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At long last, buyers of new homes in Illinois have reason to rejoice. The Illinois Supreme Court, in *Petersen v. Hubschman Construction Co.*,\(^1\) has added Illinois to the growing number of jurisdictions\(^2\) which allow a new home buyer an action against

1. 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).
the builder-vendor\(^3\) for defective construction based upon a theory of implied warranty of habitability.\(^4\) To achieve this result, the court has relaxed the rules of \textit{caveat emptor}\(^5\) and merger\(^6\) in the sale of new homes thereby joining a pervasive and well-noted trend\(^7\) toward bridging the gap between real property law and law in the sale of personalty.\(^8\)

The relaxation of \textit{caveat emptor} removes a major impediment to the concept of implied warranty. \textit{Caveat emptor} is a maxim which states that the purchaser must examine, judge, and test for himself.\(^9\) In the past, he bore the entire risk of loss if he purchased a product and subsequently discovered a de-


5. "Let the buyer beware (or take care)." \textit{Black's Law Dictionary} 281 (4th ed. 1968).

6. When purchaser, pursuant to a contract for sale, takes delivery of the deed to property, all prior conversations and understandings with reference to that property are merged in the deed. Weber v. Aluminum Ore Co., 304 Ill. 273, 136 N.E. 685 (1922).


Caveat emptor once governed the sale of both personal and real property, and was based on the premise that the vendor and purchaser dealt at arm's length. Impliedly, the buyer had a reasonable opportunity to inspect the property. The law assumed any defects would have been located and corrected on the buyer's insistence before the transaction was completed. Recently, the doctrine has been on the decline due to ever-increasing interest in consumer protection. While courts and legislatures have eroded caveat emptor with respect to personal property, they have only recently directed their attention to its via-

10. Roesser, supra note 7, at 179. See also Bearman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule, 14 Vand. L. Rev. 541 (1961); Boden, Buyer's Remedies in the Sale of Real Property in California, 53 Calif. L. Rev. 1062 (1965); Nielsen, Caveat Emptor in Sales of Real Property—Time for a Reappraisal, 10 Ariz. L. Rev. 484 (1968).

11. The classic discussion on caveat emptor is Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133 (1931).


13. Courts have eroded caveat emptor by the imposition of products liability. See James, Products Liability, 34 Tex. L. Rev. 192 (1955); Prosser, Fall of the Citadel, (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966). See also Maldonado, Builder Beware: Strict Tort Liability for Mass Produced Housing, 7 Real Est. L.J. 283 (1979) [hereinafter cited as Maldonado].

Legislatures have eroded caveat emptor by adopting the Uniform Commercial Code (1962 Official Text with Comments) [hereinafter cited as U.C.C.] warranties of merchantability and fitness for a particular purpose. U.C.C. § 2-314 defines the implied warranty of merchantability:

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.

The requirement that the seller be a merchant limits the scope of liability under the implied warranty. U.C.C. § 2-104 defines "merchant":

"Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

U.C.C. § 2-315 defines fitness for purpose as:

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.

The U.C.C. has been adopted by every state except Louisiana. Louisiana, however, has enacted statutes which impose warranties on both personal and real property transactions. See La. Civ. Code Ann. arts. 2520, 2521, 2541, 2544 (West 1952).

Several other legislatures have enacted warranty statutes for real estate transactions. See Conn. Gen. Stat. Ann. § 47-116 et seq. (West 1978);
bility in real estate transactions. The courts that have taken an "enlightened approach" and relaxed or completely discarded "caveat emptor," have done so because they have felt it has become an outmoded theory whose application in today's society is unjust.

Today, new housing is largely mass-produced and closely akin to a consumer product. Therefore, like the purchaser of goods, the new home buyer is forced to rely heavily on the skill and integrity of the builder-vendor. This reliance is given great weight by courts which grant the new home purchaser an action against the builder-vendor for defective housing.

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**MD. (REAL PROPERTY) CODE ANN. § 10-203 (1974); MINN. STAT. ANN. ch. 327A (West 1979); N.J. STAT. ANN. 46:3B-1 et seq. (West 1979).**

14. In 7 WILLISTON, CONTRACTS § 926A (3d ed. Jaeger 1963), Professor Jaeger noted that although "caveat emptor" was still broadly applied in the realty field, some courts have been inclined to make an exception in the sale of new housing where the vendor is also the developer or contractor. "In such a situation, a purchaser relies on the implied representation that the contractor possesses a reasonable amount of skill necessary for the erection of a house; and that the house will be fit for human dwelling." In conclusion he noted that "it would be much better if this enlightened approach were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerrybuilding that has become perceptible over years." *Id.* (emphasis added).

15. *See* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968), where it is stated, "The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice... to the ordinary prudent purchaser [and] to the industry itself by lending encouragement to the unscrupulous, ..., and surveyor[s] of shoddy work." *Id.* at 562. *See also* Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966). Here the court recognized that:

> The old rule... does not satisfy the demands of justice... The purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of "caveat emptor" to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice.

*Id.* at 71, 415 P.2d at 710 (emphasis added).


17. "[T]here is no substantial difference between the sale of a house and the sale of a good... Therefore [this] implied warranty of fitness for use attendant upon the sale of personal property should attach to [the] sale of a house." Yepsen v. Burgess, 269 Or. 637, 640, 525 P.2d 1019, 1022 (1974). "Although considered to be a real estate transaction... the purchase of a residence is in most cases the purchase of a manufactured product, the house. The land involved is seldom the prime element in such a purchase." Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 799 (Mo. 1972). *See also* Waggonep v. Midwestern Dev., Inc., 83 S.D. 57, 62, 154 N.W.2d 803, 807 (1967). *But cf.* Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977) (building is not a product for strict liability purposes).

Merger also acted with undue severity against the home purchaser. All agreements between the seller and the purchaser were merged into the deed upon its delivery. Thus, the acceptance of the deed foreclosed the buyer from any cause of action for defects subsequently found, except to the extent that he had expressly reserved his right against the vendor in the deed.\textsuperscript{19} Although certain exceptions to the merger doctrine were created,\textsuperscript{20} the usual result was that the purchaser of a new home had less protection than the purchaser of any other new product.\textsuperscript{21}

Courts, faced with the harsh results of \textit{caveat emptor} and merger, sought to alleviate these inequities by introducing the concept of implied warranties with respect to the sale of realty.\textsuperscript{22} Under this warranty theory, the builder-vendor impliedly warrants that when the purchaser takes possession of the house, its fixtures are free from structural defects and its construction was performed in a workmanlike manner.\textsuperscript{23} This implied war-

Many commentators also have urged the reliance concept be given great weight. \textit{See} Bearman, \textit{supra} note 7, where the author states:

The vendee’s strongest argument is reliance. He is admittedly unskilled in the mysteries of house construction and must therefore rely heavily upon the superior skill and training of his builder-vendor. Inspection will be of little use, as has been argued previously, in protecting the vendor both because of the expense and because the defects are usually hidden. Though the vendor-vendee relationship may not be technically a fiduciary one, the trust placed in the vendor coupled with the relative helplessness of the vendee, make it one, contends the vendee, on which the law should impose that high standard. \textit{Id.} at 574.


b) Quality warranties are independent to conveyance of the title. Therefore, they are not satisfied by acceptance of the deed. Rouse v. Brooks, 66 Ill. App. 3d 107, 383 N.E.2d 666 (1978). \textit{See also} Dunham, \textit{Vendor’s Obligation as to Fitness of Land for a Particular Purpose}, 37 MINN. L. REV. 108, 125 (1953).

c) An executory agreement for the performance of separate and distinct provisions does not merge with the deed. \textit{See} Chicago Title & Trust Co. v. Wabash-Randolph Corp., 384 Ill. 78, 51 N.E.2d 132 (1943); Trapp v. Gordon, 366 Ill. 102, 7 N.E.2d 869 (1937).

d) The prior contract is superseded only to such of its provisions as are covered by conveyance made pursuant to its terms. Brownell v. Quinn, 47 Ill. App. 2d 206, 197 N.E.2d 721 (1964).

\textbf{21.} \textit{See} note 12 \textit{supra}.

\textbf{22.} The terms “implied warranty of habitability,” “implied warranty of fitness,” and “implied warranty of suitability” have been used synonymously by courts. \textit{See}, \textit{e.g.}, Klos v. Gochel, 87 Wash. 2d 567, 570, 554 P.2d 1349, 1351-52 (1976).

\textbf{23.} \textit{See} Roeser, \textit{supra} note 7, at 182-83.
ranty arises as a matter of public policy and protects the purchaser from losses due to latent defects which would not have occurred in a reasonably constructed home.\textsuperscript{24}

The first indication that courts would deviate from caveat emptor occurred in 1931.\textsuperscript{25} In \textit{Miller v. Cannon Hills Estates Ltd.},\textsuperscript{26} the court held that an implied warranty for workmanlike construction existed in the sale of an uncompleted home, primarily because the purchaser was forced to rely on the builder's skill to complete the home in a workmanlike fashion.\textsuperscript{27} While this decision was followed in several American jurisdictions,\textsuperscript{28} it was also criticized for distinguishing between a complete and an incomplete home.\textsuperscript{29} The major breakthrough came in 1964 when the Colorado Supreme Court, in \textit{Carpenter v. Donohoe},\textsuperscript{30} held

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 183. The implied warranties arose through imposition by the courts, rather than through the terms of the sales contract. The underlying purpose was to protect the purchaser of defective goods by a principle of fairness. Warranty law from its inception has been an uneasy merger of contract and tort law, sometimes "relying on the presumed intent of the parties, at other times invoking morality or public policy." Comment, \textit{The Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson Mass Warranty Acts}, 26 U.C.L.A. L. Rev. 583, 589 (1979). The implied warranty of habitability, however, should be viewed as essentially contractual in nature. This would recognize the fact that the parties are actually bargaining for the sale of a habitable dwelling, i.e., when the seller fails to deliver a habitable dwelling, he has not fulfilled his side of the contract. Comment, \textit{The Implied Warranty of Habitability - Contract or Tort?}, 31 Baylor L. Rev. 207, 210 (1979).


\item \textsuperscript{26} [1931] 2 K.B. 113. The purchaser contracted to buy a home which was uncompleted at the contract execution. The home contained numerous structural defects, and the purchaser filed suit. The court allowed recovery, reasoning that the vendee had no opportunity to inspect for flaws in an uncompleted home. Therefore, they found he had relied entirely on the builder to complete the job correctly. \textit{See Bearman, supra note 7}, at 544.

\item \textsuperscript{27} [1931] 2 K.B. at 120.

\item \textsuperscript{28} \textit{See, e.g., Vanderschrier v. Aaron}, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Hoye v. Century Builders, 52 Wash. 2d 830, 329 P.2d 474 (1958).

\item \textsuperscript{29} \textit{See Roeser, supra note 7}, at 180 n.7.

\item \textsuperscript{30} 154 Colo. 78, 388 P.2d 399 (1964). The home was completed when purchased. Later, the foundation had to be shored to prevent further shifting which had cracked the walls. 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 war-
\end{itemize}
that the implied warranty extended to either an unfinished or a completed home. Since that time, only a dwindling minority of states have refused to recognize an implied warranty in realty actions. The remainder have recognized that the buyers of goods in an industrialized society must rely on the skill and honesty of the builder-vendor to assure that homes are of adequate quality. Accordingly, courts have allowed recovery on a theory of implied warranty for such defects as an improperly functioning heating or air conditioning system; cracked walls; a leaky basement; faulty roofing; a defective septic system; a defective chimney which caused fire damage; a defective foundation and wall supports; an inadequate well; and even the unsuitable nature of the site selected for the home.

Although construction methods are generally no different in Illinois than in other states, Illinois has faced a distinct problem in that its system of courts has vacillated on whether or not the implied warranty of habitability existed. Because the Illinois warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.

Id. at 81, 388 P.2d at 402.


32. See Bixby, supra note 7, at 549.


42. a) The districts which recognized an implied warranty of habitability were: 1st Dist.: Weck v. A.M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962). The purchaser was allowed to recover from the builder-vendor for latent defects in the construction of the new home, including cracked plaster in the bedroom and water leakage in the roof, basement, and bathroom. The court relied heavily on Miller v. Cannon Hill Estates, Ltd., [1981] 2 K.B. 113, to defeat the doctrine of merger and allow the plain-
Supreme Court had failed earlier to decide this issue and due to the continuing conflict among the appellate districts, the time for resolution was ripe when the supreme court was recently presented with the question of whether an implied warranty of habitability exists in the sale of new homes.

FACTS AND DECISIONS OF THE LOWER COURTS

In April, 1972, Raymond and Dolores Petersen entered into a tiff-purchaser recovery. See also Goggin v. Fox Valley Constr. Corp., 48 Ill. App. 3d 103, 365 N.E.2d 509 (1977). Plaintiff brought suit to recover for damages due to a defective roof and foundation. The appellate court reversed the judgment for the plaintiff because the complaint had failed to allege the house was unfit for human habitation alleging, instead, a breach of the implied warranty of workmanlike construction. The court remanded the case and stated what it felt to be the nature of the warranty of habitability. "[I]f a new home is not structurally sound because of a substantial defect of construction, such a home is not habitable." Id. at 106, 365 N.E.2d at 511.

3d Dist.: Hanavan v. Dye, 4 Ill. App. 3d 576, 281 N.E.2d 398 (1972). The plaintiff-purchaser sought damages from the builder-vendor for water damage caused by defendant's poor installation of drain tile. The house was complete when purchased. The court rejected caveat emptor based on the reliance concept and found that an implied warranty of habitability exists which allows an action against the builder-vendor. See also Garcia v. Hynes & Howe Real Estate, Inc., 29 Ill. App. 3d 479, 331 N.E.2d 64 (1975). Here the court sought to resolve the dichotomy caused by their decisions in Hanavan and Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), aff'd, 31 Ill. 2d 189, 201 N.E.2d 100 (1964). The appellate court followed Hanavan and made a confusing attempt to discount Coutrakon as non-controlling due to the court's changed geographical location.

4th Dist.: Conyers v. Molloy, 50 Ill. App. 3d 17, 364 N.E.2d 986 (1977). Plaintiffs purchased a home from defendant-builder. They alleged that due to a lack of ventilation in the attic the house was not habitable because of water damage. The court, citing various law reviews and sister state precedents, held that the implied warranty for habitability exists in Illinois. They also noted that because the standard disclaimer clause in the sales contract was insufficient to adequately appraise the purchasers of their waiver, the disclaimer was invalid.

b) The districts which refused to recognize an implied warranty of habitability were:

3d Dist.: Coutrakon v. Adams, 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), aff'd, 31 Ill. 2d 189, 201 N.E.2d 100 (1964). Plaintiffs purchased a new home from defendant-builder. The home, although uncompleted at the purchase date, was subsequently completed. Five months after the heating unit was first turned on, it caused two fires and extensive damage. The appellate court reversed the trial court's judgment for the plaintiff based upon the doctrines of merger and the complete/incomplete dichotomy. This decision followed the dissent in the earlier Weck case.

5th Dist.: Narup v. Higgins, 51 Ill. App. 2d 102, 200 N.E.2d 922 (1964) (abstract opinion). The court refused to find on implied warranty of condition or quality in the sale of a new home even though the plaintiffs had to repair a defective roof, curbing, and a defective air conditioner.

43. The court in Coutrakon v. Adams, 31 Ill. 2d 189, 201 N.E.2d 100 (1964), aff'd 39 Ill. App. 2d 290, 188 N.E.2d 780 (1963), never addressed the issue of an implied warranty, deciding the case on evidentiary grounds. They noted, however, that the warranty issue presented an "interesting problem." 31 Ill. 2d at 190, 201 N.E.2d at 101.
contract with Hubschman Construction Co. for the purchase of land and the construction of a new home. The parties agreed to an offset from the contract price for work which Petersen himself would perform. Later, the Petersens paid $10,000 in earnest money. In November and December of 1972, Mr. Petersen complained about and requested repair of various defects in the house. Subsequent repairs were not done to his satisfaction. The Petersens refused to close the deal unless Hubschman either placed $1,000 in a joint escrow account to insure correction of the defects or satisfactorily repaired the defects. Hubschman refused to establish the escrow account and said he would repair the defects, but demanded that the Petersens first close the deal. They refused. Hubschman then attempted to invoke the contract forfeiture clause and upon continued nonpayment by the Petersens, declared that the earnest money together with all materials and labor furnished by the Petersens was forfeited.

44. The contract price of $71,400 included various offsets, such as a plumbing allowance of $2,500 and a painting allowance of $2,000. Raymond Petersen was a plumbing contractor and was also engaged in the installation of heating, air conditioning, electrical, and ceramic tile units and fixtures in buildings in Lake and Cook Counties. Brief for Defendant-Appellant at 5, Petersen v. Hubschman Constr. Co., 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

45. Generally, earnest money is money deposited to bind a bargain. In the real estate business, an earnest money deposit is a sum of money very generally accompanying an offer to purchase the property, indicating the serious intention of the prospective purchaser. Acceptance of such sum by the owner could either effect a binding contract of sale and purchase, or it could effect only an option. Construction of this term would depend upon the language in the instrument accompanying the deposit. J. CARTWRIGHT, GLOSSARY OF REAL ESTATE LAW 297 (1972).

46. One of defendant's arguments, both at trial and on appeal, was that the Petersens, by demanding that $1,000 be held back to insure completion, were attempting to impose a unilateral amendment to an existing bilateral contract. See 53 Ill. App. 3d at 631, 368 N.E.2d at 1048. This could also be viewed, however, as a valid attempt to modify the contract, which if accepted, would have led to the closing of the deal.

As the appellate court observed, "from the practical standpoint, arrangements for an escrow hold back are frequently in the best interest of both parties," and since the defendants had not substantially performed, they had no right to demand the full purchase price. Id.

47. Paragraph 12 of the contract provided, inter alia: FORFEITURE: If the Purchaser fails to make any of the cash payments hereinabove set forth or perform any of the covenants required of Purchaser hereunder, this Agreement shall, at the option of Contractor and upon ten (10) days' notice to Purchaser by certified mail, be forfeited and determined and Purchaser shall forfeit all payments made under this Agreement and such payments shall be retained by said Contractor in full satisfaction and as liquidated damages sustained by Contractor.

The Petersens filed suit demanding return of their earnest money and the value of labor and materials they had furnished. The trial court found substantial defects in the construction; namely, improperly installed siding; a defective bay window; deterioration in the drywalls; a defective front door; and the basement floor pitched in the wrong direction. Therefore, the court ruled that Hubschman had not substantially performed the contract and the termination resulted in a breach. This entitled the Petersens to recover both their earnest money and the value of labor and materials they had furnished. Accordingly, judgment was entered for the plaintiffs.

On appeal, the defendants argued that since the home was constructed in a manner sufficient to provide a safe place to live and shelter its inhabitants from the elements, the contract for the construction of a house was substantially performed. The court, however, rejected this contention and affirmed the judgment below. The Illinois Supreme Court granted Hubschman's petition for leave to appeal.

**THE ILLINOIS SUPREME COURT OPINION**

In affirming the judgments of the lower courts, the supreme court noted:

48. In the circuit court of Lake County, Illinois.

49. The exact nature of the defects were:
1. The drywall in a substantial portion of the residence had deteriorated and the nails had "popped" as a result of failure to install insulation and this defect had not been satisfactorily remedied and still existed in December of 1972 and the drywall tape seams were visible through the paint. It is the finding of this court that such defects are not of the type ordinarily found in the installation of drywall.
2. The front door was defective in that it was too large for its jamb and would not close properly.
3. The bay window had been improperly installed and was warped and discolored.
4. The basement floor was pitched in the wrong direction with the result that seepage water in the basement drained toward the washroom.
5. A portion of the exterior siding was not properly installed and defect therein had not been properly remedied.

Petersen v. Hubschman Constr. Co., No. 73-CH 103, slip op. at 3 (19th Cir., filed Oct. 14, 1975). It would seem plaintiff's request for a $1,000 escrow account indicated that repairs would cost no more than that amount. Therefore, the "defects in substance" constituted a mere 1.4% of the purchase price of $71,400.

50. The judgment totalled $19,668.58 ($10,500 for money paid under the contract and $9,168.58 for labor and materials furnished). The court also noted that defendant had sold the house to a third party for $78,000.

51. 53 Ill. App. 3d 626, 368 N.E.2d 1044 (1977). Defendant's argument was based on Goggin v. Fox Valley Constr. Corp., 48 Ill. App. 3d 103, 365 N.E.2d 509 (1977). The court found Goggin clearly distinguishable, however, since it turned upon the implied warranty of habitability, and not upon the question of whether the builder had substantially performed his contract. 53 Ill. App. 3d at 631, 368 N.E.2d at 1048.
court held that there is an implied warranty of habitability included in the sale of a new home by a builder-vendor. This implication will support a vendee's action against the builder-vendor for latent defects and will avoid the unjust results of *caveat emptor* and merger. The court determined that the warranty of habitability means that a home must be reasonably fit for its intended use, and any disclaimer of this warranty must be strictly construed against the builder-vendor.

The court based its holding on four conclusions: (1) due to the vast changes that have taken place in the method of constructing and marketing new homes, the unjust results of *caveat emptor* and merger should be alleviated; (2) the purchaser has a justifiable expectation in receiving a house that is reasonably fit for use as a residence; (3) the implied warranty arises with the execution of the contract and the builder-vendor's substantial performance of it is a constructive condition precedent to performance by the vendee; and (4) the evidence indicated the builder had failed to substantially perform the contract. The court's rational basis and logical defense for arriving at these conclusions was based primarily on public policy considerations and an analogy to the Uniform Commercial Code.

The court recognized a need to protect new home purchasers from the outmoded concepts of *caveat emptor* and merger in much the same way that they had protected tenants in apartment leases, by the adoption of an implied warranty of habitability. They defined this warranty to be reasonable fitness for

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52. 76 Ill. 2d at 39, 389 N.E.2d at 1157.
53. *Id.* at 42, 389 N.E.2d at 1159.
54. *Id.* at 43, 389 N.E.2d at 1159.
55. While the court never mentioned the specific changes, some could include the mass produced nature of modern housing, the expanding use of models and samples to sell new homes, and due to the sheer volume of construction, a lessening of quality.
56. *Id.* at 40, 389 N.E.2d at 1158.
57. *Id.*
58. *Id.* at 41, 389 N.E.2d at 1158.
59. *Id.* at 43, 389 N.E.2d at 1159.
60. *Id.* at 44, 389 N.E.2d at 1160.
62. In Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972), the court essentially viewed a landlord-tenant relationship as a contractual relationship, with corresponding obligations on both parties, the landlord's being to substantially comply with health and safety provisions. *Id.* at 366, 280 N.E.2d at 217. This established an implied warranty of habitability in all residential leases. See Fusco, Collins, & Birnbaum, *Damages for Breach of the Implied Warranty of Habitability in Illinois—A Realistic Approach*, 55 Chi.-Kent L. Rev. 337 (1979) [hereinafter cited as Fusco].
intended use because the U.C.C. lays down similar warranties for the purchaser's protection in the sale of goods; the builder-vendor knows that the purchaser has bargained for a home, and the purchaser has not received what he has bargained for merely because the house is capable of being inhabited. The effect of comparing the implied warranty in the sale of new homes to the implied warranties under the U.C.C. is to establish requirements that the house would be of fair average quality, that it would pass without objection in the building trade, and that it would be fit for the ordinary purpose of living in it.

The combination of public policy considerations and an analogy to the U.C.C. is also apparent in the court's discussion of a possible disclaimer of the implied warranty. While a knowing disclaimer of the implied warranty is not violative of public policy, it will be strictly construed against the builder-vendor.

The last area the court discussed was contract law. The court held that substantial performance of the contract within the standards set by the implied warranty of habitability is a constructive condition precedent to the purchaser's duty to pay. Since the trial court found through evaluation of the evidence that Hubschman had not substantially performed the contract, the implied warranty was not fulfilled by Hubschman at the time of his repudiation. This entitled Petersen to recover.

**Analysis**

The adoption of an implied warranty of habitability in the sale of new homes is long overdue. The incongruity of protecting the purchaser of a defective $0.79 dog leash while ignoring the purchaser of a $70,000 new home has no place in a modern consumer society. It was anomalous that one of the largest single investments in a consumer's life offered the least consumer protection. But, while the underlying conceptualization by the court is sound, certain aspects of the Petersen decision may create problems.

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63. "(W)e hold . . . that the house . . . when conveyed to the vendees, would be reasonably suited for its intended use." 76 Ill. 2d at 42, 389 N.E.2d at 1159.

64. Id. at 40, 389 N.E.2d at 1158.

65. Id. at 41, 389 N.E.2d at 1158.

66. See U.C.C. § 2-314. See also Washington, supra note 25, at 211-12.

67. The U.C.C. section on disclaimer is § 2-316.

68. 76 Ill. 2d at 43, 389 N.E.2d at 1159.

69. Id. at 43-44, 389 N.E.2d at 1159.

70. See Haskell, supra note 7, at 633.

71. See Bixby, supra note 7, at 536.
Latent Defects

One of the troublesome aspects of the opinion is its reference to "latent defects." By most definitions, the defects the Petersens requested repaired were not latent, but rather patent.\(^7\) There are several possible explanations for the court's decision, the apparent one being that since the trial court had already found that the house was substantially defective, the supreme court merely took the opportunity to enunciate a general policy to apply to future cases.

The second possibility is far more commendable. The court may have felt that what constituted patent defects to an experienced contractor would be latent defects to the ordinary, inexperienced purchaser. This common sense approach suggests that one who is intimate with home construction methods can spot defects which are obvious to him and which warn him of hidden problems, but which would be missed by an ordinary purchaser. In Petersen, for example, the existence of "nail popping" indicated to Petersen that insulation was lacking in the walls. Because Petersen was an experienced builder, he noticed this problem and attempted to have it corrected.\(^7\)

The court also failed to define what constitutes a defect. A product is defective if it is not fit for the ordinary purpose for which such a product is used.\(^7\) The court seemingly applied this definition by stating that since Hubschman had not substantially performed the contract, the house was defective, and the implied warranty of fitness for intended use was not satisfied.\(^7\) This does not mean that any flaw a purchaser discovers will render the house defective. The builder cannot be expected to bear the burden of constructing a perfect structure because such flawless construction is impossible. Many courts have adopted a reasonableness standard to determine if something is defective.\(^7\) Under this standard, a defect is determined by judg-

\(^7\) A latent defect is one which a reasonably careful inspection will not reveal; one which could not have been discovered by inspection. McGourty v. Chiapetti, 38 Ill. App. 2d 165, 186 N.E.2d 102, 106 (1962). Accord, BLACK'S LAW DICTIONARY 1026 (4th ed. 1968). But see Note, 447 TEMP. L.Q. 172, 175 (1972) (what is latent will often depend on circumstances of case).

\(^7\) Record at 56, 94, Petersen v. Hubschman Constr. Co., No. 73-CH 103 (19th Cir., filed Oct. 14, 1975). This is not to suggest that "nail popping" is caused solely by a lack of insulation or that it is even a defect. The example merely illustrates that someone in the business has a greater awareness of potential defects.

\(^7\) BLACK'S LAW DICTIONARY 377 (5th ed. 1979).

\(^7\) 76 Ill. 2d at 44, 389 N.E.2d at 1160.

\(^7\) See, e.g., Loch Hill Constr. Co. v. Fricke, 284 Md. 708, 399 A.2d 883 (Ct. App. 1979); Smith v. Old Warson Dev. Co., 479 S.W.2d (Mo. 1972); Klug & Smith Co. v. Sommer, 265 N.W.2d 269 (Wis. 1978).
ing the problem as a matter of reasonableness, and not of perfection. It is a question of fact. This inquiry into reasonableness operates in much the same fashion as the investigation of substantial performance. Either case would allow the courts to be flexible depending upon the nature of the defect or the injury to the parties.77

The use of the term latent defect and its application also suggests the problem of the appropriateness of the remedy. In Petersen, the court properly allowed Petersen to recover both his earnest money and the value of his labor and materials. Hubschman had not substantially performed the contract when he attempted to declare a forfeiture, and the proper remedy at that point was rescission.78 However, the court, by allowing this rescission and then declining to decide whether it would be applicable if the defects had not been discovered until after the deed had been delivered,79 acts inconsistently and denies relief for the majority of new home purchasers. The court on the one hand allows a cause of action against the builder-vendor for latent defects which interfere with the vendee's legitimate expectations80 and then refuses to say what recovery may be had. A narrow interpretation of this holding will do nothing for new home purchasers, it will only protect them if they can find defects before closing. Prior to this decision, caveat emptor and merger combined to deny the new home purchaser an action for latent defects even if they were extensive. The implied warranty arose to rectify that situation. To limit the Petersen holding merely to defects discovered prior to closing would be to ignore the entire purpose of an implied warranty. The purchaser should be allowed to recover at least damages for subsequent discovery of latent defects,81 the proper measure of

77. The test of substantial performance is not strict compliance with the plans and specifications of the contract, but "whether the builder's performance meets the essential purpose of the contract." Klug & Smith Co. v. Sommer, 265 N.W.2d 269, 272 (Wis. 1978) (emphasis added). Using this approach a court would label something a defect only if it renders the house unfit for habitation.

78. Because the law abhors a forfeiture, the vendor will not be permitted to declare one except where his right to do so is shown clearly and unequivocally. Kingsley v. Roeder, 2 Ill. 2d 131, 117 N.E.2d 82 (1954). Where the contract contains an implied warranty that the contractor work will be sufficient for a particular purpose, there is no substantial performance unless the work is sufficient for such purpose. Therefore, one party may rescind the contract because of the substantial nonperformance by the other party. Eager v. Berke, 11 Ill. 2d 50, 54, 142 N.E.2d 36, 39 (1957); Lowrie v. City of Evanston, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1977). See 12 Williston, Contracts § 1455 (3d ed. Jaeger 1963).

79. 76 Ill. 2d at 44, 389 N.E.2d at 1160.
80. Id. at 42, 389 N.E.2d at 1159.
81. Obviously the purchaser should not be forced to take a substantially
damages being the cost to repair the defective condition. Re-scission should not be allowed unless the defects are not sus-
cceptible to rectification by some suitable remedy.

This does not mean that any defect a purchaser discovers prior to closing will allow the purchaser to repudiate the con-
tract. The right to repudiate should be limited to those substan-
tial defects which interfere with the expectation that the house will be reasonably suited for its intended use. The trial courts should be allowed to exercise broad discretion when deciding the question of substantial defects in newly constructed homes. This will enable them to further justice in the best interest of the parties to the contract for the sale of a home.

defective home. However, all the cases which applied the implied warranty of habitability, see note 2 supra, dealt with defects which were discovered after closing. The overwhelming majority of courts in those cases applied damages as the proper remedy. While none of these cases spoke in terms of "substantial defects," they provided for damages in cases of severe defects. See text accompanying notes 30-38 supra.

82. See Mason v. Griffith, 281 Ill. 246, 256, 118 N.E. 18, 21 (1917); Watson Lumber Co. v. Mouser, 30 Ill. App. 3d 100, 110, 333 N.E.2d 19, 28 (1975); Han-
van v. Dye, 4 Ill. App. 3d 576, 580, 281 N.E.2d 398, 401 (1972). Generally, as in most warranty cases, the measure of damages for defects which can be remedied is the reasonable cost of remedying the defect. Roeser, supra note 7, at 186; accord, Ramunno, Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings, 43 DEN. L. REV. 379, 386 (1966) (if property is capable of repair, measure of damages should be cost of repairs). This standard is also consistent with the purpose of damages, that is to put the aggrieved party into the position that he would have been had the contract been performed. See, e.g., Kemp v. Gannett, 50 Ill. App. 3d 429, 365 N.E.2d 1112 (1977). The importance of the court's enunciation (or lack of it) on the question of damages cannot be overemphasized. One reason Jack Spring has not greatly benefited tenants is that the court failed to set guidelines as to the measure of damages. See Fusco, supra note 58, at 338.

83. See, e.g., Bethlahmy v. Bechtel, 91 Idaho 55, 68, 415 P.2d 698, 711 (1966) (defects susceptible of remedy ordinarily would not warrant rescis-
sion; if the defects are not readily remediable, buyer is entitled to rescission and restitution). This would be in keeping with the court's statement that it would be manifestly unjust to force the Petersens to accept a house in which there were defects in substance and to settle for damages. 76 Ill. 2d at 44, 389 N.E.2d at 1160. But this rule should only apply if the defects are substantial and render the house unfit for its intended purpose.

84. By their very nature, substantial defects are not readily remediable and probably would not satisfy the condition precedent of fitness for use. One suggested test for determining if repairs should be allowed in sales of personal property under the U.C.C. is:

1. Look at the relative importance of the defect to the quality of product as a whole;
2. Look at the complexity of the product in which the defect occurs (if the product is very complex, it is reasonable that the product would need some repair); and
3. Look at the aspect of convenience to both parties.

This decision quite possibly signals the end of feudal property law. Just as the Illinois Supreme Court had earlier abandoned property law by viewing a residential landlord-tenant relationship as basically a contractual one, this decision represents the continuing integration of property law and contract law via the implied warranty of habitability.

The lower court decisions could have been affirmed using traditional contract law principles. Indeed, the issue of implied warranty of habitability was never reached in the lower courts. As the supreme court properly noted, the question of whether there has been substantial performance is a question of fact. Since the evidence was sufficient to support the finding of non-substantial performance, the supreme court could have affirmed based solely on this ground. However, the recognition of the implied warranty of habitability exhibits a desire by the supreme court to revise real property law to meet the needs of the complexities of a modern consumer society. The court stated that the warranty arose by virtue of the execution of the agreement between the vendor and vendee. While this is consistent with warranties arising under the U.C.C., it differs with other jurisdictions where the warranty is said to arise from the purchase of the home, rather than from the sale contract or deed. The Illinois policy thus represents a substantial advance in the emerging real estate and contract law combination.

Because the court labeled the vendor's performance of the warranty a constructive condition precedent to the purchaser's duty to pay, the contract does not become effective and the

85. See note 62 supra.
86. The trial court decided the case on substantial performance grounds. The appellate court affirmed even distinguished another case because it turned upon the implied warranty of habitability, and not upon substantial performance. 53 Ill. App. 3d at 631, 368 N.E.2d at 1048.
87. 76 Ill. 2d at 44, 389 N.E.2d at 1160. See 3A CORBIN, CONTRACTS §§ 314, 318 (1960).
90. 76 Ill. 2d at 41, 389 N.E.2d at 1158.
93. 76 Ill. 2d at 43-44, 389 N.E.2d at 1160.
parties are not bound until performance of the condition. Accordingly, the courts must specify whether performance is to be judged by a reasonableness standard, or a substantial performance standard. Because the law imposes the condition for the purchaser's benefit, this condition may or may not be enforced at his option. This will offer the purchaser the option of: (1) taking his home and waiving the condition precedent if he feels the house is satisfactory, or (2) exercising his right and refusing to close if the vendor refuses to conform to the warranty. The use of the term "constructive condition" may create problems, however. If the vendee takes possession and subsequently discovers a latent defect, the builder may argue that the purchaser waived this condition upon taking possession. This argument, however, runs contrary to the purpose of the implied warranty and should not be given effect.

The court's analogy to the U.C.C. raises the question of the Code's applicability to the sale of real property. The Code itself explains that it applies only to the sale of goods. However, as noted earlier, courts are considering homes to be goods with increasing frequency. The Illinois court also seems to have adopted this reasoning. These developments evidence a clear trend moving from separate real estate and personalty contract laws into a unified law which reasonably protects the consumer.

Reference to the U.C.C. invites consideration of disclaimer.

96. U.C.C. § 2-102 states: "[U]nless the context otherwise requires, this Article applies to transactions in goods."
97. See note 17 supra. Courts base this on: (a) the fact that consumers view the purchase of land as incidental to the purchase of a home, Yepsen v. Burgess, 269 Or. 635, 640, 525 P.2d 1019, 1022 (1974); (b) homes are now mass-produced and the builder is identical to a merchant, see Bixby, supra note 7, at 550; (c) the home itself is composed entirely of goods, see Maldonado, supra note 12, at 303; and (d) since the seller knows the buyer is purchasing a home for habitation, an accompanying warranty for habitation fulfills the expectations of both parties, see Comment, Extension of Implied Warranties to Developer-Vendors of Completed New Homes, 11 URB. L. ANN. 257, 257 n.2 (1976), quoted in Note, Implied Warranty v. Caveat Emptor, 13 RICH. L. REV. 381, 386 n.50 (1979).
98. This is especially true since the court mentioned the mass produced nature of new housing and the fulfilling of the expectations of both parties.
clauses which affect the existence of the implied warranty and the Hubschman court felt obliged to discuss disclaimers. It held that although a knowing disclaimer of the implied warranty is not against public policy, it will be strictly construed against the builder-vendor. Although this policy was already existent in some jurisdictions, the court obviously wanted to insure that the consumer protections it laid down would not be signed away in "boilerplate" clauses. The court seems to place a heavier burden on the builder-vendor than is placed on the merchant under the U.C.C., where, for example, the implied warranties of fitness may be excluded by general conspicuous language. Although some jurisdictions do not allow disclaimers of the implied warranty of habitability, the Illinois Supreme Court opinion wisely did not foreclose their use. The buyer must assume some responsibility and exercise some degree of care, otherwise the builder has too great a burden im-

101. 76 Ill. 2d at 43, 389 N.E.2d at 1159.
102. See, e.g., Conyers v. Molloy, 50 Ill. App. 3d 17, 364 N.E.2d 986 (1977), where the court held that the clause "[t]here are no warranties . . . except those manufacturers warranties . . . [then] in effect" was too broad to have given adequate notice of waiver. Public policy does not prohibit a disclaimer if it is sufficiently specific. Id. at 21, 364 N.E.2d at 989.
103. The court cited with approval Crowder v. Vandendale, 564 S.W.2d 879 (Mo. 1978), which held that boilerplate clauses, however worded, are ineffective. The opinion also stated that in order to benefit from a disclaimer, the party must show: (a) a conspicuous provision, (b) that an agreement in fact had been reached, and (c) the provision must fully disclose the consequences of its inclusion. 76 Ill. 2d at 43, 389 N.E.2d at 1159.
104. U.C.C. § 2-316 provides:

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability [or fitness], the language must mention merchantability [or fitness], and . . . must be conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)
(a) Unless the circumstances indicate otherwise, . . . all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties, and makes plain that there is no implied warranty; and
(b) When the buyer before entering into the contract has examined the goods . . . there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

105. See, e.g., Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972) where the court stated, "[W]e do not believe a reasonable person would interpret that provision (as is) as an agreement by the purchaser to accept the house with an unknown structural defect." Id. at 800. But cf. Tibbits v. Openshaw, 18 Utah 2d 422, 425 P.2d 160 (1967) (an "as is" clause prevents an implied warranty). See also Haskell, supra note 7, at 654 (a merchant should not be permitted to build and receive money for a structure which appears to be a house and avoid liability if it is defective).
posed on him. A sensible approach would be to allow the builder-vendor to exclude warranties on obvious or patent defects which should be discovered and corrected before closing, but not to allow the builder-vendor to exclude latent defects which render the home uninhabitable.\footnote{106} Therefore, the court in \textit{Petersen} through its use of essentially contract principles in a real estate transaction has continued the integration of contract and property law and quite possibly signals the end to feudal property law.\footnote{107}

\textit{Limitations on the Holding}

This holding establishing the existence of the implied warranty of habitability represents a significant integration of the property, contract, and tort laws. Because of this integration, the case may profoundly alter the role of traditional real estate law in a modern consumer society. There are, however, several self-imposed limitations to the \textit{Petersen} holding.

First, this implied warranty of habitability is limited to the sale of new homes.\footnote{108} Other jurisdictions have expanded it to include "buildings,"\footnote{109} condominiums,\footnote{110} an apartment building,\footnote{111} and the land itself.\footnote{112} While the "new homes" restriction is probably the first step in a similar expansion, it is logical with

\begin{itemize}
\item Attorneys are undoubtedly eager to see exactly what the court means by its discussion of a disclaimer. However, the attorneys should not limit their consideration strictly to the disclaimer. The court by analogizing to the U.C.C. opens the door to other alternatives available under the Code, such as modification of the buyer's remedies (§ 2-719). For an excellent discussion of this area, see J. White & R. Summers, \textit{Uniform Commercial Code} § 12-1 et seq. (1972).
\item As noted earlier, the implied warranties were originally a combination of tort and contract laws. See text accompanying note 24 \textit{supra}. The \textit{Petersen} decision indicates the Illinois court views the warranty as essentially a contractual concept. This greatly benefits the parties to the transaction by lending predictability and uniformity to this area of the law and by establishing a framework (under the U.C.C.) which can be applied to the implied warranty of habitability. See Comment, \textit{The Implied Warranty of Habitability—Contract or Tort?}, 31 \textit{Baylor L. Rev.} 207, 216 (1979).
\item While most jurisdictions require the sale of a new home, see, e.g., Klos v. Gockel, 87 Wash. 2d 567, 568, 554 P.2d 1349, 1351 (1976), there is no logical reason the warranty should not extend to the lease of a new home. This recently occurred in Pole Realty Co. v. Sorrels, 78 Ill. App. 3d 361, 397 N.E.2d 539 (1979) (the \textit{Jack Spring} warranty extends to tenancies in single-family residences). See also Duke v. Clark, 267 N.W.2d 63 (Iowa 1978); Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965).
\item Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 525 P.2d 88, 91,
respect to consumer expectation and with respect to the purpose of the warranty. The purchase of anything larger than a one or two-family home involves substantial sums of money. Someone in that position can afford competent building inspectors and should obtain legal advise prior to contracting. The purpose of the implied warranty is to protect the ordinary, relatively ignorant home buyer in his purchase of an expensive necessity, namely a house suitable for habitation. The court apparently followed this reasoning by limiting the implied warranty to new homes.

Another limitation placed on the holding is that it applies only to "builder-vendors." While this term has not been defined in Illinois, it has been applied as one who both builds and sells a house which he owns, and the Petersen court apparently adopted this usage. This preferred approach leaves the burden on the one who is in the business, responsible for the defect, in a position to repair the defect, and better able to spread the cost over several transactions. The court wisely limited the liability to one who is in the business of building and selling homes and therefore merits the purchaser's reliance.

115 Cal. Rptr. 648, 651 (1974) (warranty covers "new construction" and was applied to an apartment building).

112. See Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975) (land sold was restricted to single family dwellings, but drainage conditions made improvement impossible; court allowed rescission on basis of implied warranty); Beri, Inc. v. Salishan Prop., 282 Or. 569, 578, 580 P.2d 173, 177 (1978) (land developer has duty to determine whether the lots sold are fit for intended use). But see Witty v. Schramm, 62 Ill. App. 3d 185, 379 N.E.2d 333 (1978) (implied warranty of habitability not applicable to a vacant lot).

113. The purpose of the warranty is to protect the unknowledgeable purchaser of a new home who is forced to rely on a builder's skill. To expand the warranty to include all structures is contrary to the original purpose of the warranty. As Professor Bearman stated:

Since the imposition of the unqualified implied warranty of quality is based upon the theory that it is the ordinary home buyer, relatively ignorant of the business of buying a home, who needs this statutory protection, the unqualified warranty is implied . . . only in purchases of one- or two-family homes. Anything larger than a two-family dwelling is often an apartment house, and these are commonly purchased by corporations or individuals with enough wealth to afford competent inspection or knowledge of the realty business to lower the important reliance factor considerably.

Bearman, supra note 7, at 575.


116. Just as the U.C.C. limits the implied warranties to merchants, see note 12 supra, so should this warranty be limited to one who holds himself out as having the skill necessary for the particular job. Some courts have extended the term "builder-vendor" to include not only developers, but
A third limitation is the standard established to define habitability. “Reasonable fitness for habitation” does not mean that the completed home must be entirely free of defects. As many courts have noted, no home is built without defects. The purpose of the warranty is to allow the purchaser to move into a home which meets his reasonable expectation and to allow him future protection from latent defects that render the house uninhabitable. The imposition of fitness for intended purpose holds the builder-vendor liable for defects in construction which a reasonable builder would not have made.

THE IMPACT OF PETERSEN

As a result of Petersen, the implied warranty of habitability only applies in the sale of a new home by a builder-vendor. If other jurisdictions are any indication, the scope should eventually be expanded to include all “new buildings.” However, this will still exclude the vast number of older homes sold. The same expectations and reliance are present in the purchase of a one-year old home for $60,000 as are present in the purchase of a new home for $60,000. The fact that neither U.C.C. section 2-314 (implied warranty, merchantability) nor U.C.C. section 2-105(1) (definition of “goods”) excludes secondhand goods suggest used homes might be covered if the present trend of analogizing real property and personal property transactions continues.

even first time builders if their primary reason for constructing the house is resale. Mazurek v. Nielsen, — Colo. App. —, 569 P.2d 269 (1979).


118. This is in keeping with the court's language on reasonable expectation and with the underlying policy reasons for adopting the warranty.

119. The implied warranty could also include a requirement of good workmanlike construction. There existed at common law a duty that one who contracted to perform construction work impliedly warranted to do the work in a reasonably workmanlike manner. Dean v. Rutherford, 49 Ill. App. 3d 768, 364 N.E.2d 625 (1977); Rehr v. West, 33 Ill. App. 160, 76 N.E.2d 808 (1948) (abstract opinion). See 35 L.L.P. Vendor & Purchaser § 242 (West 1958).

120. See notes 109-10 supra.

121. Most sales of real estate involve used construction. If the implied warranty is recognized only in the area of new construction, then the law only offers occasional protection to the purchaser. “Any distinction between purchasers of used homes [and purchasers of new homes] with respect to assumption as to quality is wholly unrealistic. The only difference is degree of expectation.” Haskell, supra note 7, at 650-51. See also Bixby, supra note 7, at 560-63.

122. See also Comment, Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty
This also highlights another problem, that of duration of the warranty. Two schools of thought exist on this subject. One proposes a statutory limitation. An alternative would rely on reasonableness. The Illinois Legislature recently adopted a two-year statute of limitations for all actions arising from the improvement of real estate. The statute runs from the time the purchaser knew or should have known of the defect, but precludes any action after twelve years from the date of the act. This approach represents a viable alternative to the uncertainty of the reasonableness test and the harshness of the statutory limitation.

In the foreseeable future, the courts will probably adopt some form of strict liability in the sale of homes. Indeed, some commentators and at least one court have discussed such a possibility. While we are still years away from such a move, the transition in the sale of goods from caveat emptor to warranties to strict liability, can only serve as a model. The Petersen decision has started Illinois down that inexorable path.

One immediate result of the Petersen decision is the abandonment of the doctrines of caveat emptor and merger. While the court stated that the adoption of an implied warranty merely relaxes caveat emptor and merger in the instant situation, in actuality this case was their death knell. This is illustrated by a recent appellate court application of this "relaxation" of caveat emptor.


123. For example, U.C.C. § 2-725 has a four-year statute of limitations. Maryland has a one-year statutory limitation on real property transactions. See Md. [Real Property] Code Ann. § 10-204 (1974).

124. The reasonableness argument is that (1) different parts of the home have different durational tendencies, and (2) this test would be flexible enough to fit the needs of the case. See Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Padula v. Deb-Cin Homes, Inc., 111 R.I. 29, 33, 298 A.2d 529, 532 (1973); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975). See also McNamara, The Implied Warranty in New House Construction Revisited, 3 Real Est. L.J. 136 (1974).


127. 76 Ill. 2d at 41, 389 N.E.2d at 1158.
emphor to a used home transaction, and by the supreme court's own emasculation of the merger doctrine in its opinion. If this does not represent the end to these traditional notions, it at least foreshadows the rapid decline of these two doctrines in today's society.

CONCLUSION

The supreme court in Petersen clarified the rights of new home buyers and established consumer protections that will apply to defects in a new home sold by a builder-vendor. The implied warranty of habitability is quite similar to the warranty of fitness for intended use imposed by the U.C.C. The essence of the sales contract is the seller's implicit duty to transfer a home suitable for its intended use, habitation. While the builder-vendor should not be required to build a perfect house, the courts should use a reasonableness test to determine if the house is fit for its intended purpose and allow rescission only if there is either non-substantial performance or any latent defect is irreparable. Petersen definitively indicates caveat emptor is an outmoded concept which no longer accords with modern day practice. It should be relegated to its rightful place in the pages of history.

Randall F. Clark

128. In Posner v. Davis, 76 Ill. App. 3d 638, 395 N.E.2d 133 (1979), the court stated that because of the supreme court's amelioration of the doctrine of caveat emptor in Petersen, the seller of a used home is under a duty to disclose facts materially affecting the value of the property to the buyer.

129. The court has effectively prevented merger by the adoption of the implied warranty of fitness for intended purpose. This warranty includes both quality provisions, as well as separate implied conditions which will only merge if substantially performed, see note 20 supra.