
Peter Monahan

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THE NEW-HOUSE IMPLIED WARRANTY COMES TO ILLINOIS—

PETERSEN V. HUBSCHMAN CONSTRUCTION CO.

In response to complaints by new-house consumers, American courts have begun to limit the application of the doctrines of caveat emptor and merger in the sale of new homes by builder-vendors. Caveat emptor is a common law maxim, predicated on an arm's length bargain, providing that the purchaser buys at his or her own peril. In the context of the sale of new homes, however, modern courts have recognized that the assumption of an arm's length bargain is no longer appropriate. Changes wrought by the

1. Defects in new houses have become a primary source of consumer's complaints. See U.S. Dept. of Consumer Affairs, A Study of New Home Construction Problems in Fairfax County (1979). Census data concerning the incidence of serious structural deficiencies is available only for the 63.4 million non-farm housing units. These units are broken down into 37.9 million owner-occupied units and 25.4 million renter-occupied units. Seven million (18%) of the owner-occupied non-farm units contained one or more structural deficiencies. U.S. DEPT. OF COMMERCE, ANNUAL HOUSING SURVEY: 1976, Tables A-1, -6, -10 (1976) [hereinafter cited as 1976 SURVEY]. The specific types of defects selected by the Census were limited to patent defects and only those latent defects that were unequivocally manifested. Specifically, the defects consisted of signs of leaking roofs and basements; open holes or cracks in interior walls, ceilings, and floors; broken plaster; and peeling paint on interior walls and ceilings. Id.

2. See note 5 and accompanying text infra.

3. Merger is the extinguishment of one contract by its absorption into another. BLACK'S LAW DICTIONARY 891 (5th ed. 1979). For further discussion of merger, see notes 11 & 12 and accompanying text infra.

4. For years commentators have encouraged the courts to abandon caveat emptor in the sale of new homes by the builder-vendor. One early writer predicted the end of caveat emptor. Dunham, Vendor's Obligations as to Fitness of Land for a Particular Purpose, 37 MINN. L. REV. 108, 125 (1953) [hereinafter cited as Dunham]. The early theories of recovery used by the courts and their subsequent development has been outlined in: Bearman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule, 14 VAND. L. REV. 541, 543, 576-79 (1961).

A majority of American courts have responded to the demise of caveat emptor by recognizing an implied warranty of habitability in the sale of new homes by the builder-vendor. McNamara, The Implied Warranty in New-House Construction Revisited, 3 REAL ESTATE L.J. 136 (1974) [hereinafter cited as McNamara].

5. BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

The doctrine of caveat emptor first appeared in the common law during the seventeenth and eighteenth centuries. It was prevalent among traders in England's rural markets. See Hamilton, The Ancient Maxim Caveat Emptor, 40 YALE L. J. 1133 (1931) [hereinafter cited as Hamilton]; Comment, Caveat Emptor in the Sales of Real Property—Time for Reappraisal, 10 ARIZ. L. REV. 484 (1968).

Adherence to caveat emptor resulted in a rule that attached no liability to the seller when the buyer had a reasonable opportunity to inspect the property. Failure to inspect or discover a flaw resulted in the vendee's loss. See Roeser, The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois, 1978 S. ILL. L.J. 178, 179 [hereinafter cited as Roeser].

industrialization of the building industry and assembly-line techniques in construction have brought tract development and mass production to new-house construction.\textsuperscript{7} As the custom-made house has been replaced by the tract home, the arm's length bargain has been replaced by the standardized mass contract or adhesion contract.\textsuperscript{8} The transaction between vendor and purchaser is no longer a product of give and take; rather, the consumer must adhere to the terms prescribed by the builder.\textsuperscript{9} Under these circumstances, strict adherence to the doctrine of caveat emptor has had harsh consequences for new-house consumers and has been harmful to the industry itself.\textsuperscript{10}

Because of the vendee's loss of bargaining power, the operation of merger has had especially harsh consequences for the purchaser. Under the merger of the Unwary Home Buyer: The Housing Merchant Did It, 52 \textit{Cornell L.Q.} 835, 837 (1967) [hereinafter cited as Roberts], where the author wrote:

Caveat emptor, however, did not adversely affect the typical buyer of a new home during the nineteenth century. In those days, after all, the home-owner-to-be was commonly a middle-class fellow who purchased his own lot of land and then retained an architect to design a home for him. Once the plans were ready the landowner hired a contractor who built a house according to the plans. Quality control was assured because the builder was paid in stages. . . . If the house did happen to collapse, the homeowner had a choice of lawsuits to recoup his losses: either the plans were defective, in which case the architect had been negligent, or the building job had not been workmanlike, in which case the contractor was liable.

\textit{Id.}


Not including mobile homes, there are 74 million occupied housing units in the United States. Of these, 22.1 million, or approximately 30%, were built since 1967. These figures represent an average of 1.9 million units per year. 1976 Survey, \textit{supra} note 1, pt. A, table A-1.

Although the number of houses built each year has declined slightly since 1976, the number remains substantial. In 1977, 819,000 new units were sold; in the first 11 months of 1978, 779,000 new units were sold. \textit{Trends in Housing Industry}, 2 \textit{NAHB Builder} 2 (January 22, 1979).


In the advanced industrial society, the economic apparatus is no longer focused on . . . the particular desires of individuals, but is based on mass production and mass distribution. This . . . has by necessity become more and more standardized; and this standardization has its counterpart in standardized forms "for dealing with the customers. . . . One speaks of the standardized mass contracts or . . . 'contracts of adhesion' . . . not formulated as a result of the give and take of bargaining. . . ."

\textit{Id.} at 481.


10. See Waggoner \textit{v. Midwestern Development, Inc.}, 83 S.D.2d at 65, 154 N.W.2d at 807-08, where the court stated as follows:

Broad as is the application of the principle of caveat emptor in sales of real estate, a few courts have been inclined to make an exception in the sale of new housing where the vendor is also the developer or contractor. . . . It would be much better if this enlightened approach were generally adopted with respect to the sale of new
doctrine, once the deed is delivered, only those covenants expressly re-
erved in the deed are operable. Because of the leverage exercised by
the builder-vendor in contracting for the sale of new homes, however, only
those covenants favorable to the builder-vendor are reserved in the deed.
Consequently, the courts, through the implied warranty of habitability,
guarantee what the purchaser, through the lack of bargaining strength, cannot
expressly obtain.

The Illinois Supreme Court recently addressed the issues of implied war-
ranty of habitability, merger, and caveat emptor in Petersen v. Hubschman
Construction Co. In Petersen, the court recognized, for the first time, an
implied warranty of habitability in the sale of new homes. In so doing the
court restricted the doctrine of caveat emptor in the sale of realty and
bridged the gap between the law protecting the purchaser of goods and
the law imperiling the purchaser of improved real estate.

This Note discusses Illinois' experience with the implied warranty of
habitability, focusing particularly on the split among the appellate districts
regarding the new-house implied warranty. Additionally, the Note analyzes
the Petersen decision in two steps. First, it will examine the court's application
of the implied warranty of habitability; second, it will consider the impact
of the court's decision on the scope of the Illinois implied warranty of
habitability. Finally, the Note will criticize the court's overzealous application
of this implied warranty doctrine, the court's ambiguous rationale, and
the court's failure to provide any clear guidelines for the future application of
the Illinois implied warranty of habitability.

11. See Roeser, supra note 5, at 181. Covenants in the contract of sale that are collateral to
the transfer of the deed are exceptions to the merger rule. Collateral promises are those that do
not pertain to title, possession, or quantity of the estate. Today, the term collateral signals a
conclusion already reached. The governing feature of merger is intent, but not the actual intent
of the parties. Rather, it is the intent perceived by reconstructing the transaction on common
sense principles. Consequently, absent an express waiver of rights at the closing, the transfer is
not considered complete performance. See Roberts, supra note 6, at 839.

12. See Roeser, supra note 5, at 181.

13. See generally, Brown, Toward an Economic Theory of Liability, 2 J. of Legal

14. Dunham, supra note 4, at 110.
AN OVERVIEW OF THE IMPLIED WARRANTY OF HABITABILITY IN ILLINOIS

The new-house implied warranty of habitability evolved from the implied builder's warranty that has long been employed in Illinois construction contracts. According to the builder's warranty, a builder who furnishes building plans impliedly promises that the structure is fit for its intended use and is constructed in a workmanlike manner. The builder's warranty was imposed by law and derived from the tort concept that one who portrays himself or herself as possessing a special knowledge or skill must use care in exercising that special skill or knowledge.

The concept of an implied builder's warranty was employed in *Weck v. A: M Sunrise Construction Co.*, the first Illinois case to discuss merger, caveat emptor, and implied warranties in the sale of new housing. In *Weck*, the Appellate Court for the First District characterized the issue as whether a builder of new houses was required to deliver a dwelling fit for habitation. The court relied on a potpourri of construction contract cases and an English implied warranty case to hold a builder-vendor liable for


17. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962). In *Weck* the plaintiffs complained of leakage through the roof and in the basement, faulty bathroom plumbing, cracked ceiling plaster, and as a result, the building sank and settled causing damage to the plaintiff. The court held the defendant liable for all damages resulting from the defendant's lack of skill. Economy Fuse and Mfg. Co. v. Raymond Concrete Pile Co., 111 F.2d at 878-79.

The court explained the builder's warranty as follows: "A . . . workman undertaking to construct a piece of work, impliedly warrants that it shall be so constructed that it will be reasonably sufficient for the purpose for which it is intended." *Id.* at 878.


19. 36 Ill. App. 2d 383, 184 N.E.2d 728 (1st Dist. 1962). In *Weck* the plaintiffs argued that because the contract did not contain an express warranty that the house was to be habitable, merger operated to extinguish the plaintiffs' claim. *Id.* at 88, 184 N.E.2d at 731. The plaintiffs replied that their complaint in no way varied the terms of the contract. They argued that the real consideration for the contract was the purchase and sale of a residence with all appurtenances attached and so constructed as to be habitable. *Id.*

20. The cases relied on by *Weck* were Miller v. Cannon Hill Estates, Ltd., [1932] 2K.B. 113 (recognized an implied warranty as applied to homes purchased during construction); Laurel
latent defects in construction on the ground that a builder-vendor impliedly warrants the workmanlike completion of a dwelling that is purchased during construction.\textsuperscript{21}

One year later the Illinois Appellate Court for the Third District, in Coutrakon v. Adams,\textsuperscript{22} did not find an implied warranty even though the house was purchased during construction but was completed when title passed.\textsuperscript{23} The Coutrakon court incorrectly distinguished Weck on the grounds that Weck involved a contract requiring the builder-vendor to build in accord-

Realty Co. v. Himelfarb, 194 Md. 672, 72 A.2d 23 (1953) (collateral agreements are not merged in the deed); Weinberg v. Willensky, 26 N.J. Super. 301, 97 A.2d 707 (1953) (agreement of a grantor to complete an unfinished dwelling upon the promises to be conveyed is collateral to the conveyance); Stevens v. Milestone, 190 Md. 61, 57 A.2d 292 (1948) (collateral agreement not inconsistent with the deed would not merge).

\textsuperscript{21} 36 Ill. App. 2d at 389-92, 184 N.E.2d at 731-33.

The new-house implied warranty was initially limited to incomplete houses purchased during construction because of the implied warranty's link to the construction contract warranty. The complete/incomplete distinction was derived from the notion that when the house is purchased during construction, the agreement between the builder-vendor and the purchaser included two severable contracts, one for the conveyance of land and one for the construction of a dwelling. Under the contract for construction, the courts impose a duty on the builder-vendor as builder to construct in a workmanlike manner. Because only the contract to convey is fulfilled by the deed, merger does not operate to relieve the builder of a collateral agreement to construct the dwelling. See Note, Elderkin v. Caster — The Pennsylvania Experience with Implied Warranties in Sales of New Homes, 47 Temple L.Q. 172, 174 (1973).

In the sale of a completed house, no implied warranty of workmanship or fitness for use applied to protect the purchaser of a defective dwelling. The courts reasoned that a completed house would be provided for by an express warranty before closing. As to latent defects, merger extinguished any action they would support. See Glison v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); See also Hoye v. Century Builders, Inc., 32 Wash. 2d 830, 329 P.2d 474 (1958); Vandershrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957).

The distinction between houses purchased during construction and those purchased after completion was abandoned in Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). As the court in Carpenter said:

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

\textit{Id.} at 83, 388 P.2d at 402.

\textsuperscript{22} 39 Ill. App. 2d 290, 188 N.E.2d 780 (3d Dist. 1963), aff'd, 31 Ill. 2d 189, 201 N.E.2d 100 (1964).

\textsuperscript{23} In Coutrakon, the purchasers sued for breach of an implied warranty of habitability when two fires broke out in the utility room after the heat was turned on. The contract for sale delineated certain construction items that were to be included; but at the time of purchase, the utility room had been completed and the vendees testified that they did inspect the heating unit and utility room. \textit{Id.} at 293, 188 N.E.2d at 762.

On appeal, the vendee relied on Weck and advocated a departure from the general rule that where there was no express warranty, no liability accrued. \textit{Id.} at 300, 188 N.E.2d at 785. The appellate court upheld the doctrine of caveat emptor on the ground that without caveat emptor real estate transactions would become chaotic. \textit{Id.} at 304, 188 N.E.2d at 787.
ance with a specified plan. Due to this misinterpretation the court dismissed Weck as a construction-contract case.

At this point, there were divergent opinions among the various districts of the Illinois Appellate Court. The issue was ripe for the Illinois Supreme Court. The Illinois Supreme Court granted leave to appeal the Coutrakon decision, but, while noting that the implied warranty of habitability was an "interesting problem," the court decided the case on evidentiary grounds. The supreme court's failure to resolve the dispute among the appellate districts resulted in the appellate districts' evasion of the issue whenever possible. When the courts were forced to decide the new-house implied warranty issue, they did so with mixed results. But having been before the supreme court once, the new-house implied-warranty-of-habitability issue was not considered there again for several years.

24. Id. at 302, 188 N.E.2d at 786.
25. In hedging on its holding, the appellate court seemed confused by Weck. The court stated, referring to Weck: "[I]f in the final analysis this is not the basis for the majority opinion, we are not constrained to follow it." Id.
26. The dissent in Weck had more of an impact on Coutrakon than the majority opinion. The dissent was based on the usual arguments against the implied warranty of habitability: caveat emptor, merger, and the complete/incomplete distinction. 36 Ill. App. 2d at 397, 184 N.E.2d at 735 (Burke, J., dissenting).
27. 31 Ill. 2d at 190, 201 N.E.2d at 101.
28. This evasion has resulted in some predictably bizarre rationales. In Ehard v. Pistaee Builders, Inc., 111 Ill. App. 2d 227, 250 N.E.2d 1 (2d Dist. 1969), the court dismissed the complete/incomplete dichotomy and criticized the Illinois Supreme Court for avoiding the implied warranty of habitability issue in Coutrakon. Then, ironically, the Ehard court ruled that the past conduct of the defendant builder in correcting some defects established an express agreement to correct all the defects. Therefore, the question of an implied warranty of habitability need not be reached. Id. at 233, 250 N.E.2d at 4.

An even more bizarre rationale appeared in Garcia v. Hynes & Howes Real Estate, Inc., 29 Ill. App. 3d 479, 331 N.E.2d 634 (3d Dist. 1965). In Garcia, the court appeared to base its holding on geographical considerations. The redistricting of Rock Island County placed it in the third appellate district. The result was that the third district had cases on both sides of the implied warranty issue—Coutrakon and Hanavan v. Dye, 4 Ill. App. 3d 576, 781 N.E.2d 398 (3d Dist. 1972). In Garcia, the court for the third district attempted to solve the problem. Ignoring the Coutrakon holding, the Garcia court reasoned that because one appellate district does not control another, the Weck decision from the first district did not bind the third district when it decided Coutrakon. Id. at 481, 331 N.E.2d at 636. Further, the court noted that Coutrakon was decided at a time when Rock Island County was not a part of the third district and that there was a Rock Island County case that recognized the implied warranty of habitability—Hanavan v. Dye. The Garcia court reasoned that because Garcia originated in Rock Island County, the Rock Island County case, Hanavan, which recognized the implied warranty of habitability, should control in Garcia. Thus the court recognized an implied warranty of habitability. 29 Ill. App. 3d at 480-81, 331 N.E.2d at 635-36.

In 1972, in *Spring v. Little*, the supreme court again confronted the issues of caveat emptor and the implied warranty of habitability but only as they applied to residential leaseholds. In *Spring*, the court recognized that the traditional analysis of a lease as primarily a conveyance of an interest in land was an anachronism. The court noted that the urban dweller seeks not an interest in land but a dwelling suitable for habitation. Based on a social policy of consumer protection, the court held that the implied warranty of habitability applied to all contracts governing tenancies.

Although limited in scope, the implied builder's warranty and the implied warranty of habitability in leaseholds did serve to inhibit the court's doctrinaire adherence to caveat emptor. The extension of similar implied-
warranty protection to new-house consumers seemed a small step. As one commentator noted, "an enlightened court, presented with a cogent assertion of an implied warranty would . . . abolish the rule of caveat emptor." In Petersen, the court did so.

**The Petersen Decision**

**Facts of Petersen**

In April, 1972, the plaintiffs, Raymond and Delores Petersen, entered into a $71,000 contract with the defendant, Hubschman Construction Co., for the purchase of a parcel of land and for the construction of a new house on that land. As the closing date approached, a dispute arose concerning certain aspects of the construction that plaintiffs contended were unfinished or unsatisfactory. The defendant agreed to repair or correct these numerous items but failed to carry out this agreement satisfactorily. Testimony at the trial indicated that although repair of these defects would involve major amounts of work, they could be remedied. It was not disputed that the house was at least habitable. The plaintiffs could live in it and it was not dangerously unsafe.

See Hanavan v. Dye, 4 Ill. App. 3d 576, 281 N.E.2d 398 (3d Dist. 1972). In Hanavan, the builder constructed a house over an irrigation ditch but did not install drain tiles. Consequently, the basement flooded periodically. The court held that failure to install drain tiles, even though the building code did not require them, was a breach of the implied warranty of habitability. Id. at 577-78, 281 N.E.2d at 399. The court held that failure to install drain tiles, even though the building code did not require them, was a breach of the implied warranty of habitability. Id. at 580, 281 N.E.2d at 401.

37. McNamara, supra note 4, at 141.
38. 76 Ill. 2d at 35, 389 N.E.2d at 1155.
39. Id. at 36, 389 N.E.2d at 1156. Specifically the defects complained of included "a basement floor pitched in the wrong direction away from the drain, improperly installed siding, a defective front door and door frame, and deterioration and 'nail popping' in the dry wall in the interior." Id.
40. Id. at 35, 389 N.E.2d at 1156.
41. Id. at 36, 389 N.E.2d at 1156.
42. Id. The court's use of the term habitable here is confusing because later in the opinion the court noted that the term habitability is misleading in that it lacks definiteness. Id. at 41, 389 N.E.2d at 1158. The court's point is well taken, as no clear definition of habitable has been formulated. For example, in Spring v. Little, the implied warranty of habitability was an affirmative defense to an unlawful detainer action. Spring v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972). Ironically, however, the tenant was both living in the apartment and claiming in court that it was legally uninhabitable. Clearly, the term means more than that humans can merely survive in the house. Because, according to Petersen, the warranty is to insure that the house is fit for its intended purpose, the standard might more logically be "reasonable comfort." See Comment, Washington's New Home Implied Warranty of Habitability - Explanation and Model Statute, 54 WASH. L. REV. 185, 206 (1978).
The plaintiffs refused to close the transaction unless a $1,000 escrow account was established with funds “held back” from the balance due defendant at closing. The defendant, however, refused to close on this basis and when the plaintiffs refused to accept the house, the defendant invoked the forfeiture provision in the contract. The defendant notified the plaintiffs that they had relinquished both the $10,000 deposit and approximately $9,000 worth of labor and materials supplied by the plaintiffs.

Plaintiffs brought suit contending that defendant was not entitled to repudiate the contract or to declare a forfeiture. In a peculiar inversion of positions, the defendant-builder replied that the house conformed to the requirements of the implied warranty of habitability and, therefore, plaintiffs must close. The plaintiff-purchaser contended that Illinois did not recognize an implied warranty of habitability, and alternatively that even if Illinois did recognize such a warranty, it did not apply to this case.

The trial court ruled “that there were ‘defects in substance’ in the construction of the house;” the defendant had not substantially performed and consequently could not declare a forfeiture. Further, the court held that the plaintiffs were entitled to rescind the contract and recover the earnest money and the value of the labor and materials they had provided. The Appellate Court for the Second District affirmed but ruled, without elaboration, that the implied warranty of habitability did not apply.

43. 76 Ill. 2d at 36, 389 N.E.2d at 1156.
44. Id. Petersen was a plumbing contractor. He agreed to supply the labor and materials for the plumbing and ventilation systems in the house in exchange for an offset in the contract price. Brief for Appellee at 10.
45. 76 Ill. 2d at 36, 389 N.E.2d at 1156.
46. Ordinarily, the buyer pleads a breach of the implied warranty of habitability to recover for latent defects in the construction of the new house, while the builder-vendor urges that by reason of caveat emptor or merger there is no warranty which the purchaser can assert. 76 Ill. 2d at 36-37, 389 N.E.2d at 1156.
47. Id.
48. Id.
49. Id. at 36, 389 N.E.2d at 1156.
50. 76 Ill. 2d at 45, 389 N.E.2d at 1160 (1979). Rescission is rarely sought by disgruntled new-house consumers because the market forces in real estate operate to substantially increase the value of the property between the time of contracting and the time of closing. Under these circumstances when a purchaser rescinds he or she actually suffers an economic loss. See Suburban Tribune, Aug. 16, 1979, at 12, col. 3.
51. 76 Ill. 2d at 36, 389 N.E.2d at 1156 (1979).
52. 53 Ill. App. 3d 626, 631, 368 N.E.2d 1044, 1048 (2d Dist. 1977). The appellate court ruled that the governing principle in the case was simply that “a party cannot have the benefits of a contract unless he also performed the obligations.” Id. at 630-31, 368 N.E.2d at 1047. The court then stated in a conclusory remark that the issues of implied warranty of habitability and substantial performance are distinguishable. Id. at 631, 368 N.E.2d at 1048.
The Petersen Opinion

Faced with these facts the Illinois Supreme Court held that in the sale of a new house by the builder-vendor an implied warranty of habitability\(^{53}\) arises\(^{54}\) that will support an action against the builder-vendor by the vendee for latent\(^{55}\) defects.\(^{56}\) The court was especially influenced by the purchaser's substantial reliance on the builder-vendor's skill and integrity.\(^{57}\) The court noted that the vendee has little opportunity to inspect, that the vendee is making a major investment, and that he or she usually is not familiar with construction practices.\(^{58}\) The court determined that under these circumstances the vendee has a right to the benefit of the bargain—the vendee has a right to expect to receive a house that is fit for use as a

\(^{53}\) Although the court used the term implied warranty of habitability, it was troubled by the term "habitability." See note 43 supra. Consequently, throughout this Note the author uses the terms "implied warranty of habitability" and "new houses warranty" interchangeably.

\(^{54}\) 76 Ill. 2d at 41, 389, N.E.2d at 1158. The court states that the implied warranty arises by execution of the parties but this is misleading because it implies that the new-house implied warranty is a contract or sales warranty. See Note, The Strict Tort Liability of Builder-Vendors, 28 OHIO ST. L.J. 343, 348 (1967). The actual nature of the new house implied warranty, however, is a combination of the doctrine of strict liability in tort and sales warranty doctrine. Young and Harper, Quaere: Caveat Emptor or Caveat Venditor? 24 ARK. L. REV. 245, 267-68 (1970).

The landmark case in the application of strict liability principles to the implied warranty of habitability is Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). In Schipper, the defendant failed to install mixing valves, a common protective device, in the house water system. Instead, the defendant merely installed mixing type faucets and warned purchasers that the water system produced extraordinarily hot water and that the cold water should always be turned on before the hot. The plaintiffs brought on action when their small son was scalded by hot water. The court held the builder-vendor liable on an implied warranty of habitability. Id. at 96, 207 A.2d at 329. Risk allocation underlies much of strict liability in tort. The policy of risk allocation may have harsh consequences in the new house construction industry because the great majority of new house construction is done by small builders. A builder-vendor of tract homes can bear the risks of strict liability by spreading the increased costs to his many customers "whereas a like opportunity is not available to the typical independent contractor . . . ." Krause, Products Liability and the Independent Contractor, 1964 U. ILL. L.F. 748, 767 (1964).

Further, the cost of liability insurance coverage could put a small builder-vendor in a non-competitive position. From a risk-allocation point of view, it might be wise to have the purchaser insure himself or herself. See also Note, Real Property: Builder-Vendors: Liability for Negligence and for Breach of Implied Warranty of Habitability. 51 CORNELL L.Q. 389 (1966).

\(^{55}\) A latent defect is "one which could not be discovered by reasonable and customary inspection." BLACK'S LAW DICTIONARY 794 (5th ed. 1979).

\(^{56}\) 76 Ill. 2d at 39-40, 389 N.E.2d at 1158-59 (1979). The court also held that a disclaimer of the implied warranty habitability did not violate the public policy of Illinois. The court stated, however, that any such disclaimer must be conspicuous; it must fully disclose the consequences of its inclusion; and it must be a product of the bargain. Further, boilerplate clauses, however worded, will be ineffective in the disclaimer. Id. at 43, 389 N.E.2d at 1159 (1979).

\(^{57}\) Id. at 40, 389 N.E.2d at 1158.

\(^{58}\) Id.
Further, the court held that the implied warranty applied to the purchase of completed homes as well as to homes incomplete at the time of contract between vendor and vendee.

**Analysis and Criticism of the Petersen Decision**

*The Petersen Court's Application of the Implied Warranty of Habitability*

While a new-house implied warranty of habitability is a desirable and necessary protection for the new-house consumer and the new-house construction industry, the *Petersen* court's application of the implied warranty was both peculiar and overzealous. Although the court noted that the implied warranty of habitability was "a judicial innovation used to avoid the harshness of caveat emptor and merger," neither caveat emptor nor merger were operative in *Petersen*.

Clearly, merger was not an issue. Merger does not operate until the deed has been delivered. In *Petersen*, there was no transfer of the deed. Caveat emptor was also inapplicable to *Petersen* because the plaintiffs were not yet obligated by the contract. Substantial performance by the defendant was a constructive condition to performance by the plaintiffs. Because the material breach by defendant resulted in a failure to fulfill that condition, plaintiffs' duties under the contract never arose. Thus to invoke caveat emptor in this situation would create a duty of performance where there was no duty by contract.

Because the impediments to recovery under caveat emptor and merger were absent, there was no need for the court to reach the implied-warranty-of-habitability issue. Instead there were sufficient and appropriate grounds under the Illinois defective-performance cases for affirming the

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59. Id.
60. Id.
61. Id. at 38, 389 N.E.2d at 1157.
62. Although merger was not an issue, the court stated in dicta that the implied warranty of habitability is an independent undertaking collateral to the covenant to convey. Therefore, merger will not extinguish an action for breach of the new house implied warranty of habitability in Illinois. 76 Ill. 2d 31, 41, 389 N.E.2d 1154, 1158 (1979).
63. See notes 11-12 and accompanying text supra.
64. 76 Ill. 2d at 41, 389 N.E.2d at 1158.
65. See Hamilton, supra note 5, at 1138.
66. 76 Ill. 2d at 43-44, 389 N.E.2d at 1159.
67. Id.
lower court's decision granting judgment to the plaintiffs. According to the defective performance cases, a construction contract imposes a duty of substantial performance upon the builder rather than one of strict performance.\(^6\) Substantial performance of a construction contract to erect a dwelling requires the builder to deliver a house that is suitable to live in.\(^7\) Thus, the Petersen court rested its decision on adequate and appropriate grounds when it held that substantial performance entitled the plaintiffs to a house reasonably fit for use as a residence and that the house as constructed was not so fit.\(^7\) The court should have decided the case on substantial performance grounds alone and, indeed, the court stated that there was no substantial performance.\(^7\)

Rather than rest the case solely on defective-performance grounds, however, the court seized the opportunity to resolve the dispute among the appellate districts\(^7\) and establish new law in Illinois. The court ruled that the builder's duty to construct a house reasonably suited for use as a residence was derived from the implied warranty of habitability\(^7\) instead of from the builder's duty of substantial performance.\(^7\) In applying the new-house implied warranty, however, the Petersen court disregarded its own construction of the warranty. According to the court's own explanation of the new-house implied warranty, the warranty was inapplicable to Petersen. The court stated that the new-house implied warranty applied only to latent defects that interfere with the purchasers' legitimate expectations.\(^7\) The de-

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70. Surety Dev. Corp. v. Grevas, 42 Ill. App. 2d at 269, 192 N.E.2d at 146. In Surety, the defendants purchased a prefabricated house based on an inspection of plaintiff's models. The house was to be completed on September 27, 1961. At 4:00 P.M. on the twenty-seventh, the purchasers inspected the construction site and found the plaintiff in a crash program to complete the construction. Id. The siding on the house was not finished, the floors were yet to be installed, and the lot was yet to be graded. The purchaser left the construction site and refused to return again at 5:30. Id. at 269, 192 N.E.2d at 146. The plaintiff-builder brought suit, contending that by 5:30 on the twenty-seventh the house was substantially complete. The court held for the plaintiff-builder. Id. at 270-71, 192 N.E.2d at 146. The court stated that although a service walk, some grading and blacktopping were yet to be done, the house was suitable to live in and that the requirement of substantial performance is satisfied by a house that can be lived in. Id.
71. 76 Ill. 2d at 44, 389 N.E.2d at 1160.
72. Id.
73. See notes 17-27 and accompanying text supra.
74. Id. at 42, 389 N.E.2d at 1159.
75. The supreme court characterized the case as involving the dual issues of the implied warranty of habitability and substantial performance. 76 Ill. 2d at 35, 389 N.E.2d at 1155. The appellate court, however, distinguished the two issues. See note 52 supra.
76. 76 Ill. 2d at 42, 389 N.E.2d at 1159.
fects in Petersen, however, were patent.77 In fact, the defects were actually discovered.78

Ironically, the court was aware that the defects were patent and had been discovered.79 The court stated: "[W]e do not decide in this case what the appropriate remedy would have been if the defects had not been discovered until after the deed had been delivered."80 Thus, the Petersen opinion is ambiguous. On the one hand, the court stated that the new-house implied warranty applies only to latent defects; on the other hand, patent defects do not take a case out of the implied warranty of habitability but may merely limit the remedy.

It appears that the court was actually more concerned with the aggregate effect of the defects than whether they were latent or patent. The court suggested that to require the purchasers to accept a house that had "defects in substance" in its construction would deprive the plaintiffs of the benefit of their bargain.81 While the court's construction of the implied warranty of habitability is a legitimate extension of the scope of the new-house implied warranty, the Petersen court erred when it ignored its own limitation of the scope of the new-house implied warranty when it applied the implied warranty in a case involving patent defects. In so doing, the Petersen court rendered the application of the Illinois new-house implied warranty unclear.

The Scope of the Illinois New-House Implied Warranty

Before applying the implied warranty of habitability, the Petersen court had to consider the parameters of the implied warranty of habitability as articulated in Goggin v. Fox Valley Construction Co.82 In Goggin, the court distilled from prior Illinois cases four elements to an action for breach of the implied warranty: (1) the plaintiff must have purchased a new house; (2) the new house must have contained a substantial defect; (3) the defect must have been caused by a builder's design, material, or workmanship; and (4) the defect must have caused the house to be unfit for human habitation.83 Further, Goggin focused on the application of the doctrine by not-

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77. "A patent defect is one which is plainly visible or which can be discerned by such an inspection as would be made in the exercise of ordinary care." BLACK'S LAW DICTIONARY 1013 (5th ed. 1979).
78. See note 40 and accompanying text supra.
79. 76 Ill. 2d at 44, 389 N.E.2d at 1160.
80. Id.
81. Id. The court stated: "[p]laintiffs contracted to pay for a house reasonably fit for its intended use, not for a house with substantial defects plus damages." Id. Further, the court felt it would be unjust to require the purchasers to accept a house in which there were "defects in substance" in the construction of the house. Id.
82. 48 Ill. App. 3d 103, 365 N.E.2d 509 (1st Dist. 1977). In Goggin, the plaintiff sued for breach of the implied warranty of quality of design, workmanship, and material in the sale of a new home. The court held that the implied warranty of habitability is recognized in Illinois but that, in the absence of an allegation in the complaint that the house was not fit for human habitation, the complaint failed to state a cause of action. Id. at 105, 365 N.E.2d at 511.
83. Id. at 105, 365 N.E.2d at 510-11.
ing that the real dispute in these cases rests upon a determination of the types of defects that render a new house uninhabitable.\textsuperscript{84} According to Goggin, a house was uninhabitable if it was unsafe, unhealthy, or failed to keep out the elements.\textsuperscript{85}

The Petersen court rejected as too narrow the Goggin configuration of the implied warranty of habitability.\textsuperscript{86} The court stated that a house "merely capable of being inhabited does not satisfy the requirements of the implied warranty of habitability."\textsuperscript{87} In an effort to establish new parameters of the new-house implied warranty, the Petersen court analogized it to the Uniform Commercial Code's implied warranty of merchantability.\textsuperscript{88} The implied warranty of merchantability is based on the idea that merchantability, as defined by the Code, is that for which the parties intended to contract.\textsuperscript{89} The court pointed out that the UCC's definition of an implied warranty would satisfy the expectations of both parties as to the quality of the house. The rationale was that the implied warranty of merchantability would protect the buyer from structural defects\textsuperscript{90} while protecting the seller from liability for ordinary and minor defects.

The court's reasoning merely restated the problem. It provided no guidelines to aid the courts in determining the kinds of defects that will give rise to an action for breach of the implied warranty. The courts still must decide which defects are ordinary and minor. Further, the implied warranty

\textsuperscript{84} Id. at 106, 365 N.E.2d at 511.
\textsuperscript{85} Id.
\textsuperscript{86} 76 Ill. 2d at 41, 389 N.E.2d at 1158.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 42, 389 N.E.2d at 1158. See ILL. REV. STAT. ch. 26, §§ 2-314, -315 (1979).
\textsuperscript{90} See Comment, Washington's New Home Implied Warranty of Habitability — Explanation and Model Statute, 54 WASH. L. REV. 185, 212 (1978): As defined by the Home Owners Warranty Corporation, a structural defect is:

- Actual damage to the load-bearing portion of the home—including damage due to settling, expansion, or lateral movement of the soil—which affects the load-bearing junction and vitally affects its use for residential purposes. . . . Examples of possible major structural defects are major weakening in the home's foundation. . . . Failure of beams, joints . . . or other elements of the home's supporting structure . . .
- Minor structural problems in roofs, such as failure of its structural members.

of merchantability does not apply to patent defects because the basis of the implied warranty—justifiable reliance—is absent where the defect is patent.91 Thus, the new-house implied warranty/implied-warranty-of-merchantability analogy does little to clarify the parameters of the Petersen warranty. The Petersen court rejected the Goggin configuration of the implied warranty of habitability, but the court failed to replace it with a coherent workable framework of its own.

The courts or the legislature92 now must clarify the scope of the new-house implied warranty to determine what quality of realty the builder-vendor warrants. The Petersen court's statement that the purchaser is entitled to the benefit of the bargain is too vague to be an efficient standard of quality. The value of realty is based on a combination of many factors including land acreage, potential for commercial development in the area, quality of the neighborhood, landscaping, and the age and appearance of the surrounding buildings. If the purchaser is entitled to the benefit of his or her bargain, the implied warranty should include within its scope that one factor that made the property valuable to the purchaser. The courts must articulate those factors that will be covered by the implied warranty of habitability.

**Impact of the Petersen Decision**

The ambiguities in the Petersen decision render the ultimate repercussions of the decision uncertain. The court's application of and reliance on the national trend, however, indicate that Illinois courts will probably hold the implied warranty to be comprehensive.93 Although the Petersen court indicated that certain individual defects may be too insignificant to render a builder-vendor liable,94 the aggregate effect of multiple defects would be adequate grounds for a breach of the implied warranty.95 It is clear that the bargaining position of the purchaser now is enhanced by the implied warranty, as the vendee will now receive by implied protection that which he or she used

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92. See note 97 infra.
94. The Petersen court stated that the vendee has a right to expect "a house that is reasonably fit for use as a residence." 76 Ill. 2d at 40, 389 N.E.2d at 1158 (emphasis added). The builder is not required to deliver a perfect house, but in determining whether a house is defective the test should be one of reasonableness. See Bethlahmy v. Dechtel, 91 Idaho 55, 69, 415 P.2d 698, 711 (1966); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 800, 807-8 (S.D. 1967).
95. See note 81 and accompanying text supra.
to pay for in the form of an express warranty. As a result of this more equitable proportioning of bargaining strength between the vendor and the vendee, specific limits of warranty protection may be established through fair bargaining.

Clearly, the Petersen decision portends increased liability for the builder-vendor. For the large builder-vendor, the increased expense will mean distribution of risk through insurance and higher costs to customers. For the small builder-vendor, however, the increased production costs and the cost of insurance may prove to be an intolerable burden. While a broad and flexible new-house implied warranty is desirable for the purchaser, some limit on the builder-vendor's liability is necessary to preserve competition.

96. Questions remain concerning the liability of other parties involved in the sale of a new home. In the case of a seller who hires a builder, "the rationale of the builder's warranty would support imposition of liability upon the sellers. . . . Although the seller does not personally create defects, he or she is in a position to hire a reputable builder, inspect the work, and demand repair." Comment, Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute, 54 WASH. L. REV. 185, 212 (1978). See Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651; Smith v. Warson Dev. Co., 479 S.W.2d 795, 801 (Mo. 1972). One writer suggests that liability should be imposed upon all sellers regardless of their position to inspect or demand repairs.

Today the implied warranty of merchantability has nothing to do with the special knowledge or responsibility of the seller of goods. When the local grocer sells a loaf of packaged bread, he may be described as a merchant with respect to the bread, but he has no more control over the contents or quality of that bread and no more knowledge about how bread should be made or packaged than the plumber's wife who buys it. . . . The argument that the grocer . . . selects his supplier is also specious in this day of mass advertising and trade-name selling; in fact, the retailer may not have any idea who the producer of the particular article is. . . . So any notion that liability without demonstrated fault should only be imposed upon those who are knowledgeable about the commodity . . . does not have any significance in our sales law today, although it seems that such was the origin of the 'merchant' requirement which still exists.


As to lenders, liability may be imputed to them if they are financially tied to a builder. See Connor v. Great Western Savings & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 369, 73 Cal. Rptr. 369 (1968).


98. See authorities cited note 97 supra.

99. The Illinois General Assembly has moved to limit the builder-vendor's liability via the statute of limitations. The state legislature is considering HB 1031, which creates a twelve year statute of limitations on actions brought by new house consumers for defective construction. The bill passed both houses on June 22, 1979, but it was subjected to amendatory veto on September 14, 1979. The Governor changed the limit from eight years to 12 years in order to conform with the products liability statute of repose. The statute of limitations will run from the time the builder-vendor tenders possession of the house to the first buyer.
in the housing industry. Unfortunately, due to the ambiguity and vagueness of the Petersen rationale, the ultimate limit and scope of the implied warranty will have to be fashioned through the costly course of litigation.

CONCLUSION

There is nothing in the doctrine of implied warranty of habitability to render it inapplicable to Petersen. The Illinois Supreme Court, however, ran roughshod over its own interpretation of the new-house implied warranty. The court stated that the implied warranty applied only to latent defects, yet the defects in Petersen were patent. Further, the court noted that the purpose of the implied warranty was to avoid the harsh consequences of caveat emptor and merger, yet neither caveat emptor nor merger were operative in Petersen. Nor was Petersen a unique situation requiring judicial innovation; there were sufficient and more appropriate alternative grounds for awarding judgment to plaintiffs. Because the Petersen court was making new law it should have awaited a more appropriate vehicle through which to institute the implied warranty of habitability. Thus, although Illinois does recognize an implied warranty of habitability in the sale of new homes by the builder-vendor, clarity in the law and the ultimate scope of the implied warranty must await future determination.

Peter Monahan