

EXTENSION OF IMPLIED WARRANTIES TO DEVELOPER-VENDORS OF COMPLETED NEW HOMES

Since the post-war housing boom, American courts and commentators have been wrestling with difficulties in real estate transactions caused by the doctrine of *caveat emptor*. While uniform codes have replaced this ancient doctrine in the sales of moveables,¹ until recently it remained virtually unchanged in the sale of realty.² Faced with the hardships this imposed upon the homeowner, making one of the major

1. UNIFORM COMMERCIAL CODE §2-314 (merchantability), §2-315 (fitness for particular purpose) [hereinafter cited as U.C.C.]; cf. UNIFORM SALES ACT §15.

2. The classic work on *caveat emptor* ("let the buyer beware") is Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). "The expression first appeared in print in 1534, and the doctrine became firmly established in the common law during the seventeenth and eighteenth centuries. It apparently gained its strongest foothold among traders in England's small rural markets. . . ." Comment, *Caveat Emptor in Sales of Real Property — Time for a Reappraisal*, 10 ARIZ. L. REV. 484 (1968). A "sale of realty" was synonymous with the transfer of a legal interest in land "with appurtenances," and with the drawing up of the deed, any implied or oral covenants concerning the quality of the structure were extinguished (barring fraud or misrepresentation). See generally Green v. Superior Court, 10 Cal. 3d 616, 622-27, 517 P.2d 1168, 1171-75, 111 Cal. Rptr. 704, 707-11 (1974).

Caveat emptor, however, did not adversely affect the typical buyer of a new house 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. . . .

After World War II, however, the building industry underwent a revolution. It became common for the builder to sell the house and land together in a package deal.

Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967). There was a great demand for new housing, and it was supplied in vast quantities by "builder-vendors." The poor quality of some of these units provided the impetus to the courts for re-examining the doctrine of *caveat emptor*. The annual value of this new private residential construction rose from under \$2 billion in 1945 to \$15 billion in 1950. Bearman, *Caveat Emptor in Sales of Realty — Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 542 & n.6 (1961) [hereinafter cited as Bearman]. In 1973, that figure stood at \$57.604 billion. U.S. BUREAU OF CENSUS, CURRENT CONSTRUCTION REPORTS, VALUE OF NEW CONSTRUCTION PUT IN PLACE C30 (1974).

purchases of his life,³ courts began a case-by-case assault upon the rule.⁴ The doctrine of implied warranty emerged as one method by which courts fulfilled the reasonable expectations of the buyer.⁵ The Supreme Court of California recently aligned itself with a growing minority of jurisdictions that have found an implied warranty of reasonable workmanship and habitability in the sale of completed new homes.

In *Pollard v. Saxe & Yolles Development Co.*⁶ defendant developer entered into a series of agreements in 1960 and 1961 with a general contractor for the construction of a number of apartment buildings in San Jose. Upon completion of each, Saxe & Yolles took possession, renting them until they were sold. In 1963 defendant contracted with plaintiffs for the sale of five of the buildings. Plaintiffs discovered that Saxe & Yolles had ordered material changes during the construction of the apartments which resulted in structural defects in several buildings.⁷ Plaintiffs, however, gave defendant no notice of these defects until January 1967, just before suit was filed.

The trial court found that plaintiffs had not shown fraud or misrepresentation, and that there were no implied warranties of merchantability or fitness for purpose.⁸ The district court of appeals reversed and allowed recovery, finding that California decisions evidenced "a trend toward extension of the kinds of contracts in which the law will imply warranties and a trend toward imposing liability

3. See Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. URBAN L. 533, 551-52 (1971).

4. See Young & Harper, *Quaere: Caveat Emptor or Caveat Venditor*, 24 ARK. L. REV. 245 (1970) [hereinafter cited as Young & Harper].

5. "The issue should be whether the buyer got what he bargained for." Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 649 (1965) [hereinafter cited as Haskell]. See generally 7 S. WILLISTON, CONTRACTS § 926A (3d ed. 1963).

6. 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

7. Saxe & Yolles had ordered the use of undersized wooden beams and the substitution of concrete for magnesite on the patio decks causing structural defects which included buckling ceilings, sticking patio doors, and improper drainage on patio decks. *Id.* at 376-77, 525 P.2d at 89-90, 115 Cal. Rptr. at 649-50. The defendants maintained (and the courts agreed) that they had no actual knowledge of these defects. Brief for Defendant at 5-6, *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974). If fraud or deceit had been proven, there would have been no concern with *caveat emptor*.

8. Brief for Defendant, *supra* note 7, at 6-7. The suit was brought more than three but less than four years after discovery of the damage. This meant that California's real property tort (negligence or strict liability) statute had run; thus, possibly the easiest route to recovery was gone. See CAL. CIV. PRO. CODE § 338(2) (Deering 1972). Plaintiffs were forced to rely on the four years statute for instruments in writing. *Id.* § 337(1).

upon builder-sellers of real property."⁹ The state supreme court unanimously affirmed the finding of an implied warranty but denied recovery because plaintiffs had failed to notify defendants and enable them to repair.¹⁰ After examining the practicalities of the housing market and national trends, the court concluded that "builders and sellers of new construction should be held to what is impliedly represented — that the completed structure was designed and constructed in a reasonably workmanlike manner."¹¹

The first indication that courts would be willing to reconsider their historic position on *caveat emptor* in the sale of housing appeared in the English case of *Miller v. Cannon Hill Estates*.¹² Plaintiff had purchased a home in the course of construction which, upon completion, was found to contain structural flaws. The court concluded that when a buyer purchases a house in the course of construction, he relies on the builder to complete the dwelling in a workmanlike manner, while the purchaser of a completed home can inspect the finished product. This distinction has been the subject of extensive criticism and commentary, and has troubled American courts for some time.¹³ Few people are adept

9. *Pollard v. Saxe & Yolles Dev. Co.*, 108 Cal. Rptr. 174, 177 (Dist. Ct. App. 1973), *vacated*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

10. 12 Cal. 3d at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652; *see notes 51, 53 infra*.

11. 12 Cal. 3d at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651.

12. [1931] 2 K.B. 113, 120-21.

13. A history of the secondary works on warranties and home construction is a story in itself. For years writers, both professional and student, encouraged the courts to abandon their reluctance to impose warranties on the sale of completed homes. One early article anticipated the demise of *caveat emptor* but had to admit that the prevailing rule was otherwise. Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108, 125 (1953). In 1961 a lengthy and important article appeared that was forced to admit the same but outlined several means by which courts had circuitously granted recovery, and how such theories could be expanded in the future. A model ordinance was even included. Bearman, *supra* note 2, at 543, 576-79; *see note 59 infra*. This article figured prominently in the first extension of warranties to completed home buyers. *See notes 22-23 and accompanying text infra*. Other observations on the evolution of the implied warranty include Bixby, *supra* note 3, at 560-63; Haskell, *supra* note 5, at 640-41; Jaeger, *The Warranty of Habitability* (pt. II), 47 CHI-KENT L. REV. 1, 27-46 (1970); Roberts, *supra* note 2, at 838; Young & Harper, *supra* note 4, at 252; Comment, *Caveat Emptor in Sales of Real Property — A Time for Reappraisal*, 10 ARIZ. L. REV. 484 (1968); Note, *Builder-Vendor Liability for Construction Defects in Houses*, 55 MARQ. L. REV. 369 (1972); Note, *Developments in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses*, 10 TULSA L.J. 445 (1975); Note, *Implied Warranties in the Sale of New Houses*, 26 U. PITT. L. REV. 862 (1965); 24 ALA. L. REV. 332 (1972); 43 DENVER L.J. 379 (1966); 22 DE PAUL L. REV. 510 (1972); 38 MO. L. REV. 315 (1973); 44 N.C.L. REV. 236 (1965); 47 TEMPLE L.Q. 172 (1973); 34 U. PITT. L. REV. 458 (1973); 45 WASH. L. REV. 670 (1970). Finally in 1974 one author concluded that "an enlightened court, presented with a cogent

at technical examination of buildings, and many (if not most) flaws are hidden upon completion. Usually no less reliance or greater care in construction occurs in post-completion sales than in the prior instances. In either case the expectation is the same: the buyer contemplates a dwelling fit for the permanent habitation of his family. Express warranties are rarely given, expensive, and impractical for most buyers to negotiate. Inevitably the buyer is forced to rely on the skills of the seller.¹⁴

Most courts, including California's, have allowed a limited degree of protection to buyers under negligence standards.¹⁵ If the builder

assertion of an implied warranty would, in all likelihood, abolish the rule of *caveat emptor*." McNamara, *The Implied Warranty in New-House Construction Revisited*, 3 REAL ESTATE L.J. 136, 141 (1974).

14. For exhaustive summaries of these arguments see Bearman, *supra* note 2, at 545-46; Haskell, *supra* note 5, at 641-43. See also note 32 *infra*. On occasion, this reliance has been exploited by the unscrupulous seller. See Bixby, *Implied Warranty of Habitability: New Right for Home Buyers*, 6 CLEARINGHOUSE REV. 468 & n.1 (1972) (investigations of FHA programs).

The policy rationale for abolishing *caveat emptor* has consistently centered on the unsophisticated buyer. But what of the corporate purchaser? If the corporation has no special skill in building, or if there were latent defects which even the most astute buyer could not have discovered, there seems to be no reason why the builder-vendor should not warrant that he has done a reasonably proficient job. Cf. *Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co.*, 274 Minn. 17, 143 N.W.2d 622 (1966) (implied warranty in favor of cooperative for improper erection of a grain elevator). The understanding between the parties is basically the same as that between the single family home buyer and builder. Perhaps, though, the large corporation should be required to proficiently inspect the building, much as an architect would do periodically for the company if the building is erected *ab initio*. Consider also whether a court should require the corporate buyer to have obtained an express warranty in view of its enhanced bargaining position.

Arguments in support of *caveat emptor* primarily center around fears of unlimited liability and a flood of litigation, despite the fact that no one has suggested that builders should become absolute insurers. Some courts, anachronistically, still treat the sale as one of land "with appurtenances," and *caveat emptor* is still the rule in sales of raw land. See Haskell, *supra* note 5, at 641-42. For cases demonstrating the application of *caveat emptor* see *Voight v. Ott*, 86 Ariz. 128, 341 P.2d 923 (1959); *Whiten v. Orr Constr. Co.*, 109 Ga. App. 267, 136 S.E.2d 136 (1964); *Thomas v. Cryer*, 251 Md. 725, 248 A.2d 795 (1969); *Allen v. Wilkinson*, 250 Md. 395, 243 A.2d 515 (1968); *Levy v. C. Young Constr. Co.*, 46 N.J. Super. 293, 134 A.2d 717 (App. Div. 1957); *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966).

15. E.g., *Murphy v. Sheftel*, 121 Cal. App. 533, 9 P.2d 568 (Dist. Ct. App. 1932), in which an implied warranty of fitness sanctioning rescission was denied a purchaser of nearly completed apartment buildings, but recovery on the contract for negligently caused structural damage was allowed. See note 28 *infra*. For a time, a builder-vendor's liability *qua* vendor regarding torts was illustrated by *Smith v. Tucker*, 151 Tenn. 347, 270 S.W. 66 (1925), which held that *caveat emptor* precluded recovery for personal injury due to defects known but not disclosed. Any warranty was held to have been extinguished by the passing of the deed. The harshness of this rule had never fully applied in suits against builder-

negligently failed to complete the structure in a workmanlike manner or failed to warn of latent defects he knew or should have known of by exercising due care, the purchaser could recover damages.¹⁶ The builder-vendor has also been held accountable under strict liability for severe defects in his product causing personal or property injuries to either first or remote purchasers and occupants.¹⁷ When the doctrine of implied

vendors *qua* builders for property damage. A reprieve came through negligence law, first in the building contract situation. See note 19 *infra*. Eventually all purchasers of housing prior to completion were allowed recovery for injuries to property and persons for negligently produced homes. See generally Bearman, *supra* note 2, at 566-70; Roberts, *supra* note 2, at 843-46. In some states today, negligence has been used as an ersatz remedy for post-completion purchasers as well, but these courts still profess allegiance to *caveat emptor*. See, e.g., *Benson v. Dorger*, 33 Ohio App. 2d 110, 292 N.E.2d 919, 62 Ohio Op. 2d 176 (1972).

Whenever negligence is employed, however, plaintiff must establish defendant's duty of care, and as a practical matter many defects may simply be unforeseeable by reasonably prudent builders. See *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967). Current implied warranties are not concerned with these problems, and courts were reluctant to apply that label to any fact situation meeting another test until the late 1950's. See note 17 *infra*.

16. E.g., *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958).

17. Products liability was first introduced into the housing market by the New Jersey Supreme Court in 1965. *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), involved serious injury, due to a defective hot water system, to the son of a new tenant of the original purchaser. The court, in a landmark decision, held the mass producer of homes liable for damages, apparently under strict liability or implied warranty:

The law should be based on current concepts of what is right and just. . . . Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected. . . . We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles. . . . That being so, the warranty or strict liability principles. . . should be carried over into the realty field. . . .

Id. at 90, 207 A.2d at 325. Compare *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), with *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974).

Traditionally, the housing market was characterized by a high degree of localization and by relatively small builders who specialized in homes. See REPORT OF THE PRESIDENT'S COMMISSION ON URBAN HOUSING: A DECENT HOME 113-21 (1968). Larger builders like Levitt, however, have erected an increasing percentage of the new homes constructed. See W. KEATING, EMERGING PATTERNS OF CORPORATE ENTRY INTO HOUSING (1973). The arguments in favor of strict liability and implied warranty are even more persuasive when defendants supply large quantities of housing to the public. The competing policy considerations are complex, and fairness demands an assessment of the relative positions of each party to the transaction. The effect on housing costs needs to be considered also, preferably by legislatures. See Bearman, *supra* note 2, at 537-75; cf. Young & Harper, *supra* note 4, at 265: "The large scale type of home construction involves commensurately large lending institutions with the concomitant intricacies of finance and bureaucratic entanglements of governmental control. It has brought together strange bedfellows. . . . Each segment has its own potential liability to the consumer. . . ." See also *Yepsen v. Burgess*, 269 Ore. 635, 639-40, 525 P.2d 1019, 1022 (1974). Strict liability is potentially applicable to small as well as large builders, and for less extensive damage. See 47 TEMPLE

warranty began to surface in the 1960's, the potential for liability greatly increased. Once a house was characterized as a "product," and the transaction as one for the sale of living quarters, new remedies took shape, nominally labeled contract or tort but based on identical policy considerations.

Implied warranty cases fall into three categories.¹⁸ First are those in which the buyer contracts for a home to be built *ab initio*.¹⁹ Often, as in

L.Q. 172, 181 (1973). It has also been helpful to the used home owner, *see* notes 24, 53-57 and accompanying text *infra*, and to the first user of a housing component against the manufacturer or other third parties, *see, e.g.*, *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966).

It is uncertain whether plaintiffs in *Pollard*, as recent first purchasers, would have recovered against the builder or vendor under a strict liability theory. The court of appeals commented that "the relationship of strict liability and implied warranty is close. . . . [T]he warranty formulation adds nothing except the commercial relationship. . . ." *Pollard v. Saxe & Yolles Dev. Co.*, 108 Cal. Rptr. 174, 176 (Dist. Ct. App. 1973). *Cf. Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 86-87, 207 A.2d 314, 323 (1965); *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 63-64, 154 N.W.2d 803, 807 (1967); *Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968). *See also* note 24 *infra*. "[E]xamination of the case law indicates that a distinct form of action is emerging which may be known, without reference to contract or tort, as an action for breach of constructive warranty." Jaeger, *supra* note 13, at 46. Dean Prosser has noted that "[t]he seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." W. PROSSER, *LAW OF TORTS* 634 (4th ed. 1971). *See also* note 28 *infra*. To date, no vendor who was not also a builder has been found liable under strict liability.

The trial court had found defendant negligent, and the dissent in the lower court felt that "[a]ppellants had a fully adequate remedy either in tort or under strict liability. They slept upon their rights." *Pollard v. Saxe & Yolles Dev. Co.*, 108 Cal. Rptr. 174, 179 (Dist. Ct. App. 1973). The state supreme court did not deny plaintiffs the possibility of alternative remedies, although realistically negligence will not be necessary and may not in fact be a fully adequate substitute. *See* note 15 *supra*; *cf. Theis v. Heuer*, 280 N.E.2d 300 (Ind. 1972), which allowed both implied warranty and negligence counts to stand. "Although the evidence may also support a negligence theory, the inquiry in a warranty cause of action focuses on the adequacy of the final product . . . rather than on the reasonableness of defendant's conduct." *Chutich v. Samuelson*, 33 Colo. App. 195, ___, 518 P.2d 1363, 1366-67 (1973).

18. *See* Young & Harper, *supra* note 4, at 253. These categories provide a necessary guide to understanding judicial thinking. Presently there are 24 jurisdictions recognizing some sort of implied warranty. From the indications in *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974), Mississippi may soon become the twenty-fifth.

19. *E.g.*, *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970) (defective fireplace); *Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co.*, 274 Minn. 17, 143 N.W.2d 622 (1966) (grain elevator collapse due to defects in materials and design); *Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P.2d 474 (1958) (sewage seepage).

Implied warranties in realty were originally found in an occasional construction contract case in which owner and builder started with a raw piece of land, blueprints and instructions. For example, in *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108 (1884), a subcontracting bridge company was held to have impliedly warranted that the structure

the traditional building contract case, the buyer approves plans and specifications. The first important application of the *Miller* exception in the United States involved a case of this type. In *Hoye v. Century Builders, Inc.*²⁰ the court allowed recovery for damages from sewer seepage, but noted that the same result would not inure if the home was purchased subsequent to completion. Purchasers of homes *during* the process of construction, the second category, fall within the original fact pattern of *Miller*. Recovery is usually permitted under a standard of reasonably workmanlike quality.²¹ The third category, homes purchas-

was free from latent defects (careless work on a foundation carried away by a river). *Cf. Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974). *See also* note 28 *infra*. These implied warranty cases, however, also involved traditional contract issues such as substantial performance. They were suitable in a limited sense for some home buyers whose agreements include specifications for materials and labor. The warranty pioneered by *Miller* is based upon the proposition that the responsibility for any major housing defect should rest with the builder-vendor.

20. 52 Wash. 2d 830, 832, 329 P.2d 474, 476 (1958). A year earlier, Ohio became the first American jurisdiction to consider the *Miller* rule. In *Vanderschrier v. Aaron*, 103 Ohio App. 340, 140 N.E.2d 819 (1957), the court found an implied warranty in the sale of uncompleted homes. The rule received wider approval in other jurisdictions, however, than from the Ohio supreme court. In *Mitchem v. Johnson*, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1966), the court, *sub silentio* rejected the use of the "new" implied warranty standard, opting instead for what appears to be a negligence test, especially its standard of proof. Behind the court's application of the doctrine of merger, *see* note 46 *infra*, may have been a conservative reluctance to potentially place home builders on the same plane as auto makers under strict liability. Several jurisdictions, however, have done just that in certain circumstances. *See* notes 16-17 *supra* and note 24 *infra*. The uncertainties of *Mitchem* have led to some confusion in the Ohio appellate courts. One case, *Benson v. Dorger*, 33 Ohio App. 2d 110, 292 N.E.2d 919, 62 Ohio Op. 2d 176 (1972), read *Mitchem* to require a negligence test. Another, *Lloyd v. William Fannin Builders, Inc.*, 40 Ohio App. 2d 507, 320 N.E.2d 738, 69 Ohio Op. 2d 444 (1973), resulted in a contracts interpretation for *Mitchem*'s causation test (bearing closer resemblance, however, to the older construction contract warranty). This hornbook haggling is impeding a clear examination of the policies behind warranties and delaying the resolution of important questions. *Cf. Young & Harper, supra* note 4, at 267-68; 38 Mo. L. Rev. 315, 316 n.10.

Washington, on the other hand, subsequently allowed recovery for completed home purchases based on the policy of preventing shoddy workmanship and allocation of risk. *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969); *accord, Gay v. Cornwall*, 6 Wash. App. 595, 491 P.2d 1371 (1972).

21. *E.g., Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963) (soil conditions); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (basement flooding); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963) (defects in foundation). *Compare Hanavan v. Dye*, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972) (water damage), *with Weck v. A:M Sunrise Constr. Co.*, 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962) (general habitability), *and Coutrakon v. Adams*, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963) (faulty boiler causing fire). On its facts, *Hanavan* appears to involve a sale of a complete house, but in reaching its conclusion, the court expressly relies on *Weck*, a during-construction case, and rejects *Coutrakon*, which refused to find an implied warranty except in the construction contract situation in which specific plans or a model were shown the buyer prior to signing the contract.

ed *after* construction (on the market), was first developed in 1964. In *Carpenter v. Donohoe*²² the court allowed recovery to the owner of a home with a defective wall. It concluded that the *Miller* classification, based on the fortuitous timing of the signing of the sales contract, was meaningless. Thus, “[w]hen justified on the basis that a purchaser should inspect, *caveat emptor* does not make much sense with respect to latent defects, or those defects not discoverable as a practical matter until the house is occupied and used.”²³ *Pollard* falls within this third category.

California has frequently been in the forefront in extending the remedies available to housing consumers. In recent years it has applied the strict liability theory to home builders for serious personal or property injury.²⁴ In *Connor v. Great Western Savings and Loan*

22. 154 Colo. 78, 388 P.2d 399 (1964).

23. Haskell, *supra* note 5, at 640. Since *Carpenter*, many jurisdictions have found implied warranties in the sale of completed housing. In *Gable v. Silver*, 258 So. 2d 11 (Fla. Ct. App.), *aff'd*, 264 So. 2d 418 (Fla. 1972), a condominium owner recovered from the builder-vendor for defects in the air conditioning system. *Cf. Weeks v. Slavick Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970) (leaky roof); *Hartley v. Ballou*, 20 N.C. App. 493, 201 S.E.2d 712 (1974) (water in basement); *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972) (failure to supply potable water); *Rothberg v. Olenik*, 128 Vt. 295, 262 A.2d 461 (1970) (structural defects in foundation). These four cases would fit into a different category on their facts. In each one, however, the court expressly stated that the time of contracting was irrelevant. In *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970) (improperly installed sewer system), and *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, 154 N.W.2d 803 (1967) (basement water damage), *caveat emptor* was limited to sales of raw land and old buildings. These courts recognized that as between the builder-vendor and first purchaser, a habitable dwelling was foremost in the minds of the parties. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968) (fire caused by improper fireplace and chimney construction), and *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969) (serious foundation defects), exemplify those cases that have recognized that *caveat emptor* impedes the strong public policy of preventing shoddy workmanship and places the risks on the party least able to bear them. Other cases finding an implied warranty in completed home sales include *Cochran v. Keeton*, 287 Ala. 439, 252 So. 2d 313 (1971) (fire damage), *overruling* *Druid Homes, Inc. v. Cooper*, 272 Ala. 415, 131 So. 2d 884 (1961); *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970) (flooding of floor ductwork); *Theis v. Heuer*, 280 N.E.2d 300 (Ind. 1972) (water and sewage backup), *overruling* *Tudor v. Heugel*, 132 Ind. App. 579, 178 N.E.2d 442 (1961); *Crawley v. Terhune*, 437 S.W.2d 743 (Ky. Ct. App. 1969) (basement flooding); *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972) (settling of concrete slabs under two rooms); *Yepsen v. Burgess*, 269 Ore. 635, 525 P.2d 1019 (1974) (improper construction of septic tank and drain field system), *overruling* *Steiber v. Palumbo*, 219 Ore. 479, 347 P.2d 978 (1959); *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A.2d 529 (1973) (basement flooding and appliance defects).

24. The *Schipper* case, *see* note 17 *supra*, was followed in two subsequent California cases. In *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Dist. Ct. App. 1969), a house completed in 1951 and sold to the first purchaser in 1952, was bought

*Association*²⁵ the court went further and held a lending institution liable to home buyers for a builder's negligent soil preparation. The builder had received extensive financial and promotional aid and consultation from the lending institution. The court was especially concerned with discouraging shoddy workmanship,²⁶ particularly when defendant knew or should have known that with reasonable care and timely inspection the defects could have been obviated.²⁷

Pollard is the first California case holding that an implied warranty encompasses defects in construction, regardless of the time of purchase. Most of the earlier suits brought by homeowners had been grounded in negligence or implied warranties in building contracts.²⁸ The *Pollard*

by plaintiff in 1957. In 1959 the heating system failed due to defective tubing and defendant, a mass producer of homes, was held strictly liable for property damage. Shortly thereafter, a land developer and his soil engineer were also held strictly liable to a second purchaser for defects in filling and grading. *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Dist. Ct. App. 1969). *Contra*, *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974). *Conolley v. Bull*, 258 Cal. App. 2d 183, 65 Cal. Rptr. 689 (Dist. Ct. App. 1968), while allowing damages for negligent construction, declared that recovery under strict liability was not possible. *Avner* and *Kriegler* did not follow this reasoning.

25. 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

26. If reliable construction is the norm, the recognition "of a duty on the part of tract financiers to home buyers should not materially increase the costs of housing. . . . If existing sanctions are inadequate, imposition of a duty at the point of effective financial control . . . will insure responsible building practices." *Id.* at 868, 447 P.2d at 618, 73 Cal. Rptr. at 378. *See also* *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). The dissent in *Connor* vigorously argued that the power of the purse should not imply any power over building quality and that the lending of money per se did not cause the harm, but this is a narrow reading of the facts. In 1969, a statute was enacted providing that lending institutions will not be liable to third parties such as in *Connor* "unless such loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money, or unless the lender has been a party to misrepresentations." CAL. CIV. CODE § 3434 (Deering 1972). *See* 35 U. CHI. L. REV. 739 (1968); *cf.* *Lascher, Lending Institution Liability for Defective Home Construction: A Practical Primer*, 45 CALIF. ST. B.J. 338 (1970).

27. The court set down criteria to determine whether privity will be waived in a negligence action. Among the policy factors to balance are the extent defendant's actions were intended to affect plaintiff, the foreseeability of the harm, the certainty of injury, the nexus between the conduct and injury (causation), the moral blameworthiness of the conduct, and the court's desire to prevent future harm. 69 Cal. 2d at 865, 447 P.2d at 617, 73 Cal. Rptr. at 377.

28. *See* notes 15, 19 *supra*. One California court pointed out that a negligent failure to use ordinary care and skill may be characterized as a tort or breach of warranty. *Roscoe Moss Co. v. Jenkins*, 55 Cal. App. 2d 369, 130 P.2d 477 (Dist. Ct. App. 1942). The builder must prove substantial performance, and plaintiff must show lack of care. *Accord*, *Kuitemans v. Covell*, 104 Cal. App. 2d 482, 231 P.2d 552 (Dist. Ct. App. 1951). *See* *Sabella v. Wisler*, 59 Cal. 2d 21, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). In *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954), Justice Traynor wrote: "[W]arranties have become identified

court adopted the old and familiar construction contract warranty²⁹ as a broadbased remedy available to a buyer with a mere sales contract by characterizing it as "essentially a contract for materials and labor."³⁰ The court was impressed by other courts and commentators who had endorsed such an approach.³¹ In addition, there were equitable considerations such as the buyer's reliance and lack of technical knowledge.³² All homebuyers, therefore, should have equal standing to recover under an implied warranty.³³

In *Pollard*, however, defendant asserted that it was a mere developer rather than a *builder-vendor*.³⁴ When a plaintiff has purchased a house from a party other than the builder, many jurisdictions disallow implied warranty actions against the vendor.³⁵ In the more typical case, however,

primarily with . . . the sale or furnishing of . . . chattels . . . but they are not confined to such transactions." *Id.* at 486, 275 P.2d at 19. This suggestion was employed in *Aced v. Hobbs-Sesack Plumbing Co.*, 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961), and in *Pollard*. *Aced* found an implied warranty in a construction contract for materials and labor. The *Pollard* court also drew support from *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958), a personal injury case foreshadowing the adoption of strict liability.

29. See note 19 *supra*.

30. 12 Cal. 3d at 378-79, 525 P.2d at 91, 115 Cal. Rptr. at 651.

31. The court had no trouble in finding a legal "peg" on which to hang its result in view of the construction contract warranty. However, the implied warranty for the buyer of a house after completion is *sui generis*, and its development was influenced to a large extent by scholastic commentary. At the time *Pollard* was decided, the court could point to a respectable body of authority to buttress its opinion. *Id.* at 379 & nn.3-4, 525 P.2d at 91 & nn.3-4, 115 Cal. Rptr. at 651 & nn.3-4.

32.

In the setting of the marketplace, the builder or seller of new construction . . . makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment On the other hand, the purchaser does not usually possess the knowledge of the builder and is unable to fully examine a complete house and its components Further, unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time. Thus, he generally relies on those in a position to know . . . and his reliance is surely evident to the construction industry.

Id. at 379, 525 P.2d at 91, 115 Cal. Rptr. at 651.

33. "Clearly, it would be anomalous to imply a warranty when construction is pursuant to a contract with the owner — but fail to recognize a similar warranty when the sale follows completion of construction." *Id.* at 378-79, 525 P.2d at 91, 115 Cal. Rptr. at 651.

34. *Id.* at 376, 525 P.2d at 89, 115 Cal. Rptr. at 649.

35. "[T]he rationale . . . is applicable only against that person who not only had an opportunity to observe but failed to correct a structural defect, which, in turn, became latent, i.e., the builder-vendor." *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795, 801 (Mo. 1972); see *Yepsen v. Burgess*, 269 Ore. 635, 525 P.2d 1019 (1974); *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A.2d 529 (1973). The lower court dissent in *Pollard* also expressed concern with having a seller as a defendant. *Pollard v. Saxe & Yolles Dev. Co.*, 108 Cal. Rptr. 174, 179 (Dist. Ct. App. 1973)(Draper, J., dissenting).

the builder will also be the vendor. Then, as with third party torts,³⁶ plaintiffs usually face no privity obstacles. In California, *Connor* removed this barrier in negligence actions against non-vendors.³⁷ Some solutions have been found, however, for buyers facing multiple parties in implied warranty suits. In an action against the latter, one court was able to characterize a builder as a developer's agent.³⁸ Another tactic has been to sue both builder and vendor since there is usually a joint venture agreement between them.³⁹ In *Pollard* the only remedy apparently open to plaintiffs was an action against the vendor arising out of the sales contract.⁴⁰

The *Pollard* court did not consider the possibility of an agency relationship, but simply concluded that "builders and sellers of new construction should be held to what is impliedly represented."⁴¹ *Pollard* contains an implicit realization that the many companies and individuals collaborating in the housing industry should not be immunized from liability merely on the basis of nonprivity or lack of a common law duty or relationship.⁴² When this case is read in

36. See W. PROSSER, *supra* note 17, § 93.

37. See note 27 *supra*.

38. *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972). Defendant developer had subdivided a tract of land and hired a contractor to erect a model unit which plaintiff purchased. The foundation proved defective.

39. E.g., *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (recovery allowed against a builder, but not the vendor, for damages resulting from water seepage and foundation defects rendering the basement uninhabitable). See *Lambert v. B.&R. Constr. Co.*, 266 So. 2d 560 (La. Ct. App. 1972); cf. *Gay v. Cornwall*, 6 Wash. App. 595, 494 P.2d 1371 (1972).

40. See note 8 *supra*. Plaintiffs did not make the builder a party to attempt to recover against either or both as a third party beneficiary of the original agreement between defendants. Plaintiffs were probably concerned that the applicable statute of limitations would cover only actual written instruments between parties. See CAL. CIV. PRO. CODE § 337(1) (Deering 1972). The court might have regarded a suit against the builder as a strict liability action and barred by the statute of limitations for injuries to property. *Id.* § 338(2); see note 17 *supra*. Even though the problem of proper parties now appears to be moot in California, an argument can be made that "the builder should be unable to avoid liability by first selling the house to a commercial vendor. Such a technical requirement of privity could destroy the purpose of the implied warranty." 38 Mo. L. Rev. 315, 320 (1973). Consider also whether liability could be imposed on a vendor alone who was merely a conduit for transfer of title.

41. 12 Cal. 3d at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651 (emphasis added).

42. See *Young & Harper*, *supra* note 4, at 265; 24 ALA. L. REV. 332, 338 n.29. *Pollard* supports its holding by citing, among other cases, *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974), which extends implied covenants to tenants, but in the course of its lengthy opinion discusses many of the same policy reasons for abolishing *caveat emptor* in housing sales. *Id.* at 622-29, 517 P.2d at 1171-76, 111 Cal. Rptr. at 707-12. For a thorough study of landlord liability see Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?*, 1975 Wis. L. Rev. 19.

conjunction with *Connor* and the strict liability cases,⁴³ California courts have clearly indicated that potential liability can extend to anyone involved in supplying housing to the public. A vendor, for example, will ordinarily make indispensable representations in the course of a sale on which the buyer will rely.⁴⁴ Defendants in *Pollard* did more than merely observe the construction.⁴⁵ Saxe and Yolles were able to supervise and affect the quality of the finished product, a position similar to that of the savings and loan company in *Connor*.

Once implied warranties are recognized, as in *Pollard*, courts must still face important unanswered questions. As these issues arise in future warranty actions, consumers can expect most jurisdictions, including California, to be sensitive to the potential impact on the housing market.⁴⁶ This is exemplified by the prevailing evidentiary standard in such cases: "whether the house is defective is determined by a test of reasonableness and not perfection."⁴⁷ *Pollard* could not determine in

43. See note 17 *supra*.

44. See notes 28-31 and accompanying text *supra*; note 45 *infra*. Much the same rationale that justified the abandonment of the *Miller* exception (notes 12-14 and accompanying text *supra*) in turn supports the individual liability of the vendor. Under traditional *caveat emptor* theory, a seller who has not manufactured the goods he is vending is not liable for defects. See *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108 (1884). The market and legal milieu that produced this rule bear no significant relationship to the contemporary housing market.

45. Defendants' involvement in the construction is illustrated by the consultation over the substitute materials. See note 7 *supra*. It is possible that the same result would be reached even without this fact; the vendor *qua* vendor *ipso facto* is indispensable and intimately involved. The court, however, might have scrutinized the relationship between the builder and vendor. See notes 38-40 and accompanying text *supra*.

46. Some might even refuse to grant recovery against a vendor who cannot also be characterized as the builder. See note 35 and accompanying text *supra*. Another defense, along with *caveat emptor*, is the doctrine of merger. Any warranties arising out of the sales contract were said to merge with the deed and expire unless expressly included. Except in the technical aspects of title transfers, the doctrine of merger also is being abandoned. See, e.g., *Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968). Some states, including California, have statutes excluding warranties in real estate conveyances. These statutes have usually been interpreted to apply only to title and not to quality or collateral covenants such as habitability. See *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 2d 374, 380 n.5, 525 P.2d 88, 91 n.5, 115 Cal. Rptr. 648, 651 n.5 (1974); *Weeks v. Slavick Builders, Inc.* 24 Mich. App. 621, 628, 180 N.W.2d 503, 507 (1970).

47. *Padula v. J.J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 33, 298 A.2d 529, 532 (1973); *accord*, *Shippers v. Cunningham Shepard Builders Co.*, 28 Colo. App. 29, 470 P.2d 593 (1970). *Pollard* would seem to adopt this test. 12 Cal. 3d at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651. The terms "minor" and "major" are sometimes used, without precise definition. See *Vernali v. Centrella*, 28 Conn. Supp. 476, 478, 266 A.2d 200, 201 (Super. Ct. 1970). *But see* 38 Mo. L. REV. 315, 319 (1973).

advance the nature and degree of damage necessary to sustain an implied warranty action, although if other cases offer a clue, substantial structural flaws will prove most convincing.⁴⁸ Some cases have gone even farther. In one instance, a builder was held liable for soil defects even though there were no flaws in design or workmanship and a city engineer had previously inspected the land.⁴⁹ Building codes have occasionally been endorsed as a possible source of standards.⁵⁰ When visual inspection by the buyer could have readily disclosed the *full* defect, however, the builder-vendor should not, in fairness, be held liable (absent fraud or misrepresentation).⁵¹

Another problem left unresolved after *Pollard* concerns used homes. California has allowed several suits against original builders for diminution of property value in strict liability cases,⁵² although statutes of limitation may present some difficulties.⁵³ Negligence actions, when

48. Such defects often involve the foundation. See notes 21, 23 *supra*.

49. *House v. Thornton*, 76 Wash. 2d 428, 457 P.2d 199 (1969). Cf. *Elderkin v. Gaster*, 447 Pa. 119, 288 A.2d 771 (1972).

50. See *Carpenter v. Donohoe*, 154 Colo. 78, 80, 388 P.2d 399, 402 (1964). In *Schiro v. W. E. Gould & Co.*, 18 Ill. 2d 538, 545, 165 N.E.2d 286, 290 (1960), the court held that conformance with the building codes is implicit in building construction contracts. The lower court in *Pollard* noted that the undersized beams did not comply with the Santa Clara County Building Code. 108 Cal. Rptr. at 175.

Analogy to the U.C.C. could be helpful. Section 2-314 would require the home site and dwelling to pass without objection in the trade and be fit for the ordinary purpose for which it was intended. Section 2-315 would require that the buyer rely on the seller's expertise, and the seller to be aware of this reliance. An express warranty could arise out of the showing of a model home under § 2-313(1)(c). See *Bixby*, *supra* note 14, at 468-69; *Haskell*, *supra* note 5, at 651; Phillips, *Recent Developments in the Application of the Implied Warranty of Fitness for Habitation in the Sale of New Residential Dwellings* (unpublished manuscript on file with the *Urban Law Annual*).

51. Cf. *Hartley v. Ballou*, 20 N.C. App. 493, 498, 201 S.E.2d 712, 715 (1974). As commonsensical as this may sound, courts should follow it with care. The inexperienced buyer may see a crack in a wall and think little of it at the time, or be assured by the seller of some future remedial steps that fail to materialize. Where to draw the line between a buyer's honest or excusable oversight, gross carelessness, or stupidity can only be speculative, and perhaps courts should consider it in calculating damages. See *Haskell*, *supra* note 5, at 653. *Pollard* required, by analogy to U.C.C. § 2-607(3)(a), that the buyer give the vendor notice within a "reasonable" time to allow defendant a chance to make repairs, reduce damages, avoid future defects and negotiate settlements. 12 Cal. 3d at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652. The lower court had rejected this comparison. 108 Cal. Rptr. at 178.

52. See note 24 *supra*.

53. Some courts hold that generally the statute of limitations begins to run from the date of the wrong, regardless of whether the buyer has discovered the defect. See *Avner v. Longridge Estates*, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (Dist. Ct. App. 1969); cf. U.C.C. § 2-725. There is some authority indicating that the period should not commence until

privity is not necessary, may be available in some states to redress obvious defects.⁵⁴ Implied warranties are not usually applied to used homes,⁵⁵ and there is some indication in *Pollard* that California courts will follow this position.⁵⁶ Used homes, however, do account for a significant portion of housing sales, and a more restricted warranty could be developed, but courts would have to weigh carefully the potential for disruption of the real estate market.⁵⁷

A good deal of overlap exists in the various remedies available to buyers, and this has inevitably given rise to some conceptual difficulties inherent in fashioning new theories in a case-by-case manner.⁵⁸ It

discovery, or until a reasonable time after a failure of the builder to repair. See *Weeks v. Slavick Builders, Inc.*, 24 Mich. App. 621, 180 N.W.2d 503 (1970); *Young & Harper, supra* note 4, at 273; 24 ALA. L. REV. 332, 339 n.31 (1972). Apparently *Pollard* is in line with the latter view, as it refers to the time plaintiffs had "actual and constructive notice of the damage." 12 Cal. 3d at 377, 525 P.2d at 90, 115 Cal. Rptr. at 650. It is possible that a defect will not manifest itself until after the passage of a considerable amount of time, as in *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (Dist. Ct. App. 1969), or until some natural event occurs such as an extremely heavy rainfall. Cf. *Westwood Dev. Co. v. Esponge*, 342 S.W.2d 623 (Tex. Civ. App. 1961).

54. In *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972), a second purchaser was allowed to recover for negligent use of faulty plate glass resulting in personal injury. Strict liability was not to be applied when negligence was clearly present and the builder was unmistakably responsible. A claim founded on implied warranty was rejected because plaintiff was a second purchaser-occupant. See also *Waggoner v. Midwestern Dev. Inc.*, 83 S.D. 57, 62-63, 154 N.W.2d 803, 807 (1967).

55. See *Barnes v. Mac Brown & Co.*, —Ind. App. —, 323 N.E.2d 671 (1975); *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974); cf. note 50 *supra*. But see *Casavant v. Campopiano*, —R.I. —, 327 A.2d 831 (1974), in which an intervening tenancy of less than a year did not immunize a defendant builder from a second (permanent) occupant. The first occupant's leasehold, which never materialized into an outright sale of the dwelling, was described as an interim promotional device to aid in locating a buyer.

56. See note 57 *infra*.

57. Recently, used home warranties have become available commercially. One program insures against defects for 18 months after the company's inspection. Information can be obtained from the Certified Home Inspection Program, 200 Century Plaza, Suite 333, Columbia, Md. 21044. For commercial new home warranties, see note 62 *infra*. See also *Gable v. Silver*, 258 So. 2d 11, 18 (Fla. Ct. App. 1972): "We ponder, but do not decide, what result would occur if more remote purchasers were involved. We recognize that liability must have an end but question the creation of any artificial limits of either time or remoteness to the original purchaser." The arguments in favor of used home liability are strongest in the case of the merchant-vendor, although a few writers would go further. See *Bixby, supra* note 14, at 474-75; cf. *Haskell, supra* note 5, at 650-52. *Pollard* hinted that there are different policy considerations involved in the purchase of used homes, see note 31 *supra*, but did not specify what they were. A few cases do grant the used home buyer relief for the seller's failure to disclose the presence of termite infestation when the seller had knowledge. See 22 A.L.R.3d 972 (1968).

58. See note 17 *supra*. For example, when privity is not necessary, implied warranties,

remains unresolved, however, whether legislatures should provide a single method for recovery in place of judicially fashioned remedies.⁵⁹ To some extent these problems are being settled as more jurisdictions enunciate a clear implied warranty action as in *Pollard*, rather than continuing to stretch tort remedies. Nevertheless, uncertainty will continue to exist for the builder. He may have to bear responsibility for nonstructural defects⁶⁰ or even used homes he has built.⁶¹ *Pollard* demonstrates that even as a mere developer, the housing entrepreneur is not immune. These risks may extend over long periods of time if a defect does not surface soon after construction.⁶² Perhaps even express disclaimers will be ineffective, especially when the unsuspecting buyer did not notice or fully understand it.⁶³ As *Pollard* indicates, a homeowner who has given the vendor (or builder) notice of the condition need only prove the existence of an "unreasonable" defect at the time of the sale. With the imposition of liability on a vendor who was contractually bound to the builder, California courts seem to be continuing the process, begun in *Connor*, of holding virtually anyone

strict liability and negligence have been variously utilized, depending on the identity of the parties or the case law of the particular jurisdiction. See notes 16, 24, 39 *supra*; notes 25-26 and accompanying text *supra*.

59. Commentators have made several proposals for reform. One proposed act imposes a greater liability on merchant builders and vendors, and limits the recovery against nonmerchant sellers to defects actually known but not disclosed. The statute of limitations is only one year. Bearman, *supra* note 2, at 575-78. Professor Haskell suggests a warranty for all new construction regardless of the seller's expertise. Some reservations are suggested in the sale of used housing, and the statute of limitations would be five years (one year for used housing). Haskell, *supra* note 5, at 651-52. Another approach, preserving the tort and contract pigeonholes, see Roberts, *supra* note 2, at 866-67, contrasts with Young & Harper's proposal, which suggests the label "realtability" for their "new" implied warranty. Young & Harper, *supra* note 4, at 267. For a review of the English solutions see North, *Defective Premises Act 1972*, 36 MODERN L. REV. 628 (1973). See also notes 47-52 and accompanying text *supra*.

60. See note 49 and accompanying text *supra*.

61. See note 57 and accompanying text *supra*.

62. See note 53 *supra*. One way a builder can minimize risks in selling new homes is to participate in a commercial warranty program. The only one currently offered in the United States is by the Home Owners Warranty Corporation. The builder is financially obligated for two years. Eight more years coverage is provided by an insurance plan. The scope of protection varies somewhat over the ten years, and the insurance plan would assume responsibility for the builder in the first two years if the latter should default. Arbitration and conciliation are provided for in the event of a dispute, and *no remedies under the law are taken away*. Information can be obtained from Home Owners Warranty Corporation, National Housing Center, 15th and M. Sts., N.W., Washington, D.C. 20005.

63. See *Sallinger v. Mayer*, 304 So. 2d 730 (La. Ct. App. 1974); cf. *Casavant v. Campopiano*, — R.I. —, 327 A.2d 831 (1974).

liable who is intimately connected with supplying homes to the public. The task that lies ahead is to enunciate with greater precision the meaning of "reasonable workmanship" and to determine what class of plaintiffs beyond the first new home consumer the law will protect.

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