

CASE COMMENTS

BUILDER BEWARE: INCREASED BUILDER LIABILITY UNDER THE IMPLIED WARRANTY OF HABITABILITY

Tusch Enterprises v. Coffin, 113 Idaho 37, 740 P. 2d 1022 (1987).

In *Tusch Enterprises v. Coffin*,¹ the Idaho Supreme Court held that the implied warranty of habitability applies to residential dwellings that have never been occupied by the buyers even if the dwellings were purchased for income producing purposes.²

Tusch Enterprises³ was a partnership formed to buy three duplexes from Robert and Elizabeth Vander Boegh.⁴ The Vander Boeghs contracted with Rex Coffin to build the duplexes.⁵ Upon completion, the Vander Boeghs rented the buildings for three years before selling them to Tusch Enterprises. Prior to purchasing the duplexes as investment properties, Tusch Enterprises inspected the buildings and did not discover any defects. One month after the purchase, tenants discovered defects in the house.⁶ An investigation by experts revealed a cracked foundation which was a result of improper construction.⁷

Tusch Enterprises brought four different claims against Coffin and the Vander Boeghs, including one claim for breach of the implied warranty of habitability.⁸ The trial court granted summary judgment in favor of

1. 113 Idaho 37, 740 P.2d 1022 (1987).

2. *Id.* at 47, 740 P.2d at 1032.

3. *Id.* at 39, 740 P.2d at 1024. Marianne Tusch, a real estate agent, her husband, two sons, and a daughter-in-law formed a partnership in order to buy the duplexes for investment purposes. *Id.*

4. *Id.* at 38, 740 P.2d at 1023. The Vander Boeghs owned the land in Pocatello, Idaho where they built the duplexes.

5. *Id.* Coffin agreed to prepare plans for the duplexes, secure the necessary permits, and build the duplexes. Site preparation and exterior work were left to Vander Boegh. *Id.* at 38, 39, 740 P.2d at 1023, 1024.

6. *Id.* at 40, 740 P.2d at 1025.

7. *Id.* The experts submitted affidavits and testified by deposition that the foundation was partially constructed on fill dirt. When the fill dirt compacted, it caused the foundation to settle and crack. In their opinion construction on fill dirt amounted to improper construction. *Id.*

Coffin testified that he was concerned with the soil at the south duplex site. He indicated that Vander Boegh assured him that no fill dirt had been used. Vander Boegh testified that he discussed the problem with the soil at the south site with Coffin, and agreed it looked like fill dirt. He stated that he told Coffin to do what was needed to take care of it. *Id.* at 39, 740 P.2d at 1024.

8. *Id.* at 38, 740 P.2d at 1023. Tusch Enterprises alleged negligence, misrepresentation, and breach of express and implied warranties. Tusch Enterprises asked for recovery in the amount of

the defendants⁹ and Tusch Enterprises appealed to the Supreme Court of Idaho. The Supreme Court reversed in part, holding that the implied warranty of habitability applied to this situation.¹⁰

The policy of *caveat emptor*¹¹ has applied in real property law since the earliest days of English common law.¹² Gradually, however, real property law has evolved to encompass the buyer protection measures included in contract law. In particular, the implied warranty of habitability has developed into an important buyer protection device.

Originally, the implied warranty of habitability guaranteed that at the beginning of a rental period no latent defects in the facilities existed and that the facilities would remain in a suitable living condition.¹³ This warranty was virtually nonexistent in real property conveyances and leases prior to the Twentieth Century. Prior to this time, inspection or express warranty provided a buyer the only means of protection.¹⁴ This widely accepted policy¹⁵ originated at the time when a sale or lease of real property was viewed as a conveyance of land, and any buildings involved in

lost rental value and costs of repair. Defects in the foundation had caused damage both to the duplexes and the parking lot. Tusch Enterprises had spent "a great deal of money remedying the problems." *Id.* at 40, 740 P.2d at 1025. The opinion does not specify how much was spent.

9. *Id.*

10. *Id.* at 47, 740 P.2d at 1032.

11. "Let the buyer beware." "This maxim summarizes the rule that a purchaser must examine, judge and test for himself. This maxim is more applicable to judicial sales, auctions and the like, than to sales of consumer goods where strict liability, warranty, and other consumer protection laws protect the consumer-buyer." BLACK'S LAW DICTIONARY 202 (5th ed. 1979).

12. See generally, Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) (documenting the history of *caveat emptor* from the Middle Ages to modern times).

13. *Kamarath v. Bennett*, 568 S.W.2d 658, 660-61 (Tex. 1978).

14. See *Hicks*, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 481-82 (1972). Both parties were considered to have equal opportunity to discover flaws so the law imposed neither a duty to inform of defects nor to repair.

Baron Parke explained the policy in *Hart v. Windsor*, 12 M. & W. 68, 152 Eng. Rep. 1114 (1843), with these words: "It is much better to leave the parties in every case to protect their interests themselves by proper stipulations, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning." *Id.* at 1122.

15. See, e.g., *Doyle v. Union Pac. R. Co.*, 147 U.S. 413 (1893); *Russell v. Little*, 22 Idaho 429, 126 P. 529 (1912); *Whiteley v. McLaughlin*, 183 Mo. 160, 81 S.W.1094 (1904); *Steefel v. Rothschild*, 179 N.Y. 173, 72 N.E. 112 (1904).

This rule was adopted in all the states except Louisiana. Louisiana's civil code embodies the principle of redhibition, see LA. CIV. CODE ANN. art 2520 and 2521 (West 1952). Redhibition effectively creates an implied warranty in all sales, whether of realty or personalty. The warranty applies unless expressly disclaimed or the defect is such that it could have been discovered by inspection. See also *Bearman*, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 547 (1961); *Haskell*, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 645 (1965).

the transaction were merely incidental to the conveyance.¹⁶

In 1961, the Supreme Court of Wisconsin first recognized the implied warranty of habitability in leases of real property in *Pines v. Perssion*.¹⁷ The warranty, however, was limited to a short term lease of furnished premises.¹⁸ Likewise, in another case¹⁹ involving a short term lease of furnished premises, the Supreme Court of Hawaii recognized an implied warranty of habitability and fitness for use intended. In *Lemle v. Breeden*²⁰ the plaintiff brought suit claiming constructive eviction and breach of the implied warranty of habitability.²¹ The court in recognizing contemporary housing problems, viewed the lease as a contractual relationship deserving of an implied warranty of habitability, and held for the plaintiff.²² Further, the court said that when this warranty is available the doctrine of constructive eviction is no longer needed.²³

The implied warranty of habitability was extended to cover all leases in *Javins v. First National Realty Corp.*²⁴ In *Javins*, the D.C. Circuit held

16. Drisdale, *The Landlord-Tenant Relationship Breaks into the Twentieth Century: The Implied Warranty of Habitability*, 30 BAYLOR L. REV. 513 (1978). In the agrarian past, the importance of a real property transaction was the land. In addition, there were few if any structures on the land. It was very easy for the lessor or buyer to inspect the premises and determine if they suited his purposes. See Hicks, *supra* note 14, at 481-82.

The principle of *caveat emptor* had disappeared from the sales of chattels by the Twentieth Century. See Haskell, *supra* note 15, at 625-36. The modern warranty of merchantability originated in the early 1800's. Prior to that time, recovery against a seller rested on a theory of fraud rather than contract. With the Uniform Sales Act (1906), and then the Uniform Commercial Code, §§ 2-314 & 2-315 (1953), the implied warranties of merchantability and fitness for a particular purpose became a firm part of the sales of goods.

17. 14 Wis.2d 590, 111 N.W.2d 409 (1961). "To follow the old rules of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*." *Id.* at 596, 111 N.W.2d at 412-13.

18. 14 Wis.2d at 594, 111 N.W.2d at 411. See generally Hicks, *supra* note 14, at 490 (noting that it is unclear whether the court based its decision on public policy or on the old short term lease exception to *caveat emptor*).

19. *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969).

20. 51 Haw. 426, 462 P.2d 470 (1969).

21. *Id.* at 427-28, 462 P.2d at 471.

22. *Id.* at 433, 462 P.2d at 474.

23. *Id.* at 433, 462 P.2d at 475. The court applied the same reasoning used with implied warranties in the sales of chattels and emphasized the contractual nature of a lease. The court equated a lease with a sale of an estate in land. See Hicks, *supra* note 14, at 495-97.

24. 428 F.2d 1071 (D.C. Cir. 1970). Alleging numerous housing regulations violations, three tenants of a Washington, D.C. apartment complex refused to pay rent. They argued that the landlord had a contractual duty to keep the building in compliance with the housing regulations. *Id.* at 1073.

that the standards of habitability are determined under the local housing regulations.²⁵ The court asserted that the old common law view of the landlord-tenant relationship was no longer sound²⁶ and that leases should be read as contracts.²⁷ The *Javins* court also held that in the interests of public policy, the parties could not waive the local housing code requirements.²⁸

The implied warranty adopted by all these courts included a covenant that the leased premises would be free from latent defects and remain habitable for the full lease term.²⁹ Existing defects discoverable upon inspection were not included in that covenant. This remained true until 1981, when the California Supreme Court held that rented premises must be habitable regardless of whether the tenant knew of existing defects.³⁰

Initially, the warranty of habitability received limited acceptance in the area of real property sales. In the early cases, a homebuyer was protected by the implied warranty of habitability if he contracted for a building while it was under construction.³¹ If, however, the homebuyer made the contract for purchase after the house was completed, he was not protected by the implied warranty.³² This rule became known as the "unfinished house" exception to *caveat emptor*.³³

25. *Id.* at 1081.

26. *Id.* at 1074, 1077-80.

27. *Id.* at 1075-76. The court, noting the application of implied warranties in transactions of goods, found that they should also be applied in real estate transactions. *Id.* at 1075.

28. *Id.* at 1081-82. *But see* Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879, 881-82 (1975) (modern contract law does not support non-waivability).

Other courts have found an implied warranty in an oral lease. *Gillette v. Anderson*, 4 Ill. App.3d 838, 282 N.E.2d 149 (1972).

29. *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970). After the landlord failed to repair the plumbing, the tenant hired a plumber and offset the cost of repair from her rent. The landlord demanded full payment, claiming he had no duty to repair. The court stated, it was "pure semantics" whether it found a covenant to repair or a covenant of habitability. *Id.* at 144-45, 265 A.2d at 534.

30. *Knight v. Hallstamer*, 29 Cal.3d 46, 171 Cal. Rptr. 702, 623 P.2d 268 (1981). For a discussion on *Hallstamer's* impact, see Glaser, *Expanding the Implied Warranty of Habitability: Knight v. Hallstamer*, 24 WASH. U.J. URB. & CONTEMP. L. 231 (1983).

31. *See* Bearman, *supra* note 15, at 544.

32. Under this line of reasoning, the purchaser who signed his contract one day before construction was completed was protected by the warranty of habitability, while another who signed one day after completion was not. *See, e.g.,* *Druid Homes, Inc. v. Cooper*, 272 Ala. 415, 131 So.2d 884 (1961); *Steiber v. Palumbo*, 219 Or. 479, 247 P.2d 978 (1959). These cases, however, have been overruled.

33. *Miller v. Cannon Hill Estates Ltd.*, 2 K.B. 113 (1931). The *Miller* court gave two reasons for the "unfinished house" exception. First, unlike the purchaser of a completed home, the purchaser of a house under construction has no opportunity to inspect it and discover defects before

Gradually, policy shifted to reject *caveat emptor* in the sale of completed homes. In 1964, the Colorado Supreme Court extended the implied warranty of habitability to cover a completed house.³⁴ By the mid 1970s half the states had followed this trend.³⁵ Generally, courts based their decisions on the idea that purchasers and builder-vendors are in unequal bargaining positions in real estate transactions. The purchaser is usually unable to make a very detailed or knowledgeable inspection and relies on the builder-vendor's expertise.³⁶ Thus, responsibility for latent defects shifted to the builder-vendor.³⁷

For similar policy reasons, the implied warranty was extended to cover

signing the contract. *Id.* at 120-21. Secondly, a person buying a house under construction intends to reside in the house rather than tear it down. *Id.* at 121. He is relying on the builder to construct a house that is fit for habitation. This cannot be said of the purchaser of a completed house who may not be buying the house as a dwelling. *Id.* He may have plans to tear it down and rebuild. *Id.* at 113. For a critique of the *Miller* court's reasoning, see Bearman, *supra* note 15, at 545-46. See also Maskell, *supra* note 15, at 638-41 (discussion of reasoning behind the "unfinished house" exception).

For other American cases applying the "unfinished house" exception, see *F & S Construction Co. v. Berube*, 322 F.2d 782 (10th Cir. 1963); *Gersan v. Smolenski*, 153 Colo. 274, 387 P.2d 260 (1963); *Hoye v. Century Builders, Inc.*, 657 Wash.2d 830, 329 P.2d 474 (1958).

But see Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957). Plaintiff bought a house that was not yet completed. Faulty sewer construction caused the basement to flood with sewage. The flooding damaged carpeting and furniture and rendered the house unsanitary and unfit for habitation. Plaintiff brought suit against the builders. *Id.* at 340-41, 140 N.E.2d at 820. Citing English case law, the court found a warranty of habitability attached when a house was sold in the course of construction. *Id.* at 341-42, 140 N.E.2d at 821.

34. *Carpenter v. Donahue*, 154 Colo. 78, 388 P.2d 399 (1964). Plaintiffs purchased a completed house from defendant. Within four months after taking occupancy, the walls began to crack. Conditions progressively worsened until the building became uninhabitable. Subsequently, several building code violations were cited as causing the defects. *Id.* at 80, 388 P.2d at 400. In extending the implied warranty of habitability to completed houses, the court discussed *Miller v. Cannon Hill Est. Ltd.*, *supra* note 33, and its progeny. The court noted the difficulties in determining whether a house was "finished" for the purposes of applying *Miller*. The court stated:

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.

Id. at 83, 388 P.2d at 402.

35. *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 181, 441 N.E.2d 324, 329 (1982) (citing cases). The first Idaho decision abandoning *caveat emptor* as to sales of new homes was in 1966. *Bethlamy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966).

36. *Bethlamy*, 91 Idaho at 62, 415 P.2d at 708-10.

37. *Id.* *But see Meyers*, *supra* note 28. This commentator objects to the adoption of the warranty of habitability, asserting that it is unlikely to improve housing conditions. He states that the "rationale for the habitability duty is based on moral philosophy and distributive justice, but the objectives it seeks to achieve cannot be accomplished outside the narrow and perhaps selfish confines of economic behavior." Therefore, a tenant's bargaining position may not be improved at all by the warranty of habitability. *Id.* at 881.

subsequent purchasers. The first court to eliminate the privity requirement was the Indiana Supreme Court.³⁸ Courts in South Carolina, Wyoming, Oklahoma and Illinois followed suit by 1982.³⁹ In the Illinois case, *Redarowicz v. Ohlendorf*,⁴⁰ the Illinois Supreme Court recognized that a subsequent purchaser has neither the opportunity nor the expertise to inspect the work of the builder. The court stated that the cost of repairing defects in a house should rest upon the builder-vendor who in fact had created such latent defects.⁴¹

In *Hopkins v. Hartman*,⁴² the Illinois Court of Appeals addressed the same issue raised in *Tusch Enterprises v. Coffin*. The *Hopkins* court held that the implied warranty of habitability did not extend to a buyer-investor who purchased a building for investment purposes.⁴³ The court asserted that the relaxation of the old *caveat emptor* doctrine was intended

38. *Barnes v. MacBrown & Co. Inc.*, 264 Ind. 227, 342 N.E.2d 619 (1976). Plaintiffs were the second purchasers of the building at issue. After moving in, plaintiffs discovered that the basement leaked and that three walls in the basement were cracked. *Id.* at 228, 342 N.E.2d at 620. The court discussed the abolishment of the privity requirement in the area of products liability law. The court found that "[t]he logic which compelled this change in the law of personal property is equally persuasive in the area of real property." The court held that the privity requirement between builder-vendor and purchaser was outdated, and extended the warranty of habitability to cover subsequent purchasers. The court was explicit in limiting its holding to latent defects only. *Id.* at 230, 342 N.E.2d at 621.

The privity requirement had already been eliminated in the case of contracts for the sale of goods. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (car buyer's lack of privity with automobile dealer and manufacturer did not prevent her from recovering damages arising out of an accident caused by a defective automobile). The *Henningsen* court noted several theories underlying the policy of liability to ultimate consumers, among them the third-party beneficiary thesis. *Id.* at 374, 161 A.2d at 88. This is the policy underlying U.C.C. § 2-318, titled "Third Party Beneficiaries of Warranties Express or Implied." Comment 2 to that section states that its purpose "is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to 'privity.'" U.C.C. § 2-318 Comment 2 (amended 1966).

39. See *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324 (1982); *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E.2d 768 (1980); *Moxly v. Laramie Builders, Inc.*, 600 P.2d 733 (Wyo. 1979).

40. 92 Ill.2d 171, 441 N.E.2d 324 (1982).

41. *Id.* at 183, 441 N.E.2d at 330. See also *Terlinde v. Neely*, 275 S.C. 395, 398, 271 S.E.2d 768, 769 ("common experience teaches that latent defects in a house will not manifest themselves for a considerable period of time. . ."). *Id.*

42. 101 Ill.App.3d 260, 427 N.E.2d 1337 (1981). Plaintiffs bought a duplex residence from defendants, the builders, and used it solely for income producing purposes. Five years after purchase, tenants noticed sagging floors. Rotting support beams caused the defect. Plaintiffs paid for repairs themselves, then brought suit against the builders to recover damages.

43. *Id.* at 261, 427 N.E.2d at 1338.

to protect consumers, not investors.⁴⁴

In discussing the implied warranty of habitability claim, the court in *Tusch Enterprises v. Coffin* declined to follow the *Hopkins* decision.⁴⁵ The *Tusch* court did not agree that application of the warranty depended on the class of buyers. Rather, the court emphasized that the condition of the building is the focus of the warranty—the status of the buyer is irrelevant.⁴⁶

In support of its holding, the *Tusch* court drew analogies to the warranties of merchantability and fitness for a particular purpose as applied in the sale of chattels.⁴⁷ Those warranties do not distinguish between buyers who purchase goods for personal use and those who purchase goods with the intention of using them for income producing purposes. The focus is on the condition of the goods bargained for and whether

44. *Id.* at 263, 427 N.E.2d at 1339. The court found that the “income-seeker,” unlike the unsophisticated buyer of a residence, has the opportunity to “investigate, study, appraise and assess the relative merits and demerits of the subject matter and then to make a calculated judgment as to how profitable it will be.”

Commercial property, unlike residential property, has not enjoyed the warranty of habitability. For example, see *Interstate Restaurants, Inc. v. Halsa Corp.*, 309 A.2d 108 (D.C. 1973); *J.B. Stein Co. v. Sandberg*, 95 Ill.App.3d 19, 419 N.E.2d 652 (1981); *40 Assoc., Inc. v. Katz*, 446 N.Y.S.2d 844 (1981).

45. *Tusch*, 113 Idaho at 46, 740 P.2d at 1031.

46. *Id.*

47. *Id.* The texts of the Uniform Commercial Code sections provide in pertinent part:

§ 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

§ 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

they meet the parties' expectations.⁴⁸

Also, the court set forth public policy reasons for rejecting the *Hopkins* rule. Refuting the *Hopkins* court assertion that investors could hire experts to inspect prospective purchases, the *Tusch* court stated that it is unrealistic to expect *any* buyer to consult the specialized personnel necessary to uncover latent defects.⁴⁹ It is the builder who is in the best position to guard against latent defects.⁵⁰ Further, the court said that if the sophistication of the buyer-investor matters at all, it is only at the time of purchase when he inspects the building for obvious defects. Such defects are not covered by the warranty of habitability. In looking for such defects, the buyer-investor should be held to the standard of the reasonable nonexpert.⁵¹ Consequently, the Idaho Supreme Court reversed the lower court and held that the implied warranty of habitability did extend to dwellings purchased for income producing purposes and which had never been occupied by the buyer.⁵²

In a strong dissent, Chief Justice Shepard criticized the majority for creating a new cause of action.⁵³ He noted that the plaintiff was not an

48. 113 Idaho at 46, 740 P.2d at 1031. See also Haskell, *supra* note 15, at 649-50. The author contends that the implied warranty of merchantability has "nothing to do with the characteristics of the seller." The whole point of the warranty goes to the implicit understanding of the parties that "when a fair price is paid, that the goods are reasonably fit for the general purposes for which they are normally used, or that the building is reasonably fit for habitation." *Id.*

The *Tusch* court also noted that following the *Hopkins* rule would result in more protection being afforded the buyer of goods than the buyer of residential buildings, 113 Idaho at 46, 740 P.2d at 1031. See also Haskell, *supra* note 15, at 633. The author notes that "[o]ur law offers greater protection to the purchaser of a 79 cent dog leash than it does to the purchaser of a \$40,000 house." He suggests that this difference is the chance result of the separate developments of the law of sales of chattels and the law of real property conveyancing. He asserts that this difference does not make sense and proposes a revision of the law. Basically, he advocates adopting the principles of warranty contained in the U.C.C. *Id.* at 648-555.

49. 113 Idaho at 47, 740 P.2d at 1032.

50. *Id.* See Haskell, *supra* note 15, at 653. The author notes that the law is harsh on the homebuyer who buys in good faith with no knowledge of latent defects and asks, "[w]hy does a rational legal system place the entire risk upon the party least likely to have knowledge or the opportunity to know of the defect?" *Id.*

51. 113 Idaho at 47, 740 P.2d at 1032 n.6, (citing Haskell, *supra* note 15, at 651).

52. *Id.* at 47, 740 P.2d at 1032. The court further held that the court below erred both in dismissing the implied warranty claim against the Vander Boeghs and in granting Coffin summary judgment.

Id. at 49-51, 740 P.2d at 1034-35. The court affirmed dismissal of the negligence and express warranty counts and reversed the misrepresentation and implied warranty counts. *Id.* at 51, 740 P.2d at 1035.

53. *Id.* at 52, 740 P.2d at 1036 (Shepard, C.J. dissenting).

ordinary home buyer, but rather a sophisticated investor.⁵⁴ The cases relied on by the majority, however, applied the implied warranty of habitability to the "typical middle-class home buyer."⁵⁵ Furthermore, he noted that the property in question was not a new home, but a five-year-old complex.⁵⁶ He criticized the majority for failing to prescribe limits as to the age of structures covered or the number of subsequent purchasers protected by the warranty.⁵⁷

The court's decision is a logical step in the development of the implied warranty of habitability. The decision places responsibility for latent defects on those parties who are ultimately responsible for them and who are in the best position to guard against them—the builders.⁵⁸ Placing the final responsibility on the builder, rather than the landlord, should encourage builders to construct higher quality buildings.

The *Tusch* decision also has an impact on the landlord-tenant relationship. Prior to *Tusch*, when a tenant discovered a defect, he petitioned the landlord to repair it. Often, and especially in the case of low income housing, the landlord could not afford to make repairs, and the building would simply deteriorate.⁵⁹ If the landlord brought action against the builder, it was under a negligence or fraudulent nondisclosure theory.⁶⁰ Given the *Tusch* holding, a landlord may now sue under the implied warranty of habitability theory, which may be a much easier claim to

54. *Id.* at 54, 740 P.2d at 1038.

55. *Id.*

56. *Id.*

57. *Id.*

58. See *supra* note 50 and accompanying text. See also, Haskell, *supra* note 15, at 653. The author is concerned that taking the risk of liability for latent defects from the average homebuyer and placing it on the average home seller may produce too harsh a result. The *Tusch* decision places no risk on the amateur seller for it is the builder who ultimately assumes the risk.

59. See Meyers, *supra* note 28, at 889-893. Meyers explains the economic problems faced by landlords. He notes that taxes and repair costs tend to rise faster than the cost of living. A landlord who cannot afford repairs has few solutions. Raising rents is not always possible.

60. See Haskell, *supra* note 15, at 642-45. Under these theories, a purchaser has been able to recover where the seller knows of a material latent defect and fails to so notify the buyer. Recovery under fraudulent nondisclosure has been allowed where construction on fill dirt resulted in improper settling of the building. *Cohen v. Vivian*, 141 Colo. 443, 349 P.2d 366 (1960); *Brooks v. Ervin Constr. Co.*, 253 N.C. 214, 116 S.E.2d 454 (1960). Under the fraudulent nondisclosure theory, the purchaser must show that the seller knew of the defect. Under the implied warranty theory, the seller's knowledge is irrelevant. Haskell, *supra* note 15, at 644. See generally Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 CASE W. RES. 5 (1956).

Some plaintiffs have successfully used the negligence theory to recover. It has mainly been used where a plaintiff alleges bodily injury. See *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965) (16 month old child scalded by hot water from bathroom faucet).

establish.⁶¹

The Idaho court's decision keeps the focus of the implied warranty of habitability where it belongs—on the fitness of the dwelling. The implied warranty was originally applied, both in sales of personalty and of realty, to assure that buyers received what they bargained for.⁶² In the case of realty, a buyer is bargaining for a habitable building. The buyer in *Tusch* bargained for a habitable building even though he did not intend to live there. Thus, a buyer who purchases property for investment purposes should be afforded the same protection as a buyer who purchases property for private use. The *Tusch* court provided this result.

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61. See Meyers, *supra* note 28, at 881. Meyers alleges that the warranty of habitability placed too large a burden on the landlord and was unlikely to change his behavior. The *Tusch* decision gives the landlord recourse against the builder. If he can successfully sue the builder for costs of repairing latent defects, he will have a much better chance of keeping his buildings in repair.

The dissent points out that the majority fails to place limits as to how the age of the buildings or the state of the art in construction are to be considered in future cases, *Tusch*, 113 Idaho at 54, 740 P.2d at 1039 (Shepard, C.J., dissenting). See also Haskell, *supra* note 15, at 652. The author suggests a time limit for actions for breach of implied warranty of five years for new buildings and one year for used buildings.

62. See *supra* note 48 and accompanying text.