Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute

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WASHINGTON’S NEW HOME IMPLIED WARRANTY OF HABITABILITY—EXPLANATION AND MODEL STATUTE

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I. INTRODUCTION

In recent years the Washington courts have viewed with increasing disfavor the application of caveat emptor to sales of real property.\(^1\) With respect to new buildings, the courts have moved from recognizing an implied warranty of habitability in contracts to build structures,\(^2\) purely a builder's warranty,\(^3\) to recognizing an implied war-

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3. In Hoye v. Century Builders, Inc., 52 Wn. 2d 830, 329 P.2d 474 (1958), the court explained the builder's warranty as follows: "[i]t seems to be well settled that where 'a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use'..." Id. at 833, 329 P.2d at 476. This warranty is given only by the builder who furnishes building plans. When they are furnished by someone else, that person impliedly warrants that the plans are sufficient. See, e.g., Prier v. Refrigeration Eng'r Co., 74 Wn. 2d 25, 442 P.2d 621 (1968). Thus the builder who adequately follows such plans is not liable for defects caused by them; rather, he is liable only for defects caused by his own workmanship. Clark v. Fowler, 58 Wn. 2d 435, 439, 363 P.2d 812, 815 (1961).

The Washington cases dealing with new house warranties do not make this distinction. Liability is imposed on the builder-vendor not only when he is directly responsible for defects, but apparently on a strict liability basis also. See note 76 infra. However, the cases involving the new house warranty have all involved situations where the builder-vendor was responsible for the plans of the houses involved. If the defect which breached the warranty arose from a design for which the builder-vendor had no responsibility, a different question would present itself, and the limits of strict liability in this area would be tested.

There is some indication that Washington courts would construe the warranty broadly in the above situation; in other words, the warranty may impose liability on builder-vendors for housing defects regardless of whether they are attributable to design or construction. In House v. Thornton, 76 Wn. 2d 428, 457 P.2d 199 (1969) (dictum), the court declared, "When the foundation of a house cracks...it is no longer fit for its intended purpose.... This, of course, is true whether the danger arises from instability of the land... or from defects in the foundation's design, installation, fabrication or composition." Id. at 435, 457 P.2d at 203. Thus, despite cases such as Clark v. Fowler, 58 Wn. 2d 435, 363 P.2d 812 (1961), Washington courts may intend that the builder-vendor be liable to the buyer for defects attributable to the designer, soils engineer, or material suppliers, for example. On the other hand, the House court also noted that equity demanded builder-vendor accountability because the builder-vendor made the harm possible. 76 Wn. 2d at 435, 457 P.2d at 204. In a case involving an architect's defective design, for instance, such a premise would not be applicable and a different conclusion might well be reached.

If a conclusion of strict liability is reached, however, the courts will have to permit the builder-vendor to obtain indemnity from the party at fault if consistency with other holdings on builder liability is to be maintained. See, e.g., Clark v. Fowler, 58 Wn. 2d 435, 363 P.2d 812 (1961). In this way, a builder-vendor would occupy a position similar to that of a retailer who is directly liable to a buyer for damages arising from defective goods sold, but who may maintain an action for indemnity against a manufacturer or other third party who is causally at fault. It should be recognized that this position has not yet been clearly adopted by the Washington courts. The new house warranty has not

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warranty of habitability in the sale of new houses, a warranty affecting both builders and vendors. In recognizing such warranties, the Washington courts have joined an expanding number of jurisdictions in responding to the realities of the housing marketplace:

These cases, reflecting a change in the morals of the marketplace, more specifically rest their holdings on the ground that the underlying theory of caveat emptor, predicating an arm's length transaction between seller and buyer of comparable skill and experience, is unrealistic as applied to the sale of new houses. The courts of this persuasion recognize that the essence of the transaction is an implicit engagement upon the part of the seller to transfer a house suitable for habitation. It is also recognized that the purchaser is not in an equal bargaining position with the builder-seller of a new house and is forced to rely upon the latter's skill and knowledge with respect to the ingredients of an adequately constructed dwelling house.

This comment examines the status in Washington of the implied warranty of habitability as applied to the sale of new houses. The comment will explore the identity of the builder-vendor, the general nature of the warranty, and its specific elements. The Washington warranty is contrasted to those of other jurisdictions, suggestions are made for its modification, and a model statutory warranty is proposed.

been applied to a set of facts in which the builder-vendor was not responsible for the defect which gave rise to liability. Nonetheless, for the purposes of this comment, a literal reading of the Washington new house warranty is used, on the assumption that the courts are in fact applying that warranty on a strict liability basis. The builder-vendor's opportunities for indemnity actions against designers, engineers, or material suppliers are beyond the scope of this comment.


II. WHAT IS A BUILDER-VENDOR?

In the new house warranty area, courts impose liability for breach of warranty upon the "builder-vendor." This term sometimes refers to a builder who both builds and sells a house which he owns; it also refers to a seller who owns the land, and/or the builder he hires to erect a house upon it. Because the same term can refer to distinguishable parties, it is difficult to tell upon whom liability might be imposed in any given jurisdiction.

In Washington, liability is imposed upon all parties: the builder who is also a seller and the nonbuilder seller who hires a builder.

7. This comment purposely speaks of the "warranty," rather than specifying warranty types such as "warranty of habitability," because the exact nature of the new house warranty is not clear. Though the courts purportedly impose a warranty of "habitability," "fitness," or "suitability," see note 37 infra, they include within that term the distinguishable warranty of workmanlike quality, see Part IV-E-2 infra, and perhaps, a materials warranty, see note 3 supra. Thus, when breach of the "implied warranty of habitability" is found, it is not clear whether there was a breach of habitability, a breach of workmanlike quality, or a breach of materials warranty. It is only clear that the new house warranty, whatever its exact nature, has been breached.


10. Once a party obtains a judgment against the builder-vendor he may seek payment from the $4,000 contractor's bond required by R.C.W. § 18.27.040. The bond may be used to pay "all amounts that may be adjudged against the contractor by reason of negligent or improper work." WASH. REV. CODE § 18.27.040 (Supp. 1977).

The statute does not fully protect a house buyer, however. Only one bond is required and employee labor claims precede all others. Also, the statute is ambiguous. One part provides that "any person having a claim against the contractor for any of the items referred to" may bring suit upon the bond. This language includes buyers under a sales contract who obtain judgments. Yet the section which determines claim priority mentions only "parties to the construction contract," WASH. REV. CODE § 18.27.040(2) (Supp. 1977), thus seemingly excluding buyers under a sales contract.

This ambiguity should be rectified. The statute should protect the person who contracts with the builder, whether he is a developer who hires a builder to construct a house, and is thus a party to the construction contract, or a buyer who purchases under a sales contract directly from a builder who owned and erected the house without a construction contract.

11. See Klos v. Gockel, 87 Wn. 2d 567, 554 P.2d 1349 (1976). In Klos, the defendant builder who both owned the land and sold the house was considered for "builder-vendor" status. She was deemed a nonbuilder-vendor only because her sale was not a commercial one. See Part IV-D infra.

12. Allen v. Anderson, 16 Wn. App. 446, 557 P.2d 24 (1976), provides a possible contradiction. The jury instructions were phrased solely in terms of the builder, stating that "when the builder of a new building sells it . . . he impliedly warrants . . . ." Id. at 188
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This can be seen from an examination of *House v. Thornton*¹³ and *Gay v. Cornwall*.¹⁴ In *House*, Headley owned the land and arranged with Thornton, a builder, to erect a house. Though the court used the term "vendor-builder" when referring to both of them, Thornton did not own the land,¹⁵ and Headley was not a builder. Thus the court’s imposition of liability upon each does not appear to have depended upon a requirement that the builder-vendor be *both* a builder and seller.¹⁶ Thornton was apparently liable because he was the builder, and Headley was liable because he was a seller who hired a builder.¹⁷

Similarly, in *Gay v. Cornwall*,¹⁸ the builder was liable for breach of warranty though he never owned or sold the land. The sellers were dismissed, arguably, because they had not hired the builder.¹⁹

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¹⁵ 76 Wn. 2d at 429, 457 P.2d at 199 (Headley owned the lot and entered into a copartnership with Thornton).
¹⁷ 76 Wn. 2d 428, 457 P.2d 199 (by implication). *Accord*, Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972) (the court imposed liability upon a seller who was not a builder, but who hired one). In support of its decision the *Smith* court cited *House* as a case abandoning the "strict rule of caveat emptor... under the circumstances present in the instant case." *Id.* at 801 (emphasis added). It could be argued that hiring a builder is not enough, that instead one must be copartners with one, since the *House* court mentioned that Headley and Thornton were copartners. 76 Wn. 2d at 429, 457 P.2d at 200. However, the court included that information in a general recital of the facts and did not mention it again. This lack of emphasis encourages the belief that a copartnership was not intended as a prerequisite to imposition of liability upon the builder and seller. *Accord*, Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 377, 525 P.2d 88, 89, 115 Cal. Rptr. 648,* 649 (1974) (by implication) (the fact that the defendant sellers had a written construction agreement with the builder was enough to render them liable for breach of the warranty of fitness: the court did not stipulate that the agreement created a copartnership).
¹⁹ *Id.* at 597, 494 P.2d at 1373. The sellers were not in privity with the builder; they lacked a firm construction contract with him and thus were not deemed to have "hired" him. *See* note 31 *infra*. Because the sellers had no knowledge of the house's defects, they could not be liable for failure to disclose them.
III. SELLER'S v. BUILDER'S WARRANTY

Because either party can be liable for breach of the new house warranty, an additional question is whether the Washington warranty is a builder's or a seller's warranty. That is, is the seller who hires a builder liable because he sells the house, or because he, in some manner, participates in the construction of it?

Washington construction contracts have long had an implied builder's warranty whereby the builder who furnishes building plans impliedly promises that the structure will be fit for its intended use and will be constructed in a workmanlike manner.20

In most jurisdictions imposing such a warranty, the builder is accountable for the following reasons: (1) he is responsible for the defect or is at least in a position to detect and repair it;21 (2) he holds himself out as having the skill to construct the house;22 (3) this skill is relied upon by the buyer, who usually does not possess such expertise himself;23 and (4) the builder is usually in a better position than the buyer to spread the cost of repairs.24

The rationale of a builder's warranty also supports imposition of liability upon sellers who hire builders. Although the seller does not personally create the defect, he is in a position to hire a reputable builder, inspect the work, and demand repair.25 This position encour-

25. See Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974); Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 801 (Mo. 1972). One commentator argues that liability should not be solely restricted to sellers in a position to inspect and demand repair: Today the implied warranty of merchantability has nothing to do with the special knowledge or responsibility of the seller of goods. When the local grocer sells a loaf of packaged bread, he may be described as a merchant with respect to that bread, but he has no more control over the contents or quality of that bread and no more knowledge about how bread should be made or packaged than the plumber's wife who buys it... The argument that the grocer... selects his supplier is also spurious in this day of mass advertising and trade-name selling; in fact, the retailer may not have any idea who the producer of the particular article is... So any notion that liability without demonstrated fault should only be imposed upon those who are knowledgeable about the commodity... does not have any significance in our sales law today, although it seems that such was the origin of the "merchant" re-
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ages justified reliance by the buyer upon him.26 Furthermore, he is usually able to bear the cost of repair more easily than the buyer.27

The rationales for imposing liability on builders, and upon sellers who hire them, support the conclusion that in Washington, at least, it is the builder's construction contract warranty which has been extended to vendors in sales contracts.28 Basically, the seller who hires a builder vicariously assumes and offers builder's warranty because of the contractual relation with him.29 Thus in Gay v. Cornwall,30 the sellers were dismissed apparently because they lacked a firm construction contract with the builder, whereas in House v.

26. Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974). 27. The seller obtains an implied warranty of fitness in the construction contract with the builder. Hoye v. Century Builders, Inc., 52 Wn. 2d 830, 833, 329 P.2d 474, 476 (1958). Thus if the seller is sued, he has recourse against the builder, who in turn can spread his costs over the other houses he erects or, in some cases, seek indemnification from the supplier of the building plans. See note 3 supra. The seller also has recourse against the contractor's bond. See note 10 supra.

28. The elements of the construction contract warranty—fitness for use (habitability) and proper workmanship, see note 3 supra—are both present in the sales contract warranty explained in Klos v. Gockel, 87 Wn. 2d 567, 554 P.2d 1349 (1976). See Part IV-E-2 infra. Additionally, in House v. Thornton, 76 Wn. 2d at 434, 457 P.2d at 233, the court stated that the warranties in construction and sales contracts were "closely related." Accord, e.g., Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399, 402 (1964).

29. California courts maintain that the seller makes an implied representation for the builder. In Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974), the court, in imposing an implied warranty of merchantability, stated, "In the setting of the marketplace, the builder or seller of new construction—not unlike the manufacturer or merchandiser of personality—makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building." Id. at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651 (emphasis added).

By analogy, the Uniform Commercial Code would speak of the builder's knowledge and skill being "attributed" to the seller. It defines "merchant" as follows: "[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 . . . ." Wash. Rev. Code § 62A.2-104(1) (1976) (emphasis added).


31. Id. In Gay, Childs, the lot owner, hired a builder to erect a house. Childs then sold to the Cornwalls who sold to Mrs. Gay, who sued both the Cornwalls and the builder. The trial court dismissed the Cornwalls because they had no knowledge of the
Thornton,\textsuperscript{32} when a firm construction contract existed,\textsuperscript{33} the seller who hired the builder was accountable along with the builder. These cases demonstrate that a pure seller's warranty is not intended in Washington. The seller is liable, not because he sells the product, but because he is, or has a construction contract\textsuperscript{34} with, a

defects. \textit{Id.} at 596–97, 494 P.2d at 1373. \textit{See, e.g.}, Sorrell v. Young, 6 Wn. App. 220, 491 P.2d 1312 (1971) (seller of used house has a duty to disclose defects when the seller has knowledge of them, the purchaser is justifiably ignorant of them, and they materially affect the value of the property).

In view of the court's statement that the new house implied warranty theory is one of strict liability, 6 Wn. App. at 597, 494 P.2d at 1373, this dismissal (for lack of knowledge on a cause of action in which knowledge is irrelevant) is nonsensical unless predicated on the assumption that the seller's liability for breach of warranty depends on a firm construction contract between the seller and builder. Childs, the original owner of the lot, and the builder had such a contract, but the Cornwalls and the builder did not. Their connection to the builder was "unclear." \textit{Id.}

The only other explanation for the dismissal is to hypothesize that sellers are never liable for builder mistakes. The result in House v. Thornton, 76 Wn. 2d 428, 457 P.2d 199 (1969), refutes such a contention. \textit{See text accompanying notes 13–17 supra.} It should not be argued that the Cornwalls were dismissed because their sale to Mrs. Gay was, perhaps, noncommercial. The commercial sale requirement was articulated after the\textit{Gay} decision in Klos v. Gockel, 87 Wn. 2d 567, 554 P.2d 1349 (1976). \textit{See Part IV-D infra.}

33. In \textit{House}, Headley, the owner and seller of the land, was liable along with the builder. Their "construction contract" consisted of a copartnership. \textit{Id.} at 429, 457 P.2d at 200. The court imposed liability because:

As between vendor and purchaser, the builder-vendors, even though exercising reasonable care to construct a sound building, had by far the better opportunity to examine the stability of the site and to determine the kind of foundation to install. . . . Their position throughout the process of selection, planning and construction was markedly superior to that of their first purchaser-occupant. To borrow an idea from equity, of the innocent parties who suffered, it was the builder-vendor who made the harm possible. If there is a comparative standard of innocence, as well as culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer. \textit{Id.} at 435–36, 457 P.2d at 204.

34. The necessity of a construction contract precludes extension of the warranty to the average sale of used housing. \textit{Contra}, Haskell, \textit{supra} note 25, at 633. Generally the seller of a used house should not be responsible for defects for the following reasons: (1) he neither builds nor hires the builder of the house and thus is not in a position to oversee or demand repair; (2) he is unable to spread costs since he usually sells only one house; (3) he cannot bear the cost more easily than the buyer because any contractual relationship to the builder which would allow an indemnification suit would normally be barred by a statute of limitations; and (4) the seller makes a personal, noncommercial sale and thus does not hold himself out as a businessman who should bear the risks along with the benefits. In addition, the typical seller of a used house is a nonexpert so there can be no reasonable buyer reliance upon him. There can, however, be reasonable reliance upon his nonexpert, actual knowledge of defects, and a mandatory disclosure requirement of such knowledge is reasonable.

Such a requirement was considered by the House Financial Institutions Committee of the Washington legislature. \textit{Proposed Act Relating to Real Estate Transfers: Hearings on H-2490/78 Before the House Financial Institutions Committee, 45th Legislature (1978)} (draft of proposed act on file with \textit{Washington Law Review}). Home resale disclosure requirements would require sellers to make written disclosure of.
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builder. The simple act of selling a house is not enough.

IV. ELEMENTS OF WASHINGTON'S IMPLIED WARRANTY OF HABITABILITY

The most complete discussion of Washington's new house implied warranty of habitability appears in Klos v. Gockel. There the court explained the warranty's elements: (1) the structure must be a

among other items, "all substantial defects or malfunctions in the major systems or major appliances... known to the transferor." Id., Draft of Proposed Act at § 9(5) (emphasis added). This disclosure would generally be made when the house was listed, thus allowing buyers to make an informed decision before purchasing.

It has been suggested that the bill is not needed because warranty insurance for used homes will soon be widely available. Such insurance is currently being considered by Better Homes & Gardens Real Estate Service, Locust at 17th, Des Moines, Iowa, 50336. Insurance, however, is not a substitute for disclosure unless sellers are required to purchase it. That would be an unfortunate requirement. The cost would be passed on to the buyer in the price of the house, thus forcing purchase of insurance upon buyers who, if they knew of the obvious defects through seller disclosure, might prefer to forego insurance. Actually, Washington courts are already moving in the direction of this bill, and thus an implied warranty is not needed in sales of used housing. If the constructive fraud cases, e.g., Gunnar v. Brice, 17 Wn. App. 819, 565 P.2d 1212 (1977); Sorrell v. Young, 6 Wn. App. 220, 491 P.2d 1312 (1971), are carried to their logical conclusion, sellers of used houses will be guilty of constructive fraud if they do not disclose material defects of which they have knowledge and of which the purchaser is justifiably ignorant. This is adequate and fair protection for buyers, and no more should be expected of the layman seller. When a seller knows nothing or little about housing construction, the extent of his liability for defects should encompass only those material defects of which he has knowledge.

35. The significance of this point can be seen in the following example. A builder erects a house but is unable to sell it. An investor, who has no previous connection with the builder and plans immediately to resell for profit, buys and sells the house. His buyer discovers a defect and sues for breach of implied warranty. Under most formulations, the investor has made a commercial sale of a new house. If the warranty were a seller's warranty, he would be liable from the act of selling. Because it appears to be a vicarious builder's warranty, however, he should not be liable because he lacks the necessary construction contract with the builder. The investor had no chance to choose a reputable builder, oversee work or demand repair. In fact, he knew nothing of the actual quality of the house with the exception of those defects which could be determined upon inspection. See note 51 infra. Buyer reliance upon him is unjustified unless he holds himself out as a person experienced in buying and selling sound houses.

36. See note 31 supra.


38. Id. In Klos, the defendant was a seller-contractor who formerly assisted her builder-husband. Their practice had been to live in one house while building others and then to sell all of the houses. After her husband died, the defendant built three more houses. She testified that she built the first house, the residence in question, for her personal use, lived in it one year, and then decided to sell it to the plaintiffs. After the sale, a mudslide and settling of fill damaged the backyard area; the house itself sustained only minor damage.

39. Id. at 570, 554 P.2d at 1352. The Klos court established the warranty elements by explaining the decision in House v. Thornton, 76 Wn. 2d 428, 457 P.2d 199 (1969).
house; (2) the house must be new; (3) the warranty runs to the first purchaser and/or occupant; (4) the sale must be commercial; (5) the warranty is one of habitability covering structural defects of the dwelling and fixtures; (6) the warranty begins to run at the time the deed is passed or the buyer takes possession, whichever occurs first; and (7) there is no merger by deed. Because the simplicity of the first five elements is deceptive, they will be discussed in the following sections.

A. The Structure Must Be a House

In most of the Washington decisions discussing the implied warranty of habitability in sales of real property, the warranty is limited to sales of new houses. Most jurisdictions similarly limit their warranty. The rationale for this limitation is the belief that the average home buyer is ignorant of construction quality, whereas the buyer of

That court held that, “when a vendor-builder sells a new house to its first intended occupant, he impliedly warrants that the foundations supporting it are firm and secure and that the house is structurally safe for the buyer's intended purpose of living in it.” Id. at 436, 457 P.2d at 204. Klos amplified the House holding by quoting Hartley v. Ballou. 286 N.C. 51, 209 S.E.2d 776 (1974):

[W]e hold that in every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Id. at 62, 209 S.E.2d at 783 (emphasis added).

The warranty elements set out in the text stem from a combination of the House and Hartley definitions. Because of this, it should be noted that though the Klos court stated that Hartley contained a more detailed statement of the House warranty, the statement was made within a paragraph designed to explain the commercial sale rule. Thus one could argue that Hartley was used solely to explain that concept. The better view, and the one upon which this comment is based, appears to be that Hartley was used for that purpose, and for the purpose of fully explaining House. This is true both because the court stated that the Hartley quotation detailed House, and because the quotation goes far beyond that necessary to explain the commercial sale.

40. For a discussion of the merger doctrine, see Annot., 25 A.L.R.3d 383, 432 (1969) (general rule that a contract is merged into a deed does not apply: the sales contract implied warranty is not extinguished by buyer acceptance of the deed).

41. Klos v. Gockel, 87 Wn. 2d at 568, 554 P.2d at 1351; House v. Thornton, 76 Wn. 2d at 436, 457 P.2d at 204; Gay v. Cornwall, 6 Wn. App. at 597, 494 P.2d at 1372.

42. See, e.g., Carpenter v. Donoho, 154 Colo. 78, 388 P.2d 399 (1964). Indeed, the author has found only two states which specifically extend warranty coverage beyond houses. See note 44 infra.
commercial property is knowledgeable enough to ask for an inspection and wealthy enough to afford one.\textsuperscript{43}

Two states specifically extend the warranty beyond houses,\textsuperscript{44} and a recent court of appeals decision indicates that Washington may do likewise. In \textit{Allen v. Anderson},\textsuperscript{45} despite previous Washington holdings, the court stated that the warranty applies to new buildings\textsuperscript{46} and considered it in regard to a four-unit apartment complex.\textsuperscript{47}

Whether the \textit{Allen} application correctly states the Washington law is unclear. It can be argued that the pre-\textit{Allen} holdings did not restrict the warranty to houses, but rather used the term "house" because only houses were, in fact, at issue.\textsuperscript{48} It can also be argued that the warranty was indeed restricted to houses and \textit{Allen}'s extension was unjustified.

\textit{Allen}'s extension of the warranty beyond houses appears to be appropriate, however. Whether the structure is a house or an office building, the builder-vendor holds himself out as competent to erect it,\textsuperscript{49} and the assumption that commercial buyers can always obtain

\begin{itemize}
  \item \textsuperscript{43} Professor Bearman, the formulator of a model statutory warranty, states:
  \begin{quote}
    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.
  \end{quote}

  \end{itemize}

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  \item \textsuperscript{45} 16 Wn. App. 446, 557 P.2d 24 (1976).
  \item \textsuperscript{46} The jury instructions began: "When the builder of a new building sells it to a purchaser, he impliedly warrants . . . ." \textit{id.} at 448, 557 P.2d at 26 (emphasis added).
  \item \textsuperscript{47} \textit{id.} at 446, 557 P.2d at 25. The court assumed that the apartment qualified for warranty coverage. Instead of dismissing the suit outright, it remanded for findings of fact on other elements of the warranty.
  \item \textsuperscript{48} It could also be argued that the \textit{Allen} court simply followed the holding in Fain v. Nelson, 57 Wn. 2d 217, 356 P.2d 302 (1960); in \textit{Fain} the court applied a construction contract implied warranty to a bar and dance hall. The warranty was the same as that recognized in Hoye v. Century Builders, Inc., 52 Wn. 2d 830, 329 P.2d 474 (1958), in which it was applied to a house. No distinction between a house and a commercial building was made. These cases are distinguishable from \textit{House} and its progeny because they involved construction, rather than sales contracts. However, it appears to be the construction contract warranty which was extended to sales contracts in \textit{House}. See note 28 \textit{supra}.
  \item \textsuperscript{49} Most of the elements justifying the implied warranty in housing sales, see notes 21–27 and accompanying text \textit{supra}, are present in commercial sales of business property. The builder-vendor is responsible for the defect, is in a position to oversee, repair, or more easily bear the costs, and has a speculative intent.
\end{itemize}
and afford adequate building inspections\textsuperscript{50} is not necessarily valid.\textsuperscript{51} Also, the warranty of habitability includes a standard of local workmanlike quality,\textsuperscript{52} thus regardless of the type of building or extent of buyer reliance, the builder should be accountable when he falls below that standard.\textsuperscript{53}

The meaning of "house" is another aspect of the warranty which is unclear. Does it include only the main building, or is a driveway, for example, also included? In \textit{Klos v. Gockel},\textsuperscript{54} a mudslide ruined the patio but did little damage to the house itself.\textsuperscript{55} The court said:

[T]he buckling and sinking of the front yard patio slabs [did not] affect the habitability of the house, and [is not] a structural [defect] affecting habitability. . . . The law of implied warranty is not broad enough to make the builder-vendor of a house absolutely liable for all mishaps occurring within the boundaries of the improved real property.\textsuperscript{56}

This statement encourages the belief that defective driveways and outbuildings, though purchased as part of the housing package, are not covered. Like the patio, they do not affect the habitability of the house;\textsuperscript{57} protection appears to be extended only to the dwelling itself.

\textsuperscript{50} See note 43 \textit{supra}, quoting Professor Bearman, who states that the buyer of anything larger than a one- or two-family home is generally wealthy enough to afford competent inspection.

\textsuperscript{51} Adequate inspection of a foundation, for example, is very difficult because the foundation is hidden once the house is completed. For cases noting the difficulty of making an adequate inspection, see \textit{Pollard v. Saxe \\& Yolles Dev. Co.}, 12 Cal. 3d 374, 380, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974); \textit{Conyers v. Mollov}, 364 N.E.2d 986, 988 (1977); \textit{Smith v. Old Warson Dev. Co.}, 479 S.W. 2d 795, 799 (Mo. 1972); \textit{Rutledge v. Dodenhoff}, 254 S.C. 407, 175 S.W. 2d 792, 795 (1970). With the advent of condominium office buildings, the assumption that a commercial buyer is wealthy is also questionable. A struggling businessman, fearing an increase in rent, might choose to buy a moderately priced condominium office.

\textsuperscript{52} See Part IV-E-2 \textit{infra}.

\textsuperscript{53} In the usual commercial building sale, Washington builder accountability is not a problem because the buyer commonly has a construction contract with the builder and is thus protected by the construction contract's implied warranty. See note 2 \textit{supra}. That warranty is confined to construction contracts, however, and commercial buildings are increasingly being built on a speculation basis in which the builder erects the building on his own and then sells it through a sales contract. The buyer under the sales contract would be unprotected as he would have no construction contract implied warranty and the Washington sales contract implied warranty applies only to residences and perhaps apartments. See notes 44-48 and accompanying text \textit{supra}.

\textsuperscript{54} 87 Wn. 2d 567, 554 P.2d 1349 (1976).

\textsuperscript{55} The court stated that "a portion of the slope below the rear wall of the house slid. The ground beneath the front patio settled causing cracks and an upending of the patio slabs." \textit{Id.} at 569, 554 P.2d at 1351.

\textsuperscript{56} \textit{Id.} at 571-72, 554 P.2d at 1353.

\textsuperscript{57} A similar approach is taken by the Home Owners Warranty Program, a na-
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This policy is not followed in other areas of law, and it conflicts with Gay v. Cornwall. Clarification is needed.

B. The House Must Be New

For implied warranty coverage the dwelling must be “new,” but a house which has been lived in can be considered new if it was occupied to promote its sale. In other words, “the sale must be fairly contemporaneous with completion and not interrupted by an intervening tenancy unless the builder-vendor created such an intervening tenancy for the primary purpose of promoting the sale of the property.”

The requirement that the sale be “fairly contemporaneous” unnecessarily distorts the purpose of the implied warranty by focusing on the time of sale rather than the lifespan of the defect. For example, if a foundation could reasonably be expected to last fifty years, any...
defect appearing within the first ten years could be deemed a defect in a "new" foundation. This would be true both for a buyer who purchased the house contemporaneously with completion, and for one who purchased five years later. This approach has been taken in two jurisdictions. In Washington, however, a six-year statute of limitations governs construction litigation.

The second requirement in determining "newness" is that the sale must not be interrupted by an intervening tenancy, unless such tenancy is for the purpose of promoting sale. By implication, intervening tenancies which do not promote sale will insulate the builder-vendor from the implied warranty. Thus, builders could live temporarily in a house to negate the warranty since such a tenancy would hurt rather than facilitate sale. This practice, as explained by the trial judge in Klos, frustrates the purpose of the warranty by giving the warranty's protection to the first occupant, rather than the first purchaser and/or occupant.

62. For a discussion of the transferability of the warranty, see notes 77-82 and accompanying text infra.

63. In Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976), the warranty was extended to a second purchaser though he bought four years after completion. The defects, a leaky basement and a large crack in three of the basement walls, did not appear until after the second purchase. The court extended coverage without regard to the new or used character of the house.

In Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975), the court decided that a year-old septic tank qualified for warranty coverage, finding that, "different parts of construction may have a different expected life, such as a foundation compared to a roof. We have no problem in the present case because the septic tank system failed before a minimum life expectancy had been reached . . . ." Id. at 1282.

64. See notes 140-45 and accompanying text infra.

65. As an example, the Klos court cited Casavant v. Campopiano, 114 R.I. 24, 327 A.2d 831 (1974), a case in which the defendant builder-vendor rented a house to a couple who intended to purchase the house. About one year later the couple vacated and the defendant sold to the plaintiff. The roof subsequently sagged, making occupation unsafe. The court stated that the thrust of the implied warranty was, to afford protection to home buyers from the overreaching of knowledgeable builder-vendors. That there had been an intervening tenancy should not, standing alone, deprive the buyer of that protection. . . . This argument [that the house was used] might have merit if the intervening occupancy appeared to be causally connected with the defective condition of the roof or was of such extended duration as to make an application of the warranties unreasonable. In the absence of such findings, the court will assume that the builder-vendor was responsible for the existence of the defect and that the structure was a "new" house . . . .

327 A.2d at 833.

If one were to say that a contractor can build a residence, then move into it for any period of time, thereafter move out and sell it, or just build it, move into it and sell it while living there, the whole purpose of the law would be destroyed by that concept. The concept is to protect a person who purchases the home from the builder-contractor. . . . Here, Mrs. Gockel constructed it, moved into it in a some-
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To discourage such tenancies the court should imply a warranty in every sale by a builder because the builder is an expert and responsible for the condition of the house. A rule of reasonableness, governed by the length of the tenancy and nature of the defect, should determine the scope of the warranty.67

C. The Warranty Runs, Without Privity, to the First Purchaser and/or Occupant

In House v. Thornton,68 the court stated that the implied warranty of habitability ran to the “first intended occupant.”69 It appears, however, that the court meant “first purchaser-occupant,”70 the term used in Gay v. Cornwall.71 The court in Klos v. Gockel72 did not object to the Gay formulation, yet it used the term “initial-vendee,” a designation which would have prevented warranty extension to the plaintiff in Gay.73 This tolerance indicates that either formulation is acceptable in Washington.74 The warranty apparently runs to who-

what unfinished state although apparently suitable for her purposes while she resided in it, but did make substantial alterations and additions to it in placing it on the market.

It seems illogical to say that Mrs. Gockel would be the contractor and also the purchaser. She would be selling a house to herself, and in doing so deprive some other person the protection and that I feel confident is not within the spirit of the law.

Id.

67. A builder who occupies the house for three years before sale could not reasonably be held to the same warranty imposed upon a builder whose occupancy lasted six months.


69. Id. at 436, 457 P.2d at 204.

70. The House court originally spoke of the “first buyer and occupant,” id. at 429, 457 P.2d at 200, but used the misleading term “first intended occupant” in the holding. Id. at 436, 457 P.2d at 204.

71. 6 Wn. App. at 595, 494 P.2d at 1371 (1972).

Childs, the owner of the lot, contracted with the defendant builder to erect a house upon it. Before completion, Childs sold to the Cornwalls, who sold to Mrs. Gay, the plaintiff. She was the first occupant of the defective house.

The court allowed Mrs. Gay to utilize the implied warranty because she was the first purchaser-occupant, even though Childs was the first intended occupant.

72. 87 Wn. 2d 567, 554 P.2d 1349 (1976).

73. Id. at 570, 554 P.2d at 1352. Mrs. Gay was the second, rather than the initial vendee.

74. This result is necessary, for either term alone unnecessarily excludes some purchasers from use of the warranty. Under the “first purchaser-occupant” concept a buyer who decided to sell before occupying the house would not be covered. Defects discovered while the house was for sale might prevent sale yet recourse would be unavailable until occupation occurred. Similarly, under the “initial-vendee” concept, the Gay situation arises. Buyer A sells to Buyer B who first occupies the house and discovers defects. Because Buyer B is the second vendee, warranty coverage would not be available.
ever is appropriate under the circumstances, the initial vendee or the first purchaser-occupant, the "first purchaser and/or occupant."

The court in *Gay* also established that privity of contract is not needed between the builder-vendor and the first purchaser and/or occupant. The tort concept of strict liability, which does not require privity between plaintiff and defendant, has been incorporated into the new house implied warranty.

One unanswered question is whether successive purchaser-occupants may use the warranty. Some courts have found the warranty to be nontransferable. However, one court hinted that it would al-


77. Whether the implied warranty extends to persons related to the first purchaser and/or occupant is unclear. If the Uniform Commercial Code, WASH. REV. CODE § 62A.2-318 (1976), is used by analogy, the implied warranty, in regard to personal injuries, should extend to family, household members, and guests of the buyer, as such a group could reasonably be expected to use the house. Though the status of guests is uncertain, dictum indicates Washington will extend protection to family members. Berg v. Stromme, 79 Wn. 2d 184, 195, 484 P.2d 380, 386 (1971) (the court stated that the warranty extends to the buyer and his family). *Accord*, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (the son of the buyer's lessee was injured by a defective hot water system).

78. Oliver v. City Builders, Inc., 303 So. 2d 466 (Miss. 1974) (the implied warranty extends only to the person buying from the builder—subsequent purchasers are excluded). *See also* Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972). The Wright court based its decision to deny transfer of the warranty on H. B. Bolas Enterprises, Inc. v. Zarlengo, 156 Colo. 530, 400 P.2d 447 (1965), however, a case in which the court denied transfer because the house was used, not necessarily because the court disapproved transferring the warranty.
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low transfer of the warranty,⁷⁹ and another has actually done so.⁸⁰
Because the purpose of the warranty is to protect innocent purchasers
while holding builder-vendors accountable for their work, protecting
all purchasers who buy during the warranty period seems prefer-
able.⁸¹

Interestingly, this approach has been voluntarily adopted by build-
ers themselves. In the national written warranty-insurance plan pub-
lished by the Home Owners Warranty Corporation (HOW), purchas-
ers of homes built by HOW builders receive a ten-year warranty-
insurance package which is automatically transferred to subsequent
purchasers within the ten-year period.⁸²

⁷⁹. In Gable v. Silver, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972), the court declared:
The instant case deals with the first purchasers of condominium homes. We ponder,
but do not decide, what result would occur if more remote purchasers were in-
volved. 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.
Id. at 18.

⁸⁰. In Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976), the first purchaser-
occupants sold the defective house to the second purchaser-occupants four years after
the initial purchase. The court, declaring privity requirements to be “outmoded,” ex-
tended the warranty to the second purchaser-occupants but limited its coverage to “la-
tent defects, not discoverable by a subsequent purchaser’s reasonable inspection, mani-
festing themselves after the purchase.” Id. at 620–21. It also imposed a standard of
reasonableness to determine whether breach of the warranty had occurred. Id.

This approach is similar to that taken in the Magnuson-Moss Warranty Act, where
“consumer” means a “buyer (other than for purposes of resale) of any consumer pro-
duct, [and] any person to whom such product is transferred during the duration of an
implied or written warranty . . . applicable to the product.” MAGNUSON-Moss WAR-
WANTY ACT, 15 U.S.C. § 2301(3) (1976). The Act is not applicable here as it covers
only consumer goods. Though parts of a house might fall into this category, the house as
a unit will not. Peters, How the Magnuson-Moss Warranty Act Affects the Build-
ers/Sellers of New Housing, 5 REAL EST. L.J. 388 (1977). The concept of transferability
during the warranty period is significant, however, for it indicates the trend toward
acceptability of such transfers.

It is arguable that such a rule unduly burdens builder-vendors because the house
suffers extra strain with each new purchaser. However, purchaser-caused defects are not
covered by warranty in other areas of the law, such as sales of consumer goods, where
“an affirmative showing by the seller that the loss resulted from some action or event
following his own delivery of the goods can operate as a defense.” WASH. REV. CODE
ANN. § 62A.2–314, Comment 13 (1966). By analogy, if the walls cracked during the oc-
cupancy of the third purchaser within the warranty period, the builder-vendor would be
liable only if the cracks were attributable to him, rather than to any of the three purchas-
ers. This approach is taken by the Home Owners Warranty Program. Its written war-
ranty-insurance plan excludes “damage caused by materials or workmanship added by
the purchaser, . . . normal wear and tear; [and] defects caused by improper
maintenance or negligence of anyone other than the builder.” Home Owners Warranty
Corp., supra note 57, at 9.

The HOW limited warranty reads: “This warranty is extended to you as Pur-
chaser (the first owner to occupy the home as a residence for yourself or your family)
and automatically to any subsequent owners of the home and any mortgage lender who
takes possession of the home . . . .” Home Owners Warranty Corp., supra note 57, at 18.
A further unresolved area regarding a buyer's ability to use the implied warranty cause of action concerns his knowledge of defects. In most jurisdictions the warranty does not cover defects of which the buyer is aware or which should have been visible to a reasonably prudent person. While Washington courts have not specifically rejected this position, there is language in *House v. Thornton* which suggests that they would do so, thus allowing warranty coverage despite purchaser knowledge of defects. Excluding defects known to the buyer is more consistent with a major purpose of the implied warranty, the protection of innocent buyers. The buyer who knows or should know of a defect, yet purchases anyway, is not innocent.

### D. The Sale Must Be Commercial

A "commercial rather than casual or personal" sale must be made before a warranty will be implied. This means that the house must be built for purposes of sale, and the builder must be a merchant. According to the Uniform Commercial Code:

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84. In *House v. Thornton*, the court stated, frequently, the prospective purchaser of a house buys it with knowledge of its defects and makes no point whatever of their existence before consummating the deal; and if the defects ... do not render the house unfit ... the question of whether an implied warranty covers them could be said to depend on whether they are of such magnitude as to prevent the house from being used for the purpose for which it was purchased.

76 Wn. 2d at 434, 457 P.2d at 203 (emphasis added).

85. *Klos v. Gockel*, 87 Wn. 2d at 570, 554 P.2d at 1352.

86. The *Klos* court, *id.*, cited *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975), to explain the commercial sale. That case specifically excluded situations in which a house is built for personal use and later sold. 346 A.2d at 211. In *Klos* the builder-vendor prevailed, in part because she built the house for personal use. See note 91 infra.

87. The crucial requirement is that the builder be a merchant, whether he sells the house himself or is hired by a seller. However, the seller who hires a merchant builder does not have to be a merchant (e.g., a professional developer). In *House v. Thornton*, 76 Wn. 2d 428, 457 P.2d 199 (1969), the nonbuilder seller was found liable even though he was a real estate broker rather than a professional developer. The fact that he contracted for the construction of one other house which he subsequently sold should not have been enough to render him a professional developer. In *Klos v. Gockel*, 87 Wn. 2d 567, 554 P.2d 1349 (1976), the defendant builder was deemed a nonprofessional builder though she built and sold three houses. See note 91 infra.

88. *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975), the case cited by *Klos* to explain the commercial sale concept, contains the merchant requirement:

In the case in which we adopted the implied warranty for new houses] we adopted
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"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 . . . .

The essential element of the definition, applied by analogy to housing, is that the builder must be in the business of building.

A combination of the above requirements results in the following definition: a commercial sale occurs when there is construction of a house for purposes of sale, by a builder whose occupation is building, and there is a subsequent sale by the builder or the seller who hired him. In *Klos v. Gockel* the builder's sale was noncommercial because she built the house for personal use rather than for sale and her occupation was not building.

The foregoing definition of the commercial sale is the general formulation. Washington adds a significant additional requirement: the builder must be *regularly engaged* in the business of building. This is an unusual limitation. Most courts simply require that the builder-

by analogy the implied warranty of merchantability in the sale of goods where "the seller is a merchant with respect to goods of that kind." . . . This would, arguably, exclude the casual sale made by a seller not in the business of selling houses, as it would a sale by one not in the business of selling goods.

346 A.2d at 211 (emphasis added).


90. 87 Wn.2d 567, 554 P.2d 1349 (1976).

91. The court found that though Mrs. Gockel's conduct was ambiguous, she constructed the house "primarily for personal occupancy, but also with the idea that eventually the house might be sold." *Klos v. Gockel*, 87 Wn. 2d at 568, 554 P.2d at 1351 (emphasis added). This view is questionable. Mrs. Gockel had been in the business of building houses, living in and then selling them, for many years with her husband. After his death, she built one house, lived in it about a year, built the defective house, lived in it about a year, then built a third, lived in it about a year, and moved to Arizona. Brief for Respondents at 2-7, *Klos v. Gockel*, 87 Wn. 2d 567, 554 P.2d 1349 (1976). Although the court believed Mrs. Gockel's past building experience was relevant to the issue of whether she could be deemed a professional builder, it did not find the above pattern persuasive, perhaps because the court apparently confused the facts, thus breaking up the pattern which might have showed an intent to sell (the court stated that the first house built was the defective one, and that Mrs. Gockel built only one more house before moving to Arizona).

92. *Id.* at 568, 554 P.2d at 1351. Mrs. Gockel's construction of three houses after her husband's death was seen as continued building on a "restricted scale," rather than activity sufficient to label her as "regularly engaged" in building. *Id.*


94. "The essence of the implied warranty . . . requires that the vendor-builder be a person regularly engaged in building, so that the sale is commercial rather than casual or personal in nature." *Klos v. Gockel*, 87 Wn. 2d at 570, 554 P.2d at 1352 (emphasis added).
vendor make a commercial sale, not that he regularly make commercial sales. Washington is the only state to impose the “regularly engaged” limitation, though it has done so inconsistently. This position of the Washington courts is unfortunate for two reasons. First, it is inconsistent with the rationale for holding builders, or the sellers who hire them, liable. Secondly, it unfairly affects

95. In Tavares v. Horstman, 542 P.2d at 1282 (Wyo. 1975), the implied warranty was applied “where a vendor builds new houses for purpose of sale.” The “regularly engaged” limitation is absent, as it is in the holdings of other courts. See note 97 infra.

96. Courts impose liability upon builders-vendors even when only one speculation home is sold. For example, in Bolkum v. Staab, 133 Vt. 467, 346 A.2d 210 (1975), the defendant owned a large piece of land which he subdivided into building lots according to a development plan. He hired a builder to erect one house which turned out to be defective. The defendant argued that because he was not a “general” builder the implied warranty was not applicable. The court ignored the contention and imposed liability because the sale was commercial and the house was built for speculation. The court did not base its holding on the fact that the house was part of a development plan—the building of a single house was enough to impose liability. In Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972), there was not even a development plan. The builder-vendor wanted to sell building sites only, and built one model home to encourage sales, although the court noted that the seller subcontracted for one other house. Id. at 799 n.1. The home was defective and liability was imposed.

97. This limitation has not been imposed in cases from other jurisdictions mentioned in this comment and the author is not aware of any other cases which have done so. Possible exceptions include Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 225 S.E.2d 557 (1976), in which the court mentioned that the builder described himself as “the construction business on a full-time basis.” 225 S.E.2d at 559. This description, however, appeared in the fact section preceding the opinion, and was not referred to subsequently. Further, the holding did not incorporate the concept that the defendant was liable only because he was a “full-time” builder-vendor. In Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966), the court, in discussing why a builder rather than a buyer should be liable, said, “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.” 415 P.2d at 710. However, the discussion’s primary emphasis was on buyer reliance, and the concept of being “daily” engaged in building was not again repeated. It is thus plausible that the court would impose the warranty when justified reliance was present, even though the builder was not “daily” engaged in building houses.

98. Washington courts impose the limitation only upon builders, not upon the sellers who hire them. See note 87 supra.

99. See notes 21–27 and accompanying text supra. Basically, the builder-vendor is responsible for defects because he is in a position to inspect, holds himself out as a businessman, and produces a product specifically for sale in the market. The only missing element in the occasional sale is the builder-vendor’s ability to spread the cost of liability over other sales. However, insurance may be obtained so this limitation is neither insurmountable nor, perhaps, important when the other factors are present. Insurance programs such as the Home Owners Warranty Program are also available. Under the HOW plan, a builder who meets the program’s requirements of financial responsibility, technical competence, and fair dealings with consumers may obtain insurance for the home buyer at a cost of $2 per $1,000 in the final sales price; for example, $80 for a $40,000 home. Home Owners Warranty Corp., supra note 57, at 3–4. There is also an annual registration fee.
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purchasers from lender-vendors. The "regularly engaged" restriction should be eliminated from the Washington implied warranty for new houses.

E. Nature of the Warranty

1. The house must be habitable

The implied warranty is one of habitability covering major structural defects. The concept of habitability is expressed in Klos v. Gockel as follows:

As a final matter, we note that the house was habitable at all times. The gist of the implied warranty is that the resulting building will be fit for its intended use, i.e., habitation . . . . In the instant case, the only damage to the structure was the slight separation of the aluminum door frame from the wall of the house. Neither this nor the buckling and sinking of the front yard patio slabs affect the habitability of the house, and are not structural defects affecting habitability . . . . The respondents never moved out of the house and were still occupying it at the time of trial.

The court's reference to the fact that plaintiffs did not move out is significant. Though the court did not acknowledge appellant's claim that moving out is the "acid test" of habitability, it did rely upon the failure to move as additional evidence of habitability. This reliance suggests that moving out may become a requirement for proving uninhabitability.

100. For example, a lending institution which foreclosed a builder's interest and finished 95% of the construction would be a builder-vendor and the subsequent sale would be commercial. A buyer would be deprived, however, of warranty protection because the lender would not be "regularly engaged" in the building business (assuming that the lender did not make a practice of foreclosing and finishing construction). Without such a limitation, the lender probably would be subject to the warranty. See Note, 53 DEN. L.J. 413, 431-32 (1976). See also Annot., 39 A.L.R.3d 247 (1971).

101. Klos v. Gockel, 87 Wn. 2d at 570, 554 P.2d at 1352.

102. Id. at 571, 554 P.2d at 1352-53.

103. Brief for Appellant at 15, Klos v. Gockel, 87 Wn. 2d 567, 554 P.2d 1349 (1976)(appellant contended "that the acid test of whether a new house is unfit for occupancy is whether the buyer moves out").

104. Such a result would be unfortunate. First, it would contradict Washington decisions dealing with the warranty of habitability. For instance, in House v. Thornton, 76 Wn. 2d 428, 457 P.2d 199 (1969), the plaintiffs lived with the defects for 23 months before bringing suit. The court found the house to be uninhabitable without specifying whether or not the plaintiffs ever moved out. The same approach was used in Gay v.
This conclusion is weakened by *Allen v. Anderson*, an appellate case following *Klos* in which the building was occupied at the time of trial.\(^{105}\) The case was remanded for findings of fact on several issues, but whether plaintiff was forced to move out was not among them.

Regardless of a “move-out” requirement, a working definition of “habitable” remains to be formulated. Does it mean *livable*, in the sense that humans can survive within the house, or, for example, “reasonably comfortable”? Since the warranty is supposed to insure the house is fit for its intended purpose,\(^{106}\) the “reasonably comfortable” standard is more logical because the average buyer expects to be reasonably comfortable in a new house. This proposition was suggested, in dictum at least, in one Washington opinion.\(^{107}\) The problem with the standard is its lack of definiteness.\(^{108}\)

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\(^{106}\) Klos v. Gockel, 87 Wn. 2d at 571, 554 P.2d at 1352.

\(^{107}\) In Berg v. Stromme, 79 Wn. 2d 184, 484 P.2d 380 (1971), a new car warranty case in which the holding of House v. Thornton, 76 Wn. 2d 428, 457 P.2d 199 (1969), was discussed, the court said, “When the foundation and substructure of the house proved to be so defective and inadequate that it could not be occupied by its first purchaser with reasonable safety and comfort, we imposed a rule of strict liability . . . .” 79 Wn. 2d at 196, 484 P.2d at 396 (emphasis added).

\(^{108}\) One could argue that the standard is unworkable, since courts will necessarily differ in their interpretation of reasonable comfort. A similarly undefined standard, currently and apparently successfully, exists in the Uniform Commercial Code’s implied warranty of merchantability. Wash. Code § 62A.2-314(2)(a)-(b) (1976). The Code broadly defines “merchantable” as those goods which can “pass without objection in the trade,” and which are of “fair average quality.” *Id.*

All the terms are actually synonymous. The average person should be reasonably comfortable in a house of fair average quality, one that could pass without objection in
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2. **Implied warranty of habitability and/or workmanlike quality?**

   In *Klos v. Gockel*, the court appeared to offer only one warranty, that of habitability. Yet in defining that warranty, the court also included the distinguishable warranty of workmanlike quality. If this warranty were deemed to operate independently of the warranty of habitability, builder-vendor liability would be expanded; a house built in an unworkmanlike manner would breach the workmanship warranty though it might not breach the warranty of habitability. This result is reached in several jurisdictions.

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the trade. This conclusion argues for the adoption of an implied warranty of merchantability, rather than the implied warranty of habitability, in the new house area. See Part IV-E-4 infra.


110. id. The court spoke of "the" implied warranty of habitability, and said "such warranty" was explained in a quotation which included the workmanlike standard. *Id.* at 570, 554 P.2d at 1352. Accord, *Waggoner v. Midwestern Dev. Inc.*, 83 S.D. 57, 154 N.W.2d 803, 809 (1967) (court spoke of "an implied warranty of reasonable workmanship and habitability"). Other courts have treated them as separate and distinct warranties. For example, in *Carpenter v. Donahoe*, 154 Colo. 78, 388 P.2d 399 (1964), the court said "there are implied warranties that the home was built in a workmanlike manner and is suitable for habitation." 388 P.2d at 402 (emphasis added). This comment will continue to use the singular form when referring to the Washington warranty as it is not clear that the court intends multiple warranties. See note 7 supra.

111. Warranties of habitability and workmanlike quality are not identical. A house can be uninhabitable yet be built in a workmanlike manner. For example, in *House v. Thornton*, 76 Wn. 2d 428, 457 P.2d 199 (1969), the court found "there was no proof that the defendants failed to properly design and erect the building, or that they used defective materials or in any respect did an unworkmanlike job . . . ." *Id.* at 435, 457 P.2d at 203. Yet the home was held to be uninhabitable because it was built on unstable land which caused failure of the foundation. The builder-vendors knew of the instability but did not tell the buyer because the city engineer indicated the land had stabilized. *Id.* at 429, 457 P.2d at 200.


113. For example, an unworkmanlike application of interior paint would breach the warranty of workmanlike quality but the habitability of the house would not be affected. The argument that Washington recognizes an independent implied warranty of workmanlike quality was made in the appellants' brief in *Allen*. Brief for Appellants at 15-21, *Allen v. Anderson*, 16 Wn. App. 446, 557 P.2d 24 (1976). The court did not comment upon it.

114. In *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974), the structure was habitable but built in an unworkmanlike manner. The court imposed a warranty of quality, stating that "we conclude 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." *Id.* at 380, 525 P.2d at 91, 115 Cal. Rptr. at 651.

Similarly, in *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976), the court said that, "the jury could find the house was neither free from major structural defects nor constructed in a workmanlike manner . . . . Failure to meet this
It is not clear whether Washington courts would reach such a result. Though *Klos* mentioned the warranty of workmanlike quality, neither it nor prior Washington decisions have founded builder-vendor liability on that basis. However, a post-*Klos* appellate decision, *Allen v. Anderson*, did authorize such liability.

Because it is not clear that the *Allen* conclusion is sanctioned by the Washington Supreme Court, clarification is appropriate. The Washington new house warranty should either be acknowledged as containing separate warranties of habitability and workmanlike quality, or clarified by eliminating ambiguous references to workmanlike quality. Inclusion of both warranties is preferable.

115. In *Klos*, 87 Wn. 2d 567, 571, 554 P.2d 1349, 1352 (1976), the court stated that the "gist" of the warranty was habitability. Thus, slight structural damage and a buckled patio did not breach the warranty because they did not affect habitability. *Id.* If the court considered the warranty of workmanlike quality to operate independently of the habitability warranty, a discussion of whether or not the defects were caused by substandard work would have been necessary. Such discussion is absent.

Similarly, the warranty used in *House v. Thornton*, 76 Wn. 2d 428, 457 P.2d 199 (1969), contained standards of habitability and workmanlike quality. The *House* court extended the implied warranty found in the construction contracts in *Hoye v. Century Builders, Inc.*, 52 Wn. 2d 830, 329 P.2d 474 (1958), and *Fain v. Nelson*, 57 Wn. 2d 217, 356 P.2d 302 (1960), which insured that the work would be done in a workmanlike manner, *and* that the building would be habitable. For the warranty definition adopted in *Hoye*, see note 3 supra. Similarly, only habitability was emphasized in *House v. Thornton*. The court stated that defects could exist, but unless they rendered the house uninhabitable, they would not be covered by the warranty. 76 Wn. 2d at 434, 457 P.2d at 203. It should be noted that the court misstated the holding in *Fain v. Nelson*, 57 Wn. 2d 217, 356 P.2d 302 (1960), to reach this conclusion. In *Fain*, a defective roof was not covered by the warranty because it was completed at the time of purchase, and thus the doctrine of *caveat emptor* applied. *Id.* at 221-22, 356 P.2d at 305-06 (by implication). The fact that the roof was reparable and did not render the house uninhabitable was not discussed.

The standard of habitability was again emphasized in *Gay v. Cornwall*, 6 Wn. App. 595, 599, 494 P.2d 1371, 1374 (1972). There, the house fell well below the workmanlike quality standard. The chimney was improperly flashed, the plumbing was defective in materials and installation, vents were not connected, gutters were too short, the drainfield was inadequate, and the external paint was too thin. *Id.* at 597, 494 P.2d at 1372-73. Nevertheless, the court based its decision on the fact that the defects rendered the house uninhabitable. *Id.* at 598, 494 P.2d at 1374. The more obvious breach of the warranty of workmanlike quality was not mentioned.


117. Jury instruction number nine was challenged for stating that buildings must comply with building codes. *Id.* at 448, 557 P.2d at 26. The court approved the instruction because it found "support in *Klos*." *Id.* Such support would have to stem from the statement in *Klos* that the warranty included a standard of workmanlike quality, because *Klos* did not mention building codes, and the below-code defects in *Allen* did not render the building uninhabitable. The building was fully rented at the time of trial. *Brief for Respondents at 5-7, Allen v. Anderson*, 16 Wn. App. 446, 557 P.2d 24 (1976).

118. In other areas of the law, the offeror of goods or services is held accountable for defective quality even if the goods are still usable. For example, the builder under a
The defects must be major and structural

Klos v. Gockel\textsuperscript{119} limited the new house implied warranty to major\textsuperscript{120} structural\textsuperscript{121} defects in the dwelling and fixtures.\textsuperscript{122} This limitation to structural defects is inconsistent with the trend in other jurisdictions\textsuperscript{123} and with the earlier Washington decision in Gay v.
In that case nonstructural as well as structural defects rendered the house uninhabitable. This result can be reconciled with the \textit{Klos} limitation if the definition of structural is expanded to include \textit{all items reasonably essential to the use of the house.}\footnote{In \textit{Gay} v. \textit{Cornwall}, the court declared: Any realistic analysis of the lessor-lessee or landlord-tenant situation leads to the conclusion that the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling. . . . "When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package . . . which includes not merely walls and ceilings, but also adequate heat, light and ventilation, ser-

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viceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.”

An even stronger argument can be made that a buyer’s willingness to contract is in exchange for the seller’s promise to provide a livable dwelling, a package which includes not merely structural integrity, but nonstructural integrity as well, such as adequate heating, lighting, and plumbing. It is illogical to extend nonstructural protection to the $100-a-month tenant, but not to the buyer of a $100,000 house.

This protection may be provided in Washington despite the Klos restriction. In Allen v. Anderson, nonstructural items were included among the defects listed by the court. Without explanation, the Allen court ignored Klos and adopted the more liberal coverage contemplated by the decision in Gay v. Cornwall.

4. Implied warranty of merchantability

A solution to the problems created by the structural and habitability limitations is provided by characterizing the warranty as one of merchantability rather than one of habitability. Using the Uniform Commercial Code by analogy, the builder-vendor would guarantee

128. Id. at 27, 515 P.2d at 164.
129. In addition to having less at stake, tenants of used buildings have fewer expectations of soundness than do buyers of new homes.
131. Id. The defects included a cupped roof which prevented normal drainage, storm and sanitary drains which should not have been connected to the city sewer system, inadequate brick veneer work, inadequate retaining walls, and an inadequate foundation.
133. The “warranty of merchantability” is a better term than the currently used label, “warranty of fitness.” The warranty of fitness for a particular purpose is designed for extraordinary purposes: “A ‘particular purpose’ differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes . . . go to uses which are customarily made of the goods . . . .” Wash. Rev. Code Ann. § 62A.2–315, Comment 2 (1966). As the ordinary and customary purpose of most home buyers is to live in the home, merchantability, rather than fitness, is the more appropriate label. Furthermore, to establish breach of the implied warranty of fitness, the buyer must prove that he relied on the seller’s superior skill and judgment, and that the seller knew of such reliance. Wash. Rev. Code 62A.2–315 (1976). On the other hand, the warranty of merchantability requires no showing of reliance, and thus is more appropriate to housing sales, where typically the seller does not know whether or not the buyer is specifically relying on his judgment.
134. Builder-vendor recourse against the supplier of building plans or materials is beyond the scope of this comment. See note 3 supra.
that, upon sale, 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.

This warranty would suit the expectations and needs of both parties. The buyer would be protected against extraordinary, major, structural and nonstructural defects, while the seller would not be accountable for ordinary, minor defects. Some courts have already moved in this direction.

F. Duration of the Warranty

Opinions on the duration of the implied warranty for new houses

135. Defects stemming from post-sale events can operate as a defense:
In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense.


136. WASH. REV. CODE § 62A.2-314 (1976) states:
(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; . . . .
In addition, the draftsmen’s comment explains that, “[p]aragraphs (a) and (b) of subsection (2) are to be read together . . . . ’Fair average’ . . . means goods centering around the middle belt of quality, not the least or the worst . . . but such as can pass ‘without objection.’” WASH. REV. CODE ANN. § 62A.2-314. Comment 7 (1966). Cf. Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803, 809 (1967) (standard is reasonableness, not perfection).

This concept of “average quality” would provide the specifics which should be included within an implied warranty, but which would amount to a laundry list if they were so included. For example, jurisdictions which specifically include compliance with local building codes in their warranties would no longer need to do so, for the average new house should comply with such codes. See Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1965). The inclusion of building code compliance in the Model Statutory Warranty, however, is done for purposes of clarity and emphasis. See note 167 and accompanying text infra.

137. This aspect coincides with the Klos warranty which is presently limited to “major structural defects.” Klos v. Gockel, 87 Wn. 2d at 570, 554 P.2d at 1352.

vary. In Washington, R.C.W. § 4.16.310 provides a six-year statute of limitations for all actions brought under R.C.W. § 4.16.-300, which "applies to all claims or causes of action of any kind" brought against a builder. An identical statute of limitations applies to actions against nonbuilder sellers.

139. In model legislation presented by Professor Bearman, the warranty is fixed at one year:

One year represents a full seasonal cycle and should bring out all defects in existence at the time of the deed, or, in case of an installment purchase, at the time vendor took possession. Defects which manifest themselves later are much more likely due to ordinary wear and tear or the elements.

Bearman, supra note 43, at 576. Professor Haskell, on the other hand, recommends a five-year warranty as a workable period which does not burden the seller with eternal contingent liability. Haskell, supra note 25, at 651–52. Both of these views are rejected by still another commentator who feels that a fixed period is too inflexible and that instead a standard of reasonableness should be utilized. Williams, Development in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses, 10 Tulsa L.J. 445, 448 (1975). Accord, Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 801 (Mo. 1972); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803, 809 (1967). This standard has been adopted in at least two jurisdictions. See Barnes v. Mac Brown & Co., 432 N.E.2d 619, 620 (Ind. 1976); Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975).

140. The statute provides:

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services enumerated in RCW 4.16.300, whichever is later. The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. Any cause of action which has not accrued within six years after such substantial completion of construction, or within six years after such termination of services, whichever is later, shall be barred: Provided, that this limitation shall not be asserted as a defense by any owner, tenant or other person in possession and control of the improvement at the time such cause of action accrues.


141. The statute provides:

RCW 4.16.300 through 4.16.320 shall apply to all claims or causes of action of any kind against any person, arising from such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair of any improvement upon real property.


142. However, the six-year period does not apply to actions already governed by a shorter statute of limitations. R.C.W. § 4.16.320 states: "Nothing in RCW 4.16.300 through 4.16.320 shall be construed as extending the period now permitted by law for bringing any kind of action." WASH. REV. CODE § 4.16.320 (1976).

143. Actions against nonbuilder sellers, sellers who hire builders, appear to be controlled by R.C.W. § 4.16.040(2). It provides a six-year statute of limitations for "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement." WASH. REV. CODE § 4.16.040(2) (1976). One could argue, however, that actions against nonbuilder sellers are controlled by R.C.W. § 4.16.300. quoted at note 141 supra. Though it seems designed to encompass only builders and others actively involved in the construction process, such as architects and lending institutions, non-
It is arguable that a variable period limited by a standard of reasonableness\textsuperscript{144} would provide a better method of judging how long a builder-vendor should be subject to liability than would the fixed statutory period. A foundation, for example, could crack in the seventh year, and while suit would be barred in Washington, it might not be barred in a jurisdiction using a "reasonable period" standard.

Nevertheless, Washington's six-year statutory period appears adequate. Approximately ninety-five percent of housing defects appear within the first year, and the remainder normally appear within the six-year limit.\textsuperscript{145} Thus the statutory period effectively protects most buyers while allowing builders to avoid burdensome "eternal" liability.

\section*{G. Disclaimers}

Although the Washington courts have not had the opportunity to decide whether disclaimers of the new house implied warranty should be allowed, the issue merits consideration. Initially, the courts must decide if disclaimers contravene public policy.\textsuperscript{146} A Washington court determined that they did in the landlord-tenant area.\textsuperscript{147} Courts faced

\textsuperscript{144} Some jurisdictions reject a fixed period and use a standard of reasonableness to judge the time during which a builder-vendor remains liable. See note 139 supra.

\textsuperscript{145} Interview with Stan Mitchell, architect and building inspector, in Seattle, Washington (December 29, 1977).

\textsuperscript{146} Professor Haskell maintains:
\begin{quote}
A forceful argument can also be made for the proposition that any disclaimer of fitness for habitation in the sale of new construction is unconscionable and against public policy. Should a merchant be permitted to build and receive money for a structure which appears to be a house... and avoid liability in the event the structure has a material defect?
\end{quote}

\textsuperscript{147} In Foisy v. Wyman, 83 Wn. 2d 22, 515 P.2d 160 (1973), the court decided that a tenant should not be able to agree to live in uninhabitable premises as they are a health hazard, not only to the individual tenant, "but to the community which is exposed to said individual.... [S]uch housing conditions are at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for the conscientious landowners." \textit{Id.} at 28, 515 P.2d at 164. Whether the court would reach a similar conclusion when faced with defects in housing outside the landlord-tenant area is unclear. Arguably uninhabitability, whether it be in a rented or purchased house, is the crucial issue. Thus, since it harmfully affects the community, buyers, as well as tenants, should not be allowed to agree to live in uninhabitable premises. If the warranty is extended beyond habitability to breaches of the workmanlike quality standard, however, disclaimers might be appropriate because the effect on the community would not be as substantial. See Part IV-E-2 supra.
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with the issue in the new house context have found disclaimers to be valid if the language clearly and unambiguously illustrates the intention of both parties to disclaim the implied warranty. Essentially, the courts apply a reasonable person standard by asking whether a reasonable person would have intended the disclaimer clause to waive his right to recovery for unknown, latent defects.

Washington law suggests by analogy that a valid disclaimer should be written, conspicuous, and should include the term “merchantability.” In addition, the disclaimer must be explicitly negotiated and detail the particular items which are not being war-


151. The Magnuson-Moss Warranty Act supersedes state law governing disclaimers concerning consumer goods, whenever a written warranty is given. A seller giving a written warranty cannot disclaim the implied warranty. For a complete discussion of the Act’s effect on new housing, see Peters, supra note 80.

152. WASH. REV. CODE § 64.04.010 (1976) requires every conveyance of real estate to be in deed form. In Langert v. Ross, 1 Wash. 2d 24 P.443 (1890), the court allowed a written memorandum, rather than a deed, to satisfy this requirement.

153. WASH. REV. CODE § 62A.2-316(2) (1976). In MacDonald v. Mobley, 555 S.W.2d 916 (Tex. Civ. App. 1977), the court applied the Texas Uniform Commercial Code disclaimer rules to disclaimers of new house implied warranties. Possibly the § 62A.2-316(2) requirements of conspicuousness and express reference to merchantability are not mandatory. Subsection (3) states that “notwithstanding” subsection (2), and “unless the circumstances indicate otherwise,” the implied warranty can be disclaimed by language which makes plain the lack of a warranty. WASH. REV. CODE § 62A.2-316(3) (1976). The inconspicuous, yet plain, disclaimer of an expensive item such as a house, however, might be just the circumstance which would indicate that the requirements of subsection (2), rather than (3), are met. In Macdonald v. Mobley, 555 S.W.2d at 919, the court relied on the Texas equivalent of subsection (2) and invalidated the disclaimer because it was not conspicuous, although the disclaimer purportedly met the equivalent of Washington’s subsection (3) requirements. Contra, Conyers v. Molloy, 7 Ill. App. 3d 695, 364 N.E.2d 986, 989 (1977) (the court erroneously substituted the disclaimer requirements of the implied warranty of fitness for the implied warranty of merchantability).

This test should also govern clauses which attempt to limit remedies and warranty clauses contained in listing and earnest money agreements.

V. CONCLUSION

The present Washington implied warranty of habitability for new houses should be modified to become an implied warranty of merchantability covering both structural and nonstructural components. The warranty should be imposed in all commercial sales of new construction and should cover all items sold by the builder-vendor. In addition, the warranty should run to the first purchaser-occupant and/or the initial vendee and to all subsequent buyers who purchase within the warranty period.

Furthermore, the Washington courts should clarify the nature of the warranty. Breaches which violate the workmanlike quality stan-

155. WASH. REV. CODE § 62A.2-316(4) (1976). This provision applies only to goods purchased primarily for "personal, family, or household use." Id. The house itself, by analogy, ought to fit within its scope.

156. See Schroeder v. Fageol Motors, 86 Wn. 2d 256, 544 P.2d 20 (1975) ("conspicuousness" and "the presence of negotiation" are relevant in defining an unconscionable restriction of remedy).

157. Just as disclaimer clauses are contrary to the buyer's expectations, these warranty clauses are contrary to those of the sellers. For example, the seller of a used house ordinarily warrants nothing. However, the Eastside Brokers Association, Inc., Exclusive Sale and Listing Agreement includes a statement that, "Seller warrants that there is nothing about the property (including any improvements and structures) that needs repair, replacement or attention except ...." Eastside Brokers Ass'n, Inc., Form 100 (Dec. 1, 1976) (emphasis added). The clause is not limited to the seller's knowledge and therefore creates tremendous potential liability. If the property has a defect and the agent, because of the clause, represented it as defect free, the seller would be liable to the realtor on the warranty given.

Direct liability to the buyer could be established through the use of the Real Estate Purchase and Sale Agreement. In the fine, pale print on the back of the page, this clause appears: "Seller warrants that the septic tank serving the property: (1) is in good working order and seller has no knowledge of any needed repairs; and (2) Meets all applicable Governmental health, construction and other standards." Eastside Brokers Ass'n, Inc., Burroughs Business Forms 1 (June 1977) (emphasis added). The average seller would be unaware of this clause and have no idea whether or not his septic tank met governmental standards.

To be valid, these clauses should meet the basic standards set for disclaimer clauses. They should be conspicuous and explicitly negotiated. Such negotiation might be encouraged by decisions like Wegg v. Henry Broderick, Inc., 16 Wn. App. 589, 557 P.2d 861 (1976). There, the court imposed liability upon the defendant brokerage firm, partly for failure to discuss the ramifications of a clause contained in a form supplied by the defendant.

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dard, as well as breaches affecting habitability, should be clearly acknowledged as invoking warranty protection.\textsuperscript{158}

APPENDIX: MODEL WARRANTY

To facilitate the development of warranties in the building industry, the following model statutory warranty is offered.\textsuperscript{159}

STATUTORY WARRANTY FOR NEW BUILDINGS

Section 1. DEFINITIONS. As used in this chapter:
(1) “Purchaser” means a person who contracts to purchase a new building for fair consideration, or a mortgage lender or deed-of-trust beneficiary who takes possession of said building.\textsuperscript{160} “Purchaser” includes all purchasers who contract within six years of the date on which the deed passes or possession is taken, whichever occurs first.
(2) “Builder” means any person who constructs a new building on his or another’s property and:
(a) is an individual who deals in the construction trade or otherwise by his occupation holds himself out as having knowledge or skill peculiar to construction, or is a person who is a “general contractor” as defined in R.C.W. § 18.27.010; or \textsuperscript{161}
(b) is an individual who does all work personally without employees or is a specialty contractor as defined in R.C.W. § 18.27.010; or
(c) is an individual meeting the description of Section 1(2)(a) or (b) who contracts for the construction in whole or in part of his own new building and acts as his own general contractor.\textsuperscript{162}

\textsuperscript{158} In addition, the Washington courts should clarify whether or not an implied materials warranty is given by the builder-vendor, and whether or not builder-vendors will be strictly liable for defects caused by others. For a discussion of these issues, see note 3 supra.

\textsuperscript{159} A bill, considered by the Financial Institutions Committee of the Washington House of Representatives, was used as the base for this model. \textit{Proposed Act Relating to Home Warranties: Hearings on H-2603\textsuperscript{78 Before the House Financial Institutions Committee, 45th Legislature (1978) (draft of proposed act on file with Washington Law Review).}

\textsuperscript{160} The bill protects investors who buy for resale, as well as purchaser-occupants.

\textsuperscript{161} The “Builder” definition is intended to encompass all builders who are engaged in the business of building for profit. There is no requirement that the builder be regularly engaged in the business; building one house for profit is sufficient to invoke the warranty.

\textsuperscript{162} A professional builder offers the warranty even on houses built for personal use, as he has the expertise to construct an adequate house and his buyer may justifiably rely on that expertise. However, a nonprofessional, such as a layman constructing his
(3) "Developer" means a person or corporation to whom a builder's knowledge or skill may be attributed by his employment of said builder to erect a building for purposes of sale.163

(4) "Building" means all items constructed, subtracted, altered or repaired by the builder. "Building" does not include landscaping.164

(5) "Trade" means the business of building, buying, and selling buildings for profit.

Section 2. WARRANTY. (1) (a) In every contract for the sale of a completed new building, in every contract for the construction of a new building, and

(b) in every contract for the alteration, repair, addition, subtraction, or improvement of a new or used building,165

(c) the builder and/or developer166 shall be held to warrant to the purchaser that, at the time of the passing of the deed or of the purchaser taking possession, or at the time the work done under (1)(b) of this section is substantially completed, whichever occurs first, the building, in the contract specified in (1)(a) of this section, and that portion of the building worked on or damaged because of the contract specified in (1)(b) of this section, together with all its fixtures:

(i) complies with all of the requirements of R.C.W. §§ 19.27 and 19.28 and any local amendments authorized thereby;167 and

(ii) is fit for its ordinary purpose; and168

(iii) is constructed so as to pass without objection in the trade under the contract description.169

own home, would not offer the warranty. He would not, by his occupation, hold himself out as having construction expertise, and therefore buyer reliance upon such expertise would be unjustified.

163. The "Developer" definition encompasses sellers who hire builders to erect speculation buildings. Their liability stems from the creation of a product for the housing market. The definition excludes the seller who has a building erected for personal use and subsequently decides to sell. Though this reliance on intent provides a loophole for unscrupulous developers, the exemption is necessary to prevent the true layman from becoming a "developer" simply by hiring a builder to erect his home.

164. The definition goes beyond the common law by covering not only the main structure, a house for example, but also other items for which the builder is responsible (fence, barn, patio, etc.). Landscaping is excluded because a builder does not "construct" a lawn in the sense that he should be responsible for its failure to grow.

165. The bill encompasses new work done on used buildings such as kitchen remodeling, additions, and roof repairs.

166. For the purpose of simplicity, the bill imposes liability only upon the builder and/or developer. It is assumed that the builder and/or developer will seek indemnity from architects, materials suppliers, and owners, etc., when such is appropriate.

167. The bill mandates compliance with applicable building codes.

168. Since the ordinary purpose of a home or apartment building is habitation, there would be a warranty of habitability in dwellings.

169. The building must be generally acceptable in the building industry; it need not be the best nor can it be the worst; it must be of average quality. The phrase "within the
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This warranty survives the passage of the deed or the taking of possession by the initial vendee.170

(2) The warranty given in subsection (1) of this section shall be automatically transferred to all subsequent purchasers of the building within six years of the date on which the work done under (1)(b) of this section is substantially completed, the deed passes, or the purchaser takes possession.171

(3) The warranty given in subsection (1) of this section shall not apply to loss caused by anything172 or anyone other than the developer, builder, or his/their employees, agents, or subcontractors, or to loss caused by normal wear and tear, deterioration, or acts of God.

Section 3. NOTICE. Notice, either oral or written, of breach of the warranty given in Section 2 must be given to the party or parties sued under this act within a reasonable time after the purchaser discovers or should have discovered the breach.

Section 4. DISCLAIMERS. No agreement which purports to waive any warranty given under Section 2 of this act shall be effective in contracts for dwellings bought for personal habitation by one or two families. Any authorized disclaimer of liability under Section 2 must be in writing, explicitly negotiated between the contracting parties, and must state with particularity the qualities and characteristics not being warranted.173

Section 5. CAUSE OF ACTION. In the event of a breach of any warranty given under Section 2 of this act, the purchaser or his heirs

contract description" provides a basis for judging quality. For example, a two bedroom house at $50,000 is presumably of lower quality than one at $80,000. This presumption assumes the price differential is not due to outside considerations, such as the popularity of the area in which the house is located.

170. There is no merger by deed.
171. The warranty runs with the house for six years.
172. The term "anything" encompasses all nonhuman acts for which the builder should not be liable, such as termite infestation.
173. The bill assumes that the unsophisticated layman buying a home for personal use needs the greatest protection. Thus, disclaimers are prohibited in such cases, both for the buyer's and the community's protection. For a discussion of the detrimental effects to the community caused by poor housing, see note 147 supra. The bill allows the investor who buys a rental house to waive the warranty. Upon renting, however, he will be liable to his tenants on a warranty of habitability, so such a waiver will merely shift the burden of providing minimal housing from the builder/developer to the buyer.

In the nonresidence context, disclaimers are allowed in the belief that the Section 2 warranty will not be greatly utilized. Most nonresidences are built under construction contracts in which an implied warranty already exists. For those not built under contract, it is probable that the buyer is sophisticated enough to realize the consequence of accepting a disclaimer.
or personal representatives in case of his death, shall have a cause of action against the builder and/or developer for damages.\textsuperscript{174}

Section 6. MEASURE OF DAMAGES. (1) The measure of damages for breach of the warranty given in Section 2 of this act shall be the difference at the time and place of acceptance between the value of the building accepted and the value it would have had if it had been as warranted, unless special circumstances show proximate damages of a different amount.

(2) In a proper case incidental and consequential damages may also be recovered.

(a) Incidental damages include reasonable expenses incurred from breach of the warranty, such as but not limited to, costs of inspection and care.

(b) Consequential damages include any loss resulting from general or particular requirements and needs of which the builder-vendor at the time of contracting had reason to know and which could not reasonably be prevented, and injury to person or property proximately resulting from any breach of warranty.

(3) In a proper case rescission may be granted.\textsuperscript{175}

Section 7. STATUTE OF LIMITATIONS. No cause of action under Section 5 of this act shall be maintained more than six years after the date on which the work done under Section 2(1)(b) is substantially completed, the deed passes, or the purchaser takes possession, whichever occurs first.\textsuperscript{176}

Section 8. ATTORNEYS' FEES AND COSTS. In any action taken under this chapter, the prevailing party may be awarded reasonable attorneys' fees, plus costs.

Section 9. NONEXCLUSIVE. This chapter is nonexclusive and is in addition to any other remedy available by law.

\textit{Holly Keesling Towle}

\textsuperscript{174} The purchaser may sue the builder, the developer, or both. If only the developer is sued, it is expected he will join the builder, as an implied warranty will exist in the construction contract between them.

\textsuperscript{175} The verb "may" is used to indicate the rescission is discretionary with the court.

\textsuperscript{176} The bill adopts the base period of six years used in the statutes which cover suits against builders and sellers. It rejects, however, the statutes' designation for commencement of the six-year period. \textsc{Wash. Rev. Code} §§ 4.16.040, .310 (1976). See generally notes 140-43 and accompanying text supra.