

# Commercial Law - Implied Warranties in Sales of Real Estate - The Trend to Abolish Caveat Emptor

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## COMMERCIAL LAW—IMPLIED WARRANTIES IN SALES OF REAL ESTATE—THE TREND TO ABOLISH CAVEAT EMPTOR

David Silver and his fellow owners took possession of their new condominiums in late 1966 and early 1967. Shortly thereafter gurgling and banging noises in their air conditioning units disturbed some of the building's inhabitants. By the end of summer the condominiums were without air conditioning on two or three occasions due to the water pump of the "water-to-air" system having "lost its prime." The builder's sub-contractor made the necessary repairs without cost to the condominium owners pursuant to a one-year express warranty against defects in equipment, materials, and workmanship. Nonetheless, the pump again "lost its prime" in January, 1968, and the sub-contractor again agreed to make the repairs but, this time, for a charge of \$550.00 since the express warranty had expired. Disillusioned by past performances, the owners refused the offer and employed an engineering company which found the wells and pumps of the air conditioning system to be so defective that, for the system to work properly, new wells would have to be drilled and new pumps installed at a cost of \$5,144.00.

David Silver and the other condominium owners subsequently filed suit against the builder-vendor, David Gable (a builder and developer in southern Florida since 1954), to recover their damages. Holding that defendant Gable had breached an implied warranty of fitness of their air conditioning and heating system, the trial court rendered a judgement of \$5,869.11 plus costs in favor of the plaintiffs.<sup>1</sup> The District Court of Appeal later affirmed the trial court's decision holding that "the implied warranties of fitness and merchantability extend to the purchase of new condominiums in Florida from builders." *Gable v. Silver*, 258 So.2d 11 (Fla. Dist. Ct. App. 1972).<sup>2</sup>

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1. Plaintiff's original complaint charged defendant with negligence, breach of the written express warranty and breach of an implied warranty of fitness of the air conditioning and heating system. Petitioner's Reply Brief for Certiorari at 2, *Gable v. Silver*, No. 42,149 (Fla. July 5, 1972). The trial court found that defendant's sub-contractor was guilty of negligence in its improper drilling of the wells and improper installation of the pumping equipment but that such negligence could not be imputed to defendant. *Id.* at 8. Plaintiffs did not pursue their theory of express warranty since that warranty had expired prior to the time the last mechanical breakdown in the system occurred.

2. Prior to considering the issue of implied warranties in sales of real estate,

The significance of this case lies in the strength it lends to a growing trend among courts to abandon the doctrine of *caveat emptor* in the sales of new homes by builder-vendors. This note will briefly survey the doctrine of *caveat emptor* as it applies to the sale of realty through a review of the history of relevant English and American case law, focusing on the traditional defense of *caveat emptor* and on theories which have recently formed the basis of builder-vendor liability. In conclusion there will be an evaluation of the particular contribution of *Gable v. Silver* to the current trend.

The doctrine of *caveat emptor* originated in Sixteenth Century England where trade practices in the market place were premised on the fact that a purchaser had knowledge of the goods and a bargaining position equal to that of his vendor. Thus, if a purchaser, while inspecting the goods prior to sale, found reason to doubt their soundness or quality, he could easily extract an express warranty from his vendor.<sup>3</sup> If the purchaser later attempted to hold the vendor liable for defects in the goods, the courts required him to offer proof of fraud or express warranty.<sup>4</sup> This result was equitable since both parties to the transaction dealt at arm's length and the buyer was fully aware of the consequences should he fail to "beware." It is in this form that the same doctrine was subsequently adopted in the United States.

Although *caveat emptor* is usually thought of with respect to sales of chattels or personal property, it applies equally to sales of real estate.<sup>5</sup> It is significant to note, however, that while legislatures<sup>6</sup> and courts in recent times have substituted the theory of implied warranty for the doctrine of *caveat emptor* in sales of chattels, they have denied comparable relief to purchasers of realty.<sup>7</sup>

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the appellate court found that the express warranty did not preclude nor was it inconsistent with an implied warranty of fitness and merchantability. Therefore, the two warranties could coexist. The court also characterized the air conditioning system as realty since it was fixed and could not be removed without damage to the premises.

On July 5, 1972 the Supreme Court of Florida denied defendant Gable's petition for writ of certiorari to review the decision of the District Court of Appeal.

3. *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (1970) quoting from Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

4. *Kohl v. Lindley*, 39 Ill. 195 (1866); *Hight v. Bacon*, 126 Mass. 10 (1878).

5. Traditionally the courts have considered the purchase of a home to be a sale of real estate "with appurtenances." Consequently, when one purchases a home he is subject to the body of law governing sales of realty. Annot., 25 A.L.R.3d 383, 390 (1969).

6. UNIFORM COMMERCIAL CODE § 2-314.

7. *Weeks v. Slavik Builders, Inc.*, 24 Mich. App. 621, 624, 180 N.W.2d 503, 505 (1970).

The strength and longevity of *caveat emptor* as the governing rule of law in sales of real estate is due in large part to what is known as the "doctrine of merger."<sup>8</sup> Reflecting the significance traditionally afforded the deed of conveyance, this doctrine stands for the proposition that:

[a]ll agreements, whether oral or written, entered into by and between the parties to a deed prior to its execution are presumed to have been merged in the deed in the absence of pleading and proof that references thereto were omitted from the deed through mistake, accident, or fraud, and after delivery and acceptance of a deed in performance of a contract for the purchase and sale of land the deed is regarded as the final expression of the agreement of the parties and the sole repository of the terms on which they have agreed.<sup>9</sup>

Thus, should a purchaser of a home attempt to hold his builder-vendor liable for breach of a term stated in the contract of sale but omitted from the deed, or for breach of an implied warranty, courts have often denied relief by invoking the doctrine of merger as a rationale in support of the theory of *caveat emptor*.<sup>10</sup>

Policy considerations such as those enumerated in *Levy v. C. Young Construction Co.*<sup>11</sup> provide a further defense for *caveat emptor*. In reversing a lower court's judgement in the plaintiff's favor on the issue of an implied warranty in a sale of real estate, the court observed that

[w]ere plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability.<sup>12</sup>

Consequently, the court in this case, as in the vast majority of cases prior to 1957, held that in the absence of an express warranty included in the deed or proof of fraud, the doctrine of *caveat emptor* precluded the plaintiff's recovery for defects in his home purchased from the defendant builder-vendor.<sup>13</sup>

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8. Jaeger, *The Warranty of Habitability*, 47 CHI-KENT L. REV. 1, 27-28 (1970).

9. 7 WILLISTON ON CONTRACTS § 926 (W.H.E. Jaeger ed. 1963) quoting from *Union Producing Co. v. Sanborn*, 194 F. Supp. 121, 126 (E.D. Tex. 1961).

10. *Amos v. McDonald*, 123 Ga. App. 509, 181 S.E.2d 515 (1971); *Levy v. C. Young Construction Co.*, 46 N.J. Super. 293, 134 A.2d 717 (1957) (subsequently overruled). But see *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963); *Week v. A:M Sunrise Construction Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Staff v. Lido Dunes, Inc.*, 47 Misc. 2d 332, 262 N.Y.S.2d 544 (Sup. Ct. 1965); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968).

11. 46 N.J. Super. 293, 134 A.2d 717 (1957).

12. *Id.* at 297-98, 134 A.2d at 719.

13. *Id.* at 296, 298, 134 A.2d at 719-20.

The English case of *Miller v. Cannon Hill Estates, Ltd.*<sup>14</sup> marked the turning point in the traditional application of *caveat emptor* to sales of real estate. The plaintiff in that case contracted for the purchase of a lot and house in the course of erection thereon. Shortly after taking possession, dampness so penetrated the house that plaintiff, pursuant to medical advice, abandoned it as unfit to live in. In his suit for damages, the English court for the first time declined to apply the doctrine of *caveat emptor* and, holding for the plaintiff, declared:

[w]hen you contract with a builder or with the owners of a building estate in course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them . . . the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling. . . . If the plaintiff has no implied warranty that it shall be fit for human habitation, then the consideration for which he bought his house wholly fails.<sup>15</sup>

Significant as this decision is, it is important to note that the court limits the implication of a warranty of habitability to (1) homes purchased in the course of construction (as opposed to the purchase of a completed house) and (2) homes so defective as to render them uninhabitable.<sup>16</sup> These two standards were subsequently clarified by two later English decisions.

Following the precedent set by the *Miller* case, the court in *Perry v. Sharon Development Co., Ltd.*<sup>17</sup> offered a more palatable rationale than did *Miller*<sup>18</sup> for the distinction between a completed and uncompleted house for purposes of implying a warranty. In the sale of an uncompleted house there is a contract to build as well as to sell real estate. In contracts to build "it is only natural and proper that there should be an implied undertaking that the building work should be done properly."<sup>19</sup> Further, one who purchases a finished house can inspect it to assure himself of its good condition while the buyer of an unfinished house cannot inspect it.<sup>20</sup> As an example of the type of defects for which recovery would be allowed, the court in *Jennings v. Tavener*<sup>21</sup> granted the plain-

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

15. *Id.* at 121.

16. *Id.* at 120-21.

17. [1937] 4 All E.R. 390.

18. [1931] 2 K.B. at 120-21.

19. [1937] 4 All E.R. at 395.

20. *Id.* at 395-96.

21. [1955] 2 All E.R. 769.

tiff damages for a cracked and weakened foundation but not for other more minor defects since "neither of those alone would have made the bungalow unfit for habitation."<sup>22</sup>

Courts in the United States were initially reluctant to follow the English precedent and thus refused to impose implied warranties in sales of real estate. Nonetheless, a number of jurisdictions provided remedies for distraught home-buyers by applying theories of relief other than implied warranty.<sup>23</sup>

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22. *Id.* at 774.

23. *Jose-Balz Co. v. DeWitt*, 93 Ind. App. 672, 176 N.E. 864 (1931) and *Mann v. Clowser*, 190 Va. 887, 59 S.E.2d 78 (1950) were both actions brought by builder-vendors to enforce mechanic's liens against the purchasers who, in turn, sought damages for the costs of repairing major structural defects in their homes. In holding for the purchasers, both courts relied on the theory expressed in 17A C.J.S. Contracts § 329 (1963):

"Ordinarily a person undertaking a particular work impliedly agrees to exercise a degree of skill and care equal to the undertaking . . . .

Accordingly, . . . where a person holds himself out as specially qualified to perform work of a particular character there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use; and in building and construction contracts and related contracts it is implied that the building shall be erected or the work shall be done in a reasonably good and workmanlike manner and when completed the structure shall be reasonably fit for the intended purpose."

*Loma Vista Development Co. v. Johnson*, 177 S.W.2d 225 (Tex. Civ. App. 1943) was an action for damages based on false representations made to plaintiffs by defendant builder-vendor's agent as to the soundness of the home's foundations. The court, although reversing on other grounds, supported plaintiffs' contentions stating at 227 that:

"By offering the house for sale as a new and complete structure appellant impliedly warranted that it was properly constructed and of good material and specifically that it had a good foundation, and it was well within the scope of Jones' agency to represent to appellees or any other purchaser that the property had such a foundation."

It appears that, in spite of the court's language regarding an implied warranty, it based its decision on the representations made by defendant's agent to plaintiffs.

*Bozeman v. McDonald*, 40 S.2d 517 (La. App. 1949) also dealt with an unstable foundation. The court based its decision for the plaintiff purchaser on the civil law concept of redhibition embodied in the Louisiana Civil Code, L.A. Civ. Code Ann. art. 2474, 75, 76. Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961) at 547 describes redhibition as: "[Creating] an implied warranty, existing at all sales unless expressly excluded or unless the defect is such that the buyer might have discovered it by simple inspection. It applies to the sale of realty as well as personalty. . . ."

*Lutz v. Bayberry Huntington, Inc.*, 148 N.Y.S.2d 762, 767-68 (1956), an action by plaintiff purchasers alleging they did not receive what they had bargained for, was decided on traditional contract theory, the court holding that: "It is well established that every contract implies good faith and fair dealing between the parties. . . . A corollary of this principle is the doctrine that in every contract there is an implied covenant that neither party will do anything having the

The first American case to fully adopt the rules set out in the English cases, discarding the doctrine of *caveat emptor* in sales of realty, was *Vanderschrier v. Aaron*.<sup>24</sup> The facts of this case met both standards prescribed by the English courts as prerequisites to the implication of a warranty—the plaintiffs contracted to purchase their home from the defendant builder-vendor prior to its completion and the defective sewer that caused sewage to flood the basement rendered the house uninhabitable. In holding for the plaintiffs, the court declared:

[S]ufficient credible evidence established the fact that the house, when sold, was still in the course of construction and incomplete; and the bargain implied in law between the sellers and the buyers was the completion of the entire house in such a way that it would be reasonably fit for its intended use, and that the work would be done in a reasonably efficient and workmanlike manner.<sup>25</sup>

To further affirm its position that the house be unfinished at the time of contracting, the court stated that:

[t]he vendor of a *completed house*, in respect of which there is no work going on and no work to be done, does not generally, in the absence of some express bargain or warranty, undertake any obligation with regard to the condition of the house.<sup>26</sup>

It is interesting to note that shortly after rendering its decision in *Vanderschrier*, the Ohio Court of Appeals was presented with the issue of whether there is an implied warranty in the sale of a completed house.<sup>27</sup> In this case the alleged defects could have been such as to render the house uninhabitable<sup>28</sup> but, since the plaintiffs contracted for the purchase of the house after its completion, the court affirmed a judgment for the defendants based on the doctrine of *caveat emptor*.<sup>29</sup>

For the next few years the American courts considering the issue of implied warranties in sales of real estate continued to apply the standard as set out by the English courts. This finished/unfinished dichotomy suggests that the courts were hesitant to dispense totally with the doctrine of *caveat emptor* in sales of realty. The language offered to rationalize the distinction implied that the courts, as in the *Perry v. Sharon*

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effect of destroying or injuring the right of the other party to receive the fruits of the contract. . . . Thus, there was an implied term of the agreement here that the house would be constructed in a good and workmanlike manner. . . .”

24. 103 Ohio App. 340, 140 N.E.2d 819 (1957).

25. *Id.* at 342, 140 N.E.2d at 821.

26. *Id.* at 341, 140 N.E.2d at 821 (court's emphasis).

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

28. Six years after taking possession of the house, plaintiffs discovered that twelve windows were improperly set causing the lath and plaster to disintegrate from dampness. Plaintiffs had to replace those windows together with the framing, lath and plaster surrounding them.

29. 106 Ohio App. at 283-85, 151 N.E.2d at 255-56.

*Development*<sup>30</sup> case, were actually separating the real estate transaction into a contract for construction of a house in addition to a contract for the sale of real property.<sup>31</sup> The question then arises whether the courts were implying a warranty in the sale of real estate or applying the well-established principle that the law will imply a warranty in a construction contract "that the building shall be erected or the work shall be done in a reasonably good and workmanlike manner and when completed the structure shall be reasonably fit for the intended purpose."<sup>32</sup>

The Colorado Supreme Court finally took the initiative and abandoned the requirement that a home-buyer enter into a contract for sale *prior* to completion of construction before the law will imply a warranty as to the fitness of his house. The plaintiffs in *Carpenter v. Donohoe*<sup>33</sup> purchased their house after its completion and within the first year thereafter the cracks in the walls and foundation became so serious that the defendant builder-vendor braced a basement wall with heavy lumber to prevent it from collapsing. The plaintiffs subsequently brought a suit for breach of an implied warranty. In its opinion the court referred to *Miller v. Cannon Hill Estates, Ltd.*<sup>34</sup> and that court's decision to imply a warranty of fitness for habitation if the house was incomplete at the time of purchase. The Colorado court then noted that the English court had later applied the same theory in *Perry v. Sharon Development Co.*<sup>35</sup> where the house was substantially finished<sup>36</sup> at the time the contract of sale was entered into.

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30. [1937] 4 All E.R. 390.

31. Typical is the language in the *Rappich* case where the court distinguished *Vanderschrier* by stating: "[T]hat case involved work to be done upon the property after the sale had been completed. Such work was to be done in a good and workmanlike manner. The action was brought for breach of that agreement by the purchasers who claimed that certain of the additional work which had been agreed to had either not been completed or if completed had not been performed in an efficient and workmanlike manner as agreed upon. The house in the present case was entirely completed and it was purchased without any representations being made." 106 Ohio App. 282, 283-84, 151 N.E.2d 253, 255 (1957). See *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963); *Weck v. A:M Sunrise Construction Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); *Loraso v. Custom Built Homes, Inc.*, 144 So. 2d 459 (La. App. 1962); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963); *Caldwell v. Wells*, 228 Or. 389, 365 P.2d 505 (1961); *Hoye v. Century Builders, Inc.*, 52 Wash.2d 830, 329 P.2d 474 (1958).

32. 17A C.J.S. Contracts § 329 (1963). See *F. & S. Construction Co. v. Berube*, 322 F.2d 782 (10th Cir. 1963).

33. 154 Colo. 78, 388 P.2d 399 (1964).

34. [1931] 2 K.B. 113.

35. [1937] 4 All E.R. 390.

36. At the time the plaintiffs in *Perry* purchased their house it was complete but for some plastering, water taps, grates, an electric meter and decorations.



In conclusion the court declared:

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

We hold the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. . . . Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation.<sup>37</sup>

In so discarding the finished/unfinished standard, the Colorado court added one of the most significant contributions to the growing body of case law striving to abandon the rule of *caveat emptor* in real estate sales.

Of comparable significance are the decisions granting a plaintiff damages for personal injury proximately caused by defendant builder-vendor's negligent failure to correct defects in his building. In *Leigh v. Wadsworth*<sup>38</sup> the plaintiff lessee of the home's second owner was injured two years after the house was built when a porch roof fell on her. The evidence demonstrated that the roof was poorly fastened to the house. Defendant builder-vendor contended that, absent privity of contract, the plaintiff should be denied recovery. The court disagreed, declaring:

The duty owed by a building or construction contractor to third persons, after he has completed and turned over his work to the owner, is the same as that owed by the manufacturer or vendor of chattels to persons not in privity of contract with him, as that duty was expressed in the *Mac Pherson* case.<sup>39</sup>

Thus, the court, taking the rule established in respect to chattels<sup>40</sup> and extending it to sales of real estate implied that a builder-vendor is under a duty to construct a building with care since he knows that it will be dangerous if negligently made. . . .

One of the most notable cases in this area is *Schipper v. Levitt and Sons, Inc.*,<sup>41</sup> important not only for its extension of strict liability and implied warranty to sales of real estate by builder-vendors but also for the strong often-quoted language used by the New Jersey Court to attack the doctrine of *caveat emptor* in sales of realty. The defendant in the case was a mass-developer of homes who failed to install an inexpensive mixing valve in its hot water units. As a result, plaintiffs' (lessees of the purchaser) six-

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37. 154 Colo. at 83-84, 388 P.2d 402; *accord*, *Weeks v. Slavik Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503 (1970); *Waggoner v. Midwest Development, Inc.*, 154 N.W.2d 803 (S.D. 1967).

38. 361 P.2d 849 (Okla. 1961).

39. *Id.* at 852; *accord*, *Rogers v. Scyphers*, 251 S.C. 128, 161 S.E.2d 81 (1968).

40. *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

41. 44 N.J. 70, 207 A.2d 314 (1965).

teen-month-old son severely scalded his hand as the 190° water flowed from the spigot. In affirming a judgment for the plaintiffs in their suit for damages based on negligence and breach of implied warranty, the court initially discarded the illusory distinction between "Levitt's mass production and sale of homes and the mass production and sale of automobiles" and extended the theory of strict liability in tort to real estate sales.<sup>42</sup> To defendant's contention that the doctrines of merger and *caveat emptor* should be applied in the instant situation, the court responded that to do so would be to ignore "the realities of the situation" noting that "[c]aveat emptor developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed."<sup>43</sup> On the contrary, modern real estate transactions involve a vendee, ignorant of building construction skills, purchasing a development house in reliance "on the skill of the developer and on its implied representation that the house will be erected in a reasonably workmanlike manner and will be reasonably fit for habitation."<sup>44</sup> Likewise, his lack of expertise leaves the vendee incompetent to make a fruitful inspection of the home and "his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder-vendor is negligible."<sup>45</sup> The defendant's final contention went to the same sort of policy considerations as those expressed by the court in *Levy v. C. Young Construction Co.*,<sup>46</sup> that is, "the fear of 'uncertainty and chaos' if responsibility for defective construction is continued after the builder-vendor's delivery of the deed and its loss of control of the premises."<sup>47</sup> The court found the argument to be without merit since no similar "uncertainty and chaos" have plagued the products liability field since its abandonment of *caveat emptor*.<sup>48</sup>

Thus, in implying a warranty that a home is constructed in a workmanlike manner and fit for habitation, the New Jersey Supreme Court discarded the requirement of privity when personal injury results from de-

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42. *Id.* at 90, 207 A.2d at 325; *accord*, *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969).

43. 44 N.J. 70, 91, 207 A.2d 314, 326 (1965).

44. *Id.* at 91, 207 A.2d at 325.

45. *Id.* at 91, 207 A.2d at 325-26; *accord*, *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (1970); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. App. 1969); *Weeks v. Slavik Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503 (1970); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Rothberg v. Olenik*, 262 A.2d 461 (Vt. 1970).

46. 46 N.J. Super. 293, 134 A.2d 717 (1957).

47. 44 N.J. at 92, 207 A.2d at 326.

48. *Id.*

fects in the home, disposed of the policy considerations behind *caveat emptor* as immaterial, and surveyed the actual relationship of the builder-vendor and his vendee to illustrate the absurdity of further adherence to *caveat emptor*, a doctrine based on the premise that a buyer and seller are in an equal bargaining position.

In the past decade many jurisdictions have chosen to imply warranties in sales of real estate but, probably because the defects in the homes involved were so serious as to actually render the house uninhabitable,<sup>49</sup> those courts rarely spoke of how serious a defect must be to warrant recovery under an implied warranty. The court in *Miller v. Cannon Hill Estates, Ltd.*<sup>50</sup> stated "there is an implication of law that the house shall be *reasonably* fit for the purpose for which it is required, that is for human dwelling."<sup>51</sup> As noted earlier, one can fairly assume from such language that recovery will not be allowed for all defects but only those that render the house uninhabitable.<sup>52</sup> Consequently, plaintiffs forced to bear the costs of repair for lesser defects may be left without a remedy.

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49. Examples of the defects include discharge of raw sewage into the home; a shifting foundation causing large cracks in the walls and tilted doors, windows and floors; continual seepage of water into the basement carrying in bugs, damaging furniture and causing an offensive odor; a defective fireplace causing the house to ignite; a defective heating system which blew water and particles of fill throughout the house; and a roof that leaked during rainstorms damaging ceilings.

50. [1931] 2 K.B. 113.

51. *Id.* at 121 (emphasis added). Similar language was used in the *Vanderschrier* case, 103 Ohio App. 340, 140 N.E.2d 819, 820 (1957): "The seller . . . impliedly warrants . . . the house . . . will be . . . *reasonably* fit for occupancy as a place of abode. . . ." (emphasis added).

52. See *Shiffers v. Cunningham Shepherd Builders Co.*, 28 Colo. App. 29, 41, 470 P.2d 593, 598 (1970): "For construction to be done in a good and workmanlike manner there is no requirement of perfection; the test is reasonableness in terms of what the workmen of average skill and intelligence . . . would ordinarily do."

*Crawley v. Terhune*, 437 S.W.2d 743, 745 (Ky. App. 1969): "[I]n the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner. . . ."; *Waggoner v. Midwestern Development, Inc.*, 154 N.W.2d 803, 809 (S.D. 1967): "The builder is not required to construct a perfect house and in determining whether a house is defective the test is reasonableness and not perfection." *House v. Thornton*, 457 P.2d 199, 203 (Wash. 1969): "[I]f the defects . . . do not render the house unfit for habitation, the question of whether an implied warranty covers them could be said to depend on whether they are of such magnitude as to prevent the house from being used for the purpose for which it was purchased. . . . But the present trend is toward the implied warranty of fitness and away from caveat emptor when it comes to the things which vitally affect the structural stability or preclude the occupancy of the building." *Hoye v. Century Builders, Inc.*, 52 Wash.2d 830, 834, 329 P.2d 474, 477 (1958) quoting from *Miller*; cf. *Bethlahmy v. Bechtel*, 91 Idaho 55, 68, 415 P.2d 698, 711 (1966): "The implied warranty of fitness does not impose upon the builder an

The decision of the Florida Court of Appeals in *Gable v. Silver*<sup>53</sup> not only provided additional strength to the growing trend of case law that has implied warranties in sales of real estate but more significantly it awarded damages for a defect which did not render the premises uninhabitable—a malfunctioning air conditioning system. By comparison, previous courts have allowed recovery for discharge of raw sewage into the home,<sup>54</sup> improper installation of a chimney and fireplace causing the house to ignite,<sup>55</sup> and construction of the house on improper soil resulting in a shifting and settling foundation.<sup>56</sup>

Nonetheless, the court in *Gable* did not imply a warranty of habitability or workmanlike construction as other jurisdictions had done, but affirmed the lower court's decision to impose a warranty of fitness and merchantability.<sup>57</sup> In reaching its decision the court relied heavily on policy considerations as enunciated by other courts, noting further that, of the two parties, the builder-vendor is in a better position to bear the costs of his mistakes than is the unsuspecting home-buyer.<sup>58</sup> One can fairly assume then, that the court perceived the applicable standard to be more than merely furnishing a home that is structurally sound and will not impair the health of its inhabitants. Rather, the court recognized that the home-buyer also relies on the builder's superior skill when the latter installs a complex heating and air conditioning system.

Finally, in light of the factual situation involved, the decision of the Florida court extended the rule of implied warranty to the purchase of new condominiums as well as homes. However, the majority of jurisdictions have yet to imply warranties in the sale of real estate.<sup>59</sup> As for those

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obligation to deliver a perfect house. No house is built without defects and defects susceptible of remedy ordinarily would not warrant rescission. But major defects which render the house unfit for habitation, and which are not readily remediable, entitle the buyer to rescission and restitution." *But see Moore v. Werner*, 418 S.W.2d 918 (Tex. Civ. App. 1967), where the court affirmed a judgment awarding damages to plaintiffs for breach of an implied warranty of fitness where a pea gravel patio and driveway of a home purchased from defendant builder-vendor washed away.

53. 258 So.2d 11 (Fla. Dist. Ct. App. 1972).

54. *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957).

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

56. *House v. Thornton*, 457 P.2d 199 (Wash. 1969).

57. 258 So.2d at 17-18. The court concluded that the UCC provisions dealing with implied warranties of fitness and merchantability were inapplicable to the case at bar since defendant *Gable* was not a merchant; that is, he did not deal in the sale of goods.

58. *Id.* at 14-17.

59. The court in *Gable* refers to three jurisdictions which have recently considered the issue but declined to imply warranties in sales of realty. *Id.* at 16.

that have already abandoned the doctrine of *caveat emptor* along with the finished/unfinished dichotomy and privity of contract requirement in personal injury cases, they must now decide which imperfections, short of major structural defects and those that impair the health of the home's inhabitants, justify the protection of an implied warranty.

*Barbara Fredericks*

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Livingston v. Bedford, 284 Ala. 323, 224 So. 2d 873 (1969); Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971); Allen v. Wilkinson, 250 Md. 395, 243 A.2d 515 (1968).

## APPENDIX

<u>JURISDICTION</u>	<u>CASE</u>	<u>NATURE OF WARRANTY</u>
Arkansas	Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970)	Warranty to first purchaser
California	Kreigler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969)	Strict liability in tort of builder-vendor of tract houses
Colorado	F. & S. Construction Co. v. Berube, 322 F.2d 782 (10th Cir. 1963)	Fit for habitation
	Carpenter v. Donohoe, 154 Colo. 78, 338 P.2d 399 (1964)	Workmanlike manner; fit for habitation; compliance with local building code; warranty extends to a <i>completed</i> house
	Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963)	Fit for habitation
	Shiffers v. Cunningham Shepherd Builders Co., 28 Colo. App. 29, 470 P.2d 593 (1970)	Workmanlike construction
Connecticut	Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (1970)	Workmanlike manner
Florida	Gable v. Silver, 285 So. 2d 11 (Fla. Dist. Ct. App. 1972)	Fitness and merchantability
Idaho	Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966)	Fit for habitation
Illinois	Weck v. A:M Sunrise Construction Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962)	Workmanlike manner and fit for habitation
Indiana	Theis v. Heuer, 270 N.E.2d 764 (Ind. App. 1971)	Fit for habitation
Kentucky	Crawley v. Terhune, 437 S.W.2d 743 (Ky. App. 1971)	Workmanlike manner
Louisiana	Loraso v. Custom Built Homes, Inc., 144 So. 2d 459 (La. App. 1962)	Fit for habitation; warranty extends to a <i>completed</i> house
Michigan	Weeks v. Slavik Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (1970)	Fit for purpose intended
New Jersey	Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965)	Reasonable skill; fit for habitation; strict liability in tort for personal injuries which are proximately caused by unreasonably dangerous defects

Ohio	Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957)	Workmanlike manner; fit for habitation
Oklahoma	Jones v. Gatewood, 381 P.2d 158 (Okla. 1963)	Workmanlike construction; fit for habitation
	Leigh v. Wadsworth, 361 P.2d 849 (Okla. 1961)	Recovery allowed without privity of contract where personal injury results
South Carolina	Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970)	Workmanlike manner; fit for habitation
	Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968)	Recovery allowed without privity of contract where personal injury results
South Dakota	Waggoner v. Midwest Development, Inc., 154 N.W.2d 803 (S.D. 1967)	Reasonable workmanship; fit for habitation
Texas	Humber v. Morton, 426 S.W.2d 554 (Tex. 1968)	Workmanlike construction; fit for habitation
	Diana v. Parks, 433 S.W.2d 761 (Tex. Civ. App. 1968) ( <i>aff'd</i> for defendant on other grounds)	Workmanlike construction; fit for habitation
	Moore v. Werner, 418 S.W.2d 918 (Tex. Civ. App. 1967)	"[P]roperty is reasonably fitted for and will reasonably perform the service for which it is sold"
Vermont	Rothberg v. Olenik, 262 A.2d 461 (Vt. 1970)	Against structural defects
Washington	House v. Thornton, 457 P.2d 199 (Wash. 1969). <i>But see</i> Fain v. Nelson, 57 Wash. 2d 217, 356 P.2d 302 (1960)	House is structurally safe
	Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958)	Fit for habitation