely serve as rebuttable evidence that such a relinquishment was negotiated.

A few courts have demonstrated a willingness to look beyond a disclaimer's terms to the parties' conduct in determining whether a disclaimer effected a contractual waiver. In Colsant v. Goldschmidt, the Appellate Court of Illinois stated that merely because a disclaimer was conspicuous did not mean the seller had carried his burden of proving the home buyer had been

88. 643 S.W.2d 392 (Tex. 1982).
89. Id. at 393 (citations omitted).
aware, at the time the sale was consummated, that no implied warranty attached. 95 Although the court in Colsant offered no substantive guidelines as to what proof was sufficient to meet this burden, it apparently contemplated the seller's use of extrinsic evidence of the parties' negotiations. A similar implication arises from Sloat v. Matheny, 96 in which the Colorado Supreme Court held that the seller's oral refusal to provide an express warranty did not constitute a valid disclaimer. 97

As the foregoing discussion indicates, the use of printed disclaimers in home sale contracts involves much uncertainty. Several states, perhaps wary of the confusion inevitably accompanying litigation over the issue, have enacted strict enforcement guidelines for disclaimer provisions. For example, a Maryland statute provides:

Exclusion or modification of implied warranty — Neither words in the contract of sale, nor the deed, nor merger of the contract of sale into the deed is effective to exclude or modify any implied warranty. However, if the contract of sale pertains to an improvement then completed, an implied warrant [sic] may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to exclusion or modification, and the terms of the new agreement with respect to it. 98

Most state statutes governing implied warranties in home sale contracts were derived from the Uniform Land Transactions Act (ULTA). 99 The National Conference of Commissioners on Uniform State Laws adopted the ULTA in 1975 to provide some measure of uniformity among the states in the law of real estate transfers. 100 The Act was intended to do for the law of real property what the Uniform Commercial Code (UCC) did for the law of personal property. 101 ULTA section 2-309 imposes implied

95. Id. at 56, 421 N.E.2d at 1076.
96. 625 P.2d 1031 (Colo. 1981).
97. 625 P.2d at 1034.
98. MA. REAL PROP. CODE ANN. § 10-203(d) (Michie 1981).
99. For a discussion of the Uniform Land Transactions Act and the warranties it imposes, see Comment, Warranties in the Uniform Land Transactions Act of 1975—Progression or Retrogression for Pennsylvania?, 49 TEMP. L.Q. 162 (1975).
100. Id. at 162.
warranties of suitability and quality of construction against those engaged in the business of selling homes.\textsuperscript{102} Section 2-311 provides that these implied warranties cannot be disclaimed by "general" language.\textsuperscript{103} However, the ULTA and its official comments permit specific disclaimers, if actually negotiated by the parties, as well as exclusive remedies for breach of warranty.\textsuperscript{104} The ULTA also permits the use of a limitations period within which a claim must be asserted, provided actual notice is given to the buyer and the exclusive remedies do not fail in their essential purpose.\textsuperscript{105} Thus, the ULTA substantially preserves the bargaining position of the seller while implementing safeguards for the protection of the buyer.

South Carolina has adopted no statutory provision governing the use of disclaimer clauses in real estate sales contracts, nor has the issue arisen in any reported litigation. As a result, the value of a disclaimer provision to builder-vendors in South Carolina is uncertain.

Since many South Carolina implied warranty decisions cite the Uniform Commercial Code (UCC) for analogous authority,\textsuperscript{106} the supreme court's treatment of disclaimer clauses in cases arising under the UCC may provide some guidance when dealing with the unanswered questions surrounding the use of disclaimer provisions in home sale contracts. Perhaps the most important observation is that South Carolina courts strictly construe contractual provisions limiting the seller's liability in sales governed by the UCC.\textsuperscript{107} Disclaimers are permitted, but in order to be operative they must comply with the stringent requirements of section 36-2-316.\textsuperscript{108} Under this section, a disclaimer provision must be written, conspicuous, and mention by name the warranty to be excluded or modified. The parties' previous course of dealing, usually not applicable in the sale of a home, is

\textsuperscript{102} ULTA § 2-309(b) and comment 1.
\textsuperscript{103} ULTA § 2-311(c) and comment 4. ULTA § 2-311 does not require conspicuous language as does UCC § 2-316.
\textsuperscript{104} ULTA § 2-517.
\textsuperscript{105} ULTA § 2-521.
\textsuperscript{106} See supra notes 48-57 and accompanying text.
also admissible to aid in ascertaining the parties' intent.\textsuperscript{109}

Thus, if South Carolina courts continue to apply UCC concepts in real estate implied warranty actions, it is possible that a builder-vendor could limit his liability by using disclaimer provisions similar to those permitted under the UCC. Although the majority of jurisdictions considering the issue have adopted this approach,\textsuperscript{110} the courts in these same jurisdictions have often held such clauses unconscionable.\textsuperscript{111} Given South Carolina's general disfavor with disclaimers,\textsuperscript{112} the courts in this State would probably reach the same result. In any event, it is possible that such a disclaimer provision, if carefully drafted, would be effective in precluding a buyer's recovery; at least one court applying the UCC by analogy has so held.\textsuperscript{113}

No prudent builder-vendor should rely solely on a contractual waiver for protection from implied warranty liability.\textsuperscript{114} The unsettled nature of the law, particularly in South Carolina, makes the value of a disclaimer questionable at best. Nevertheless, a seller should routinely incorporate such provisions in his sale contracts to obtain every possible benefit. Also, the cautious builder-vendor should take appropriate steps to ensure that the disclaimer achieves the high degree of specificity that other jurisdictions require. However, negotiation concerning specific disclaimer provisions could be self-defeating. It is unlikely that a fully informed home buyer would willingly waive his right to recourse against the seller for unknown defects without a substantial concession in the price.

2. Limited Express Warranties

Builder-vendors have also sought to limit the implied warranty through carefully drafted written warranties intended to provide the buyer limited protection in lieu of the more expansive implied warranty. Although one commentator views limited express warranties as a viable alternative,\textsuperscript{115} a majority of the

\textsuperscript{110} See supra notes 91-93 and accompanying text.
\textsuperscript{111} Id.
\textsuperscript{112} See supra note 107 and accompanying text.
\textsuperscript{113} Tibblitts v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967).
\textsuperscript{114} Comment, supra note 74, at 596.
\textsuperscript{115} McNamara, supra note 2, at 50.
courts ruling on the issue have refused to permit express warranties to limit the protection implied by law.

In Tassan v. United Development Co., the Appellate Court of Illinois considered whether an express limited warranty covering the same subject as the implied warranty of habitability operated to displace the implied warranty and render a buyer's claim for damages nonactionable. The express warranty limited the seller's liability to defects reported within one year after the date of purchase. Noting the absence of case law directly on point, the court cited cases applying the UCC for the proposition that "an express warranty covering the same subject matter as an implied warranty of merchantability or an implied warranty of fitness for a particular purpose does not render either of those implied warranties nonactionable." Further, the court reasoned that since the implied warranty of habitability covers only latent defects it would be inequitable to limit the buyer's recovery to only those defects discovered within one year of sale because most latent defects do not appear until much later. Thus, the court rejected the defendant-seller's argument that the express warranty contained in the sales contract relieved it of any liability for defects reported after the one-year period expired.

The Appellate Court of Illinois also rejected the displacement defense in Herlihy v. Dunbar Builders Corp. There, unit owners of a condominium complex brought suit against their vendor for failing to repair defects in the common areas. The court held that the one-year express warranty could not limit the seller's responsibility because a contrary holding would permit the seller to exclude the implied warranty without proving a knowing and willing disclaimer. The court reasoned that under Illinois law an implied warranty may be disclaimed only

117. Id. at 590, 410 N.E.2d at 910.
119. 88 Ill. App. 3d at 590, 410 N.E.2d at 910.
120. Id., 410 N.W.2d at 910.
122. 92 Ill. App. 3d at 316, 415 N.E.2d at 1228.
through clear and conspicuous language, and that the limited express warranty did not sufficiently appraise the buyer of the restrictions placed on the implied warranty of habitability.

In *Omaha Home for Boys v. Stitt Construction Co.*, the Nebraska Supreme Court applied reasoning in rejecting a builder-vendor’s defense based on a one-year limited express warranty. Unlike the other courts that have rejected the displacement defense, the Nebraska Supreme Court refused to find the limited express warranty ineffective. Instead, the court described the contract provision requiring the builder-vendor to repair defects discovered within one year of substantial completion as “additional protection.” This interpretation was based on a second contract provision which stated that the builder-vendor’s obligation under the contract “shall be in addition to and not in limitation of any obligation . . . prescribed by law.” Thus, although the basis of the opinion is unclear, the court arguably allowed the contract provisions to control. In any event, the Nebraska Supreme Court did not appear receptive to the seller’s attempt to limit the implied warranty’s protection.

The courts’ widespread rejection of the displacement defense lessens the limited express warranty’s attractiveness to builder-vendors. Even though the defense has achieved judicial recognition in only two states, one commentator has stated

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123. See supra note 92.
124. 92 Ill. App. 3d at 317, 415 N.E.2d at 1229.
125. 195 Neb. 422, 238 N.W.2d 470 (1976).
126. Id. at 425, 238 N.W.2d at 473. The court stated that the limited express warranty was “not exclusive and did not bar recovery for defective work discovered more than one year after the date of substantial completion.” Id., 238 N.W.2d at 473.
127. The second contract provision stated in full: “The obligation of the Contractor under this Paragraph 13.2 shall be in addition to and not in limitation of any obligation imposed upon him by special guarantees required by the Contract Documents or otherwise prescribed by law.” Id., 238 N.W.2d at 473 (emphasis added).
129. The only two jurisdictions in which courts have permitted limited express warranties to displace or supplant implied warranties are Louisiana and Tennessee. In *Slack v. Inglehart*, 386 So.2d 967 (La. Ct. App. 1980), the Louisiana Court of Appeal held that under the Louisiana Code, parties to a contract may, by express agreement, limit or diminish the implied in law warranty. *Id.* at 970. See *La. Civ. Code Ann.* art. 2503 (West 1952). As a result, the litigants could have agreed to a limited express warranty, which would govern the seller’s obligations if a defect was discovered. However, Louisiana has a unique civil law system—a fact that may explain that state’s recognition of the displacement defense.

The Tennessee Supreme Court has also recognized the displacement defense. In
that the limited express warranty may offer the cautious seller some protection, provided the warranty is equitable and states that the vendor gives, and the purchaser accepts, the express protection in lieu of any warranty implied by law.130 The greater weight of authority, however, suggests that even a well-drafted express warranty will not displace an implied warranty. Decisions such as Tassan—which cite cases applying the UCC to reject the argument—make the displacement defense unreliable in South Carolina.131 If the seller decides to include a limited express warranty in the sales contract, however, the express warranty should not include a short limitation period. Several courts have focused on arbitrary and unreasonable time limitation periods in rejecting the displacement defense,132 and the South Carolina Supreme Court has been similarly reluctant to impose an arbitrary time restriction on implied warranty protection.133

3. Expiration

Builder-vendors often assert the expiration of the implied warranty’s protection as a third defense.134 Under this defense the seller argues that a statute of limitations bars all implied warranty claims not brought within the prescribed period.

In Duncan v. Schuster-Graham Homes, Inc.,135 the Colorado Supreme Court rejected a builder-vendor’s argument that the Colorado statute of limitations barred an implied warranty

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130. McNamara, supra note 2, at 50.
131. South Carolina cases decided under the UCC support this conclusion. In Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 208 S.E.2d 31 (1974), the South Carolina Supreme Court held that a repair clause in a contract for lease and possible sale of refrigeration equipment did not exclude the seller’s implied warranty of fitness under the UCC. The repair clause required the lessor-seller to replace defective parts for no longer than one year.
132. See supra notes 116-28 and accompanying text.
134. This defense is similar to the limited express warranty designed to terminate one year after sale. See supra notes 116-33 and accompanying text.
claim. The home in question was built in 1968 and sold to a non-litigant shortly thereafter. The builder-vendor repurchased the home in 1969 after the new owner complained of various defects. The plaintiffs then purchased the home later that same year, fully apprised of the previously discovered defects. Other defects were soon discovered; and although the builder-vendor made minor repairs, the major problems were never remedied.\textsuperscript{136} The plaintiff brought suit in 1974 alleging misrepresentation and breach of express and implied warranties. The defendant builder-vendor moved for summary judgment, arguing that the Colorado statute of limitations barred the plaintiffs' claim.\textsuperscript{137}

The Colorado Supreme Court stated that the "plain language" of the statute demonstrated the Colorado legislature's intent to "limit only claims for personal injury or damage to property other than the defective improvement itself."\textsuperscript{138} Based on this interpretation, the court reversed both the trial court and the court of appeals and held that the statute was inapplicable to cases in which "the plaintiff seeks only to receive what the builder promised to deliver, or damages to compensate him for deficiencies in the final product."\textsuperscript{139}

In relying on the "plain language" of the statute, the Colo-

\textsuperscript{136} Id. at 443, 578 P.2d at 638.

\textsuperscript{137} Id. at 444-45, 578 P.2d at 639. The Colorado statute of limitations, 
\textsuperscript{138} Colo. Rev. Stat. \textsuperscript{1973}, section 13-80-127, provided in pertinent part:

\textit{Limitation of actions against architects, contractors, engineers, and inspectors.} (1) All actions against any architect, contractor, engineer, or inspector brought to recover damages for injury to person or property caused by the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within two years after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than ten years after the substantial completion of the improvement to the real property, except provided in subsection (2) of this section.

(2) In case such injury to person or property occurs during the tenth year after substantial completion of the improvement to real property, said action shall be brought within one year after the date upon which said injury occurred.

(4) The limitations provided by this section shall not be asserted as a defense by any person in actual possession or control as owner, tenant, or otherwise of such an improvement at the time any deficiency in such an improvement constituted the proximate cause of the injury for which it is proposed to bring an action.

\textsuperscript{139} 194 Colo. at 446, 578 P.2d at 639 (emphasis in the original).

\textsuperscript{139} Id. at 446, 578 P.2d at 640.
rado Supreme Court focused on the statute’s failure to explicitly impose a time restraint on implied warranty actions. The court noted that other jurisdictions enacting similar legislation have used language that suggested a time limit on implied warranty actions and thus achieved a degree of specificity not apparent in the Colorado statute.\textsuperscript{140} The court quoted as an example a Nevada statute of limitations that provides a six-year limitation.\textsuperscript{141}

The Supreme Judicial Court of Maine has also considered the expiration defense. In \textit{Parsons v. Beaulieu},\textsuperscript{142} the plaintiff brought an action against a contractor for damages resulting from the installation of a septic tank system and the construction of a garage. The contractor argued that the implied warranty of workmanlike construction customarily expired after one year.\textsuperscript{143} The court disagreed, stating that the implied warranty

\begin{itemize}
  \item \textsuperscript{140} See \textit{id. at} 446 n.5, 578 P.2d at 640 n.5.
  \item \textsuperscript{141} The Nevada statute of limitations, \textit{Nev. Rev. Stat.} § 11.205 (1983), provides in pertinent part:
    \begin{quote}
      Actions for damages for injury to person or property or wrongful death caused by deficiency in design, planning, supervision of construction or construction of improvements to real property.
    \end{quote}
    1. No action in tort, contract, or otherwise shall be commenced against any person performing or furnishing the design, planning, supervision or observation of construction, or the construction, of an improvement to real property more than 6 years after the substantial completion of such an improvement, for the recovery of damages for:
      \begin{itemize}
        \item (a) Any deficiency in the design, planning, supervision or observation of construction or construction of such an improvement; or
        \item (b) Injury to real or personal property caused by any such deficiency; or
        \item (c) Injury to or wrongful death of a person caused by any such deficiency.
      \end{itemize}
    \end{quote}
  \item \textsuperscript{142} 429 A.2d 214 (Me. 1981).
  \item \textsuperscript{143} This defense is analogous to the one-year limited express warranties discussed
\end{itemize}
does not expire at the end of an arbitrary time period.\textsuperscript{144}

\textit{Duncan} and \textit{Parsons} reflect the reluctance of courts to impose arbitrary time constraints on the implied warranties accompanying new home sales.\textsuperscript{145} Instead, a majority of the courts apply a reasonableness standard to decide whether the implied warranty was operative when the defect was discovered.\textsuperscript{146} This standard allows a court broad discretion to decide the question based on the peculiar facts of each case. As the interval of time lengthens between the sale and the complaint, however, courts are reluctant to find a breach of warranty\textsuperscript{147} because the implied warranty's duration is not unlimited.\textsuperscript{148}

Thus, the reasonableness test permits at least a theoretical limitation on the implied warranty's duration. Unfortunately, the case law considering the reasonableness standard indicates only what is \textit{not} an appropriate duration for an implied warranty. For example, the courts have universally rejected a one-year limit,\textsuperscript{148} and they will most likely look with similar disfavor on a five-year limit.\textsuperscript{149} One court has even rejected a six-year time limit as an unreasonable warranty period for the installation of a septic system, an improvement which does not affect the dwelling's structural integrity.\textsuperscript{150} Based on these cases, the warranty period for work affecting structural fitness appears likely to approach, if not exceed, a decade.

New Jersey has sought to limit the life expectancy of the implied warranty by statute.\textsuperscript{151} The New Jersey statute provides detailed time limits for the implied warranty attaching to three facets of home construction: (1) a one-year time limit for faulty workmanship or defective materials; (2) a two-year limit for

\textsuperscript{144} 429 A.2d at 218.


\textsuperscript{146} See infra notes 116-28 and accompanying text.

\textsuperscript{147} Parsons v. Beaulieu, 429 A.2d 214, 218 (Me. 1981).


\textsuperscript{149} See supra notes 116-29 and accompanying text.


\textsuperscript{151} Sims v. Lewis, 374 So.2d 298 (Ala. 1979).
faulty installation of furnishings; and (3) a ten-year limit for major construction defects. A corollary provision provides for the extension of warranty periods.153

The absence of both statutory and recognized nonstatutory time limitations on implied warranty actions is most disquieting for builder-vendors in jurisdictions such as South Carolina where both the reasonableness standard154 and the discovery rule are applied to actions involving latent defects in improved real property.155 Under the discovery rule the time period is measured from the date the breach was discovered rather than from the date of the defective installation or construction.156 Although the discovery rule arguably reflects the "more equitable and rational view,"157 it nevertheless permits a significant extension of implied warranty protection because a court may conclude that the warranty was breached when the defect was discovered. Thus, under this approach the duration of the implied warranty is subject to no actual time limitation. Instead, any time limit involved applies only to the period between when the buyer discovers the defect and when he institutes suit. On the other hand, a court could apply the reasonableness standard to determine whether a defect is a breach of warranty or simply the result of normal use and wear. The latter approach is perhaps the better view.

Builders have responded to the absence of time limitations on implied warranty actions through the Home Owner's Warranty (HOW) program. HOW is an alternative to common-law implied warranties. Under HOW the builder "buys" the purchaser a ten-year insurance policy against defects. The policy costs approximately two dollars per thousand dollars of the purchase price.158 The builder bears the responsibility of repairing any defects that appear during the first two years after the sale. The insurer then assumes the responsibility for repairs for the remaining eight years.159 The warranty is transferable to subsequent purchasers, but the ten-year time limit remains in

156. Id. at 583, 291 S.E.2d at 376.
158. See Shedd, supra note 2, at 301-02.
159. Id.
force.\textsuperscript{160}

4. Exercise of Reasonable Care

Several courts have applied a reasonableness standard to decide whether a builder is liable for defects in the ground upon which a home is constructed. In \textit{Stepanov v. Gavrilovich},\textsuperscript{161} for example, the subdividers of a real estate tract successfully asserted a reasonable care defense in an action brought by builders of defective homes.\textsuperscript{162} The developers subdivided a housing project on ground containing significant amounts of permafrost. Prior to development, geologists employed by the developer had conducted soil tests that failed to reveal the presence of permafrost.\textsuperscript{163} After the building contractor completed several homes within the development, the permafrost began to thaw, the soil settled, and the homes were damaged. The contractor repurchased the homes from their buyers and brought suit against the developer for breach of implied warranty and strict liability.\textsuperscript{164} However, the Alaska Supreme Court held that a developer who exercises reasonable care in his work cannot be held responsible for defects he could not have reasonably discovered.\textsuperscript{165}

This holding is motivated in part by our belief that its opposite would lead to an illogical and unjust result. In enacting the Uniform Land Sales Practices Act for Alaska, the legislature clearly intended to impose a system of controls on the actions of large-scale subdividers such as [the defendant]. One of those controls is civil liability when subdividers fail to disclose to a purchaser a physical characteristic of the subdivided land, such as permafrost, which adversely affects the usefulness of the land. But, when the condition is unknown to the subdivider, he is liable only if it is one that he could have learned of through the exercise of reasonable care.\textsuperscript{166}

Although the subdivider, rather than the builder-vendor, as-

\begin{itemize}
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} 594 P.2d 30 (Alaska 1979).
  \item \textsuperscript{162} Id. at 35.
  \item \textsuperscript{163} Id. at 32.
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id. at 35.
  \item \textsuperscript{166} Id. (emphasis added).
\end{itemize}
serted the reasonable care defense in Stepnov, the same defense is arguably available to builder-vendors in suits brought by dissatisfied buyers. In fact, the West Virginia Supreme Court implicitly adopted such a rule in Gamble v. Main. There the court held that the implied warranty did not extend to adverse soil conditions that the builder could not have discovered by the exercise of reasonable care.

The Tennessee Supreme Court has also held that a builder-vendor is not liable for damages caused by defects in the land. In Zack Cheek Builders, Inc. v. McLeod, the court absolved the builder of liability for damages caused by landslides. The landslides were the result of a strong rain, a circumstance over which the builder obviously had no control. However, the Tennessee Supreme Court preferred to focus on the argument that the implied warranty did not apply to disputes over the land itself rather than on the substance of the builder's reasonable care defense. In implied warranty cases Tennessee law requires an allegation that the home itself is defective.

Despite these decisions, a majority of the courts considering the issue have rejected the reasonable care defense when the builder's workmanship is at issue because such a defense is inconsistent with the warranty concept. Under the majority rule the builder-vendor is liable for defects in construction regardless of whether he exercised reasonable care. In Waggoner v. Midwestern Development, Inc., for example, the South Dakota Supreme Court held that a breach of the implied warranty is

167. Two points must be stressed, First, the Alaska Supreme Court's decision rests upon purely statutory authority: The Uniform Sales Practice Act. Second, courts have frequently held builder-vendors liable for the negligence of the independent contractors they employ. See, e.g., Matulunas v. Baker, 569 S.W.2d 791 (Mo. Ct. App. 1978). On the other hand, courts have often held independent contractors not liable to the builder. See Wood-Hopkins Contracting Co. v. Masonry Contractors, Inc., 235 So.2d 548 (Fla. Dist. Ct. App. 1970)(Mason not liable for latent defects in bricks not discernible through exercise of reasonable care).

169. Id. at 115.
170. 597 S.W.2d 888 (Tenn. 1980).
171. Id. at 894.
172. Id. at 889.
173. Id. at 892. But see Hesson v. Wahmsley Constr. Co., 422 So.2d 943 (Fla. Dist. Ct. App. 1982)(implied warranty extends to both house and lot if sold as a package).
174. 597 S.W.2d at 892.
175. 83 S.D. 57, 154 N.W.2d 803 (1967).
sufficient to justify recovery regardless of whether the seller is free of negligence or fault.\textsuperscript{176} This "strict liability" position has also found strong support in Oregon. In \textit{Chandler v. Bunick},\textsuperscript{177} the Oregon Supreme Court held that a builder is liable for damages caused by a breach of implied warranty even when he has exercised all reasonable, or even possible, care.\textsuperscript{178}

South Carolina also favors a strict liability approach to the builder-vendor's responsibility for supplying the warranted qualities. As the South Carolina Supreme Court stated in \textit{Rutledge v. Dodenhoff},\textsuperscript{179} "there [is] an implied warranty which [binds builder-vendors] absolutely for the existence of the warranted qualities in the building, \textit{irrespective of any fault on their part."}\textsuperscript{180}

5. Minor Defects

A growing number of courts have applied the reasonableness standard to determine whether the defect involved is of sufficient magnitude to constitute a breach.\textsuperscript{181} In applying this standard these courts have implicitly adopted the "minor defect" defense. Under this defense the builder's substantial performance in tendering a home free of major defects satisfies his implied warranty obligations. The standard of reasonableness is used to determine whether the seller has satisfied the implied warranty,\textsuperscript{182} so the central question is whether the defect is sufficient to trigger implied warranty protection, not whether the defect exists.\textsuperscript{183}

In \textit{Wagner Construction Co. v. Noonan},\textsuperscript{184} the Indiana Court of Appeals held that a defect in the septic tank system was serious enough to constitute a breach of the implied war-

\begin{itemize}
\item \textsuperscript{176} Id. at 61, 154 N.W.2d at 806 (citing 77 C.J.S. Sales § 304 (1952)).
\item \textsuperscript{177} 279 Or. 353, 569 P.2d 1037 (1977).
\item \textsuperscript{178} Id. at 356, 569 P.2d at 1039.
\item \textsuperscript{180} 254 S.C. at 414-15, 175 S.E.2d at 795 (emphasis added).
\item \textsuperscript{181} \textit{See infra} notes 182-88 and accompanying text.
\item \textsuperscript{183} Wagner Constr. Co. v. Noonan, — Ind. App. —, 403 N.E.2d 1144 (1980).
\item \textsuperscript{184} — Ind. App. —, 403 N.E.2d 1144 (1980).
\end{itemize}
However, the court also indicated that the implied warranty covers only those defects serious enough to impair the home’s usefulness or value.  

Similarly, in *Taveras v. Horstman*, the Wyoming Supreme Court rejected the builder-vendor’s argument that the implied warranty was not breached because the septic problems involved were of minor consequence, but the court did imply that the minor defect defense was available. Also, in *Petersen v. Hubschman Construction Co.*, the Illinois Supreme Court suggested that the builder’s substantial performance may be a possible defense to an implied warranty action.

The most persuasive early decision considering the minor defect defense is *Wimmer v. Down East Properties, Inc.* In *Wimmer*, the buyer brought an action to recover for damages caused by a contaminated well and an inadequate water supply. The seller argued that the defect was inconsequential and thus insufficient to constitute a breach of the implied warranty. The Supreme Judicial Court of Maine permitted the purchaser to recover for a breach of the implied warranty of workmanship, but stated that the minor defect defense may bar a purchaser’s recovery under the implied warranty of habitability. Thus, *Wimmer* is one of those rare decisions in which a court has made a substantive distinction between the implied warranties of habitability and workmanlike performance.

[The sellers’] argument confuses the implied warranty of habitability, breach of which requires that the defect be of sufficient magnitude to render the dwelling unsuitable for habitation, and the implied warranty of workmanlike performance, which requires only that a house be constructed in a reasonably skillful and workmanlike manner. The test is one of reasonableness, not perfection, the standard being, ordinarily, the quality

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185. Id. at __, 403 N.E.2d at 1148.
186. Id. at __, 403 N.E.2d at 1149.
188. Id. at 1282.
189. 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).
190. Id. at 44, 389 N.E.2d at 1160. However, the Illinois Supreme Court stated that “[i]t would be manifestly unjust to require the [buyers] to accept a house in which ‘there were defects in substance in construction’ and to settle for damages.” Id., 389 N.E.2d at 1169-60.
192. Id. at 93.
of work that would be done by a worker of average skill and intelligence.\textsuperscript{193}

The South Carolina Supreme Court also recognizes a distinction between these two most widely recognized implied warranties. In \textit{Rutledge v. Dodenhoff},\textsuperscript{194} the court held that "in the sale of a new house by the builder-vendor there is an implied warranty that the house was built in a reasonably workmanlike manner and is reasonably suitable for habitation."\textsuperscript{195} However, to date this distinction is largely semantic because no South Carolina case has yet to require a distinction comparable to that expressed in \textit{Wimmer}.

Regardless of the distinction between the implied warranties, the minor defect defense appears viable, at least for the moment. After all, to hold the builder-vendor liable for even the most minor imperfections in a new home is unjust. Furthermore, the minor defect defense would discourage frivolous suits. Inevitably, the issue will become what constitutes a "minor" defect. To decide this question most courts will apply a reasonableness standard, a standard which seldom benefits the seller. A majority of the courts have applied the reasonableness standard to benefit the buyer in determining both the duration of the warranty\textsuperscript{196} and the degree of care exercised by the builder.\textsuperscript{197}

6. Waiver

An express waiver of the implied warranty protection has been discussed previously under both the disclaimer\textsuperscript{198} and limited express warranty defenses.\textsuperscript{199} However, even if a purchaser has not expressly waived implied warranty protection, a court may infer an implied waiver from patent defects and post-sale delays.

\textsuperscript{193} Id. (citing Shiffers v. Cunningham Shepherd Builders Co., 28 Colo. App. 29, 470 P.2d 593 (1970); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967)).
\textsuperscript{194} 254 S.C. 407, 175 S.E.2d 792 (1970).
\textsuperscript{195} Id. at 414, 175 S.E.2d at 795 (emphasis added).
\textsuperscript{196} See supra notes 145-154 and accompanying text.
\textsuperscript{197} See supra notes 161-80 and accompanying text.
\textsuperscript{198} See supra notes 76-114 and accompanying text.
\textsuperscript{199} See supra notes 115-33 and accompanying text.
Waiver is closely associated with patent defects.200 Many courts have held that implied warranty protection does not extend to patent defects—defects that the purchaser either knew or should have known existed at the time of sale.201 The South Carolina Supreme Court has paid only cursory attention to the patent defect rule, stating that the implied warranty's objective is to protect the innocent purchaser from latent, rather than patent, defects.202

The rationale behind the patent defect rule is clear. The implied warranty's primary objective is to guarantee that the parties' expectations are realized in the transaction.203 Thus, because patent defects are discoverable with "the exercise of ordinary and reasonable care,"204 the buyer should be aware of any defects when he tenders an offer. Theoretically, the buyer's offering price includes an adjustment for all patent defects; and the home he receives, though defective, will meet his expectations. Finally, whether a defect is latent or patent is frequently uncertain because it is usually a question of fact.205

A court may also infer an implied waiver from a purchaser's post-sale delay. In Pollard v. Saxe & Yolles Development Co.,206 the California Supreme Court held that a buyer must notify the builder within a reasonable time after he discovers or should have discovered the breach of warranty.207 The buyer's failure to notify the builder within a reasonable time bars the buyer's right to recover for a breach of an implied warranty.208 In Pollard, the purchasers were aware of substantial defects for nearly four years before they notified the builder and filed suit.209

200. See Comment, supra note 75, at 981.
207. Id. at 390, 525 P.2d at 92, 115 Cal. Rptr. at 652.
208. Id., 525 P.2d at 92, 115 Cal. Rptr. at 652.
209. Id., 525 P.2d at 92, 115 Cal. Rptr. at 652.
The court in *Pollard* based the notice requirement on a statute that imposed a similar obligation in the sale of goods.\(^{210}\) The court noted that, when appropriate, other courts have often applied statutory standards in dealing with common-law warranties.\(^{211}\) The court justified the notice requirement as a "sound commercial rule designed to allow the [builder-vendor] opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements."\(^{212}\) Finally, the court held that the buyer's cause of action for breach of implied warranty was barred because of his "unreasonable" delay of nearly four years.\(^{213}\)

The South Carolina Supreme Court has also considered whether the parties' post-sale conduct constitutes an implied waiver. In *Terlinde v. Neely*,\(^{214}\) the original purchaser executed a release in favor of the builder after receiving compensation for defects that were discovered after the sale. Several years later a subsequent purchaser brought an action against the builder for breach of implied warranty. The South Carolina Supreme Court reversed the trial court's decision to grant summary judgment for the builder, thus implying that the original purchaser's release did not prejudice the subsequent purchaser's rights.\(^{215}\) Nevertheless, *Terlinde* leaves unanswered the question of whether a release executed by the plaintiff constitutes a waiver of an implied warranty cause of action.

7. Other Defenses?

The courts have recognized other builder-vendor defenses in addition to the six most often-asserted defenses discussed above. Foremost among these other defenses is the "intervening occu-


\(^{212}\) 12 Cal. 3d at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652. In Pickler v. Fisher, 7 Ark. App. 125, 644 S.W.2d 644 (1983), the Arkansas Court of Appeals held that adequate notice does not require the utmost specificity about the defect's nature. Rather, the notice need only apprise the seller of the breach and his opportunity to remedy it.

\(^{213}\) 12 Cal. 3d at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652.


\(^{215}\) Id. at 398, 271 S.E.2d at 769.
This defense is based on the argument that the implied warranty runs only from the builder-vendor to the initial purchaser, not to any subsequent buyer. Although a majority of jurisdictions recognize this defense as a limitation on the implied warranty, a select few, including South Carolina, have expressly rejected it.

The basis of the intervening occupancy defense is lack of privity between the builder and subsequent purchaser. In other words, the second sale destroys the privity that existed between the builder and initial purchaser. However, the often-applied foreseeability standard supports the extension of implied warranty protection to subsequent purchasers. In Terlinde v. Neely, for example, the South Carolina Supreme Court stated:

The key inquiry is foreseeability, not privity. In our mobile society, it is clearly foreseeable that more than the original purchaser will seek to enjoy the fruits of the builder's efforts. The plaintiffs, being a member of the class for which the home was constructed, were entitled to a duty of care in construction commensurate with industry standards. In the light of the fact that the home was constructed as speculative, the homebuilder cannot reasonably argue he envisioned anything but a class of purchasers. By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.

Another possible builder-vendor defense involves the commercial sale limitation. This limitation is based on the argument that the implied warranty attaches only to commercial sales. Several courts have defined a commercial sale as the sale of a home constructed solely for sale to a public consumer.


220. Id. at 399, 271 S.E.2d at 770.

221. Sims v. Lewis, 374 So.2d 298 (Ala. 1979); Sloat v. Matheny, 625 P.2d 1031 (Colo. 1981). Neither the Uniform Sales Act nor the Uniform Commercial Code extend implied warranties beyond the commercial sale. Haskel, supra note 9, at 635.
though the commercial sale limitation is widely recognized, several recent decisions have diminished its possible effectiveness.

The Colorado Supreme Court considered the commercial sale limitation as a defense to an implied warranty action in *Sloat v. Matheny.*222 There the court stated that the builder-vendor's original purpose in building the home was not controlling on the commercial sale issue.223 Instead, the court held that the home was sold through a commercial sale, and thus the implied warranty attached because the builder was engaged in the home construction business and the buyer was a member of the class the implied warranty was designed to protect.224

The Alabama Supreme Court has also stated that the implied warranty attaches only to commercial sales. In *Capra v. Smith,*225 the defendant real estate developer argued that the implied warranty applied "only to those in the business of building and selling houses, much as the implied warranties in the Uniform Commercial Code apply only to merchants."226 However, the court disagreed and stated that the key inquiry was not the defendant's business or profession, but "whether the construction and sale was commercial rather than casual or personal in nature."227 Since the defendant built the home in question for sale to a prospective buyer, the court held that the implied warranty attached even though the defendant could not be classified as a builder-vendor.228 Thus, both the Colorado and Alabama Supreme Courts have narrowly interpreted the commercial sale limitation to benefit the buyer.

Builder-vendors have asserted other arguments as defenses to implied warranty actions. First, a builder-vendor may argue that the implied warranty applies only to homes purchased after

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223. 625 P.2d at 1034. In *Sloat,* the defendant builder had constructed the house as a home for his family, but financial troubles forced him to sell the house to the plaintiff. Shortly after the sale the air conditioning system malfunctioned and the driveway pavement began to crack. 625 P.2d at 1032. *See also* Lane v. Trenholm Bldg. Co., 267 S.C. 497, 229 S.E.2d 728 (1976) (developer who did not originally intend to market the home held liable under an implied warranty).
224. 625 P.2d at 1034.
226. *Id.* at 321 (emphasis in the original).
227. *Id.*
228. *Id.*
the warranty was recognized in the jurisdiction.\textsuperscript{229} Second, a builder-vendor may argue that when a purchaser supplies the plans and specifications used in the home’s construction, the purchaser implicitly warrants their adequacy and suitability for the purposes for which they are tendered.\textsuperscript{230} Furthermore, at least one court has held that a contract provision requiring the builder to make on-site inspections does not nullify this implied obligation.\textsuperscript{231} Under this argument the contractor is liable only if he relies on the plans and specifications knowing them to be defective.\textsuperscript{232} Third, a builder-vendor may argue that compliance with municipal regulations precludes implied warranty liability. Most courts, however, have rejected this argument.\textsuperscript{233}

\section*{IV. Conclusion}

Is the seller defenseless? The continued expansion of the implied warranty protection afforded new home purchasers and the uncertain status of the builder-vendor’s traditional defenses illustrate the magnitude of the modern builder-vendor’s predicament. With \textit{caveat emptor} largely discarded, builder-vendors no longer possess a universally recognized defense in implied warranty actions. Although a few “defenses” have gained limited recognition, they are generally applied in retrospect and thus may not be used to limit builder-vendor liability when the sales contract is negotiated. Furthermore, the courts have accepted in theory, but rejected in practice, such prospective defenses as disclaimers and limited express warranties.

The builder-vendor’s present predicament accentuates the need for legislative action. In recent years the courts have made the builder-vendor a virtual insurer of new home quality. Although still in its infancy, the ULTA offers a sensible solution to the present situation. The ULTA implements safeguards to pro-

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\textsuperscript{229} See Leffler v. Banks, 251 Ark. 277, 472 S.W.2d 110 (1971)(implied warranty applies prospectively only).
\textsuperscript{232} Id. at 330, 573 S.W.2d at 322.
\end{flushright}
tect the buyer’s expectations while at the same time preserving the seller’s bargaining position by permitting the negotiation and enforcement of disclaimer provisions. Until the seller’s implied warranty liability is clarified through the ULTA or a similar statutory scheme, the builder-vendor will continue to suffer from inequities created by the courts’ sometimes overweening protection of new home purchasers.

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