

**MANAGING THE IMPLIED WARRANTY OF HABITABILITY  
IN NEW HOME SALES**

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## **I. *Introduction***

Thirty six years ago, in 1969, the Washington Supreme Court first imposed an implied warranty of habitability on builders of new homes. Over the past three and a half decades the Washington courts have interpreted, refined and expanded the implied new home warranty. Sixteen years ago, the Washington legislature imposed implied warranties on condominium builders in the (then) new Washington Condominium Act. The surge in condominium defect litigation during the last five years led to a number of judicial holdings adverse to developers, particularly condominium developers.

Development is a risk-intensive business. Developers need to manage a number of significant risks to have a chance of a successful project. Those risks include land costs, entitlement risks and schedules, construction costs, market conditions, construction quality and warranty exposure. A developer who does not or cannot control or mitigate these risks is rolling the dice when he undertakes a project. His capital and business are at risk. So are the jobs and careers of his family and the families of his employees.

The increased attention on new home defects has forced developers to look more closely at their exposure to defect claims in an effort to manage the risk of defect liability. Unfortunately, the implied warranty of habitability is a common law creature. It evolves over time and the decision of whether a developer has violated the warranty rests with a judge or jury. It is difficult to manage this risk. Many drafting efforts by developers' attorneys have failed because developers and their counsel have not understood the implied warranty of habitability.

This paper examines a developer's ability to manage the implied warranty of habitability to purchasers of homes. It begins with an explanation of the elements and evolution of the implied warranty of habitability in Washington. It then discusses various strategies for managing the implied warranty of habitability.

## **II. *The Distinction Between Subdivisions and Condominiums***

The public generally takes the word "condominium" to mean a flat or unit in a multi-family building. A condominium is generally understood not to be a detached house. Legally, however, a condominium is not a construction product; it is a form of ownership of real property. Whether a home is a condominium or not depends on how the real property interest was created before it was sold. For purposes of this paper, we will assume the real property interest at issue is fee simple ownership.

### **A. Subdivisions**

Subdivisions are created under RCW 58.17 et seq.<sup>1</sup> The completed subdivision is frequently subjected to "Covenants Conditions and Restrictions" that impose restrictions on the use of the property within the subdivision and create a homeowners association to govern the subdivision. If a homeowners association (a nonprofit corporation) is formed, it is governed by the Homeowners Association Act, RCW 64.38 et seq.

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<sup>1</sup> Short subdivisions are allowed under various local codes and ordinances.

The completed subdivision is composed of “lots” and publicly dedicated features such as streets or parks. It may also have “tracts” for features such as private streets or drives, open space, utility installations and the like.

What makes a development a subdivision is that the lots are physical portions of the property that may be individually owned while the tracts are physical portions of the property that are owned by the home owners association for the benefit of the lot owners.

## **B. Condominiums**

Condominiums are created under the Condominium Act, RCW 64.34. The condominium will be governed by a condominium association, which is also a nonprofit corporation. Condominiums contain “units” and “common elements”. Units, like lots, are physical portions of the property that may be individually owned. However, common elements, unlike tracts, are owned in common by all of the unit owners as co-owners. Common elements are not owned by the condominium association. What makes a development a condominium is the common ownership of the common elements.

## **C. Ownership Structure Does Not Dictate Product Type**

The legal ownership structure of a real estate development does not necessarily dictate the product type in the development. A detached single family home can be on a lot in a subdivision or in a unit in a condominium. A townhouse can be a condominium unit or a zero-lot line subdivision lot. A flat or apartment will not be a subdivision in Washington (since we have no legislation authorizing vertical subdivisions) but a flat might be a condominium unit or a cooperative apartment.<sup>2</sup>

## **D. Ownership Structure Does Govern The Implied Warranty of Habitability**

The ownership structure of a real estate development does, however, govern the source and effect of the implied warranty of habitability. For subdivision homes the implied warranty of habitability is a creature of common law. See, e.g., *House .v Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969). There is no statutory regulation of express or implied warranties by developers of subdivision homes.

For condominium homes, however, the implied warranty of habitability is governed by the Condominium Act. The implied warranty of habitability is a creature of statute. See, e.g., RCW 64.34.445 through 455. The statute provides an expansive scope of implied warranty and severely restricts the ability of a condominium developer to disclaim the implied warranty. The differences between the statutory warranty of habitability and the judicial warranty will be described below. The reader will soon appreciate that where our courts have generally been conservative in formulating the implied warranty, the legislature adopted an expansive implied

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<sup>2</sup> This paper does not discuss cooperatives since they are not common in Washington and there are no reported cases in Washington involving the implied warranty of habitability in a cooperative. A cooperative is another form of ownership in which a membership nonprofit corporation owns all of the real property. There are no areas for separate ownership. Instead, membership in the corporation gives one the right to occupy a portion of the property. Real Property Deskbook, 3<sup>rd</sup> ed., Vol. I, 1997, §15.4(1).

warranty in the Condominium Act. Whether or not it is proper, recent cases involving subdivision homes are finding guidance in the Condominium Act. This suggests that the courts will interpret the implied warranty more broadly in the future.

### III. *The Implied Warranty of Habitability for Subdivision Homes*

#### A. The Genesis of the Implied Warranty In Washington

The Supreme Court first announced the implied warranty of habitability in *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969). In that case, Mr. Thornton began construction of a custom house in northeast Seattle for a “young doctor” but the doctor backed out of the deal. Thornton continued with construction. One Homer House bought the home (or house)<sup>3</sup> when it was almost completed. The house was on a hillside. Thornton knew that a prior house on the lot had been removed due to the instability of the soils but his due diligence led him to believe that causes for the instability had been removed. Unfortunately, Thornton was wrong and ground water and slope movement caused significant structural problems in the new home (or house)<sup>4</sup>. Despite valiant efforts to correct the drainage issues, the Houses were forced to move out in less than two years.

The Houses sued for rescission based on fraud. The trial court found no fraud or deceit. Moreover, it found no proof of improper design, defective materials or an unworkmanlike job. The trial court did, however, grant rescission on the basis of fraudulent concealment.<sup>5</sup> The Supreme Court affirmed the judgment, but on entirely different grounds: it imposed an implied warranty of fitness in the sale of the house.

We apprehend it to be the rule 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.

*House*, 76 Wn.2d 428 at 436.

The court noted that two prior Washington cases recognized an implied warranty of fitness in a construction contract (as opposed to a sale of realty) when a contractor undertook to build a building on the land of another. See, *Hoye v. Century Builders*, 52 Wn.2d 830, 329 P.2d 474 (1958); *Fain v. Nelson*, 57 Wn.2d 217, 356 P.2d 302 (1960). The court stated however:

The rule of implied warranty of fitness covering new construction of the sale of a partially constructed building, although closely related to the sale of a brand-new residence, falls short of meeting the precise issues in the instant case.

*House*, 76 Wn.2d 428 at 434. In reality, the *Hoye* case was almost square with the *House* case, but the court was announcing its intention to push the envelope of caveat emptor. The *Hoye* court had simply exercised more restraint than the *House* court.

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<sup>3</sup> The author begs your pardon. He could not resist.

<sup>4</sup> The author promises not to do this again.

<sup>5</sup> See *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960) for the elements of this cause of action, which arises from the seller’s failure to disclose material information to the purchaser.

In *Hoye*, the defendant was a home builder who was selling new homes in a subdivision. Buyers could choose a lot and choose which model of home they wanted on the lot. *Hoye*, 52 Wn.2d 830 at 831. This was, obviously, the sale of a house. The builder argued that caveat emptor precluded any warranty on the sale of real property. The home buyer argued that it was a contract to construct a house. The builder replied that if the contract was characterized as a contract for construction services, there was not a “sale” so there could not be an implied warranty. *Id.* at 832-33.

The court assumed that caveat emptor would apply. It then held that a construction contract included an implied warranty of fitness of the plans and construction work that the builder furnished. Interestingly, the court relied in part on prior cases that impose a warranty of sufficiency on a party to a building contract who provides the plans for the building. See, *McConnell v. Gordon Const. Co.*, 105 Wash 659, 178 P. 823 (1919). This rule had been used by builders against owners when the plans are insufficient. Now, it was being used against builders on behalf of owners.

### **B. The Implied Warranty Is a Strict Liability Tort Doctrine**

A builder seller does not need to be negligent, misleading, in breach of contract or otherwise nefarious to be liable under the implied warranty. The sole question is whether the house is fit for its intended purpose of being lived in. In *House*, the court found that the builder-vendor had done nothing negligent, fraudulent or in breach of contract. Nevertheless, the court imposed liability.

Although the court found that the defendants were free of fraud and misrepresentation, and 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, and that they were innocent of any intentional wrong, the fact remains that they sold and turned over to plaintiffs a brand-new \$32,000 residence which turned out to be unfit for occupancy. 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. Although hindsight, it is frequently said, is 20-20 and defendants used reasonable prudence in selecting the site and designing and constructing the building, 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 of culpability, the defendants who built and sold the house were less innocent and more culpable than the wholly innocent and unsuspecting buyer. Thus, the old rule of caveat emptor has little relevance to the sale of a brand-new house by a vendor-builder to a first buyer for purposes of occupancy.

*House*, 76 Wn.2d 428 at 435-36.

In *Berg v. Stromme*, 79 Wn.2d 184, 484 P.2d 380 (1971), the court described the *House* case in these words:

We imposed a rule of strict liability holding the builder-seller to the principle that he was under a duty to supply a structure adequate in foundation and supporting terrain to be used by the buyer for the purposes for which the house and lot had been sold.

79 Wn.2d 184 at 196.

In *Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 725 P.2d 422 (1986), the court explained that the implied warranty was adopted as a matter of public policy, to protect the ordinary purchaser of a new home:

Many new houses are, in a sense, now mass produced. The vendee buys in many instances from a model home or from predrawn plans. The nature of the construction methods is such that a vendee has little or no opportunity to inspect. The vendee is making a major investment, in many instances the largest single investment of his life. He is usually not knowledgeable in construction practices and, to a substantial degree, must rely upon the integrity and the skill of the builder-vendor, who is in the business of building and selling houses. The vendee has a right to expect to receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence.

106 Wn.2d 714 at 719, citing *Peterson v. Hubschman Constr. Co.*, 389 N.E.2d 1154 (Ill., 1979).<sup>6</sup>

### **C. What is Warranted**

The cases addressing the scope of the judicially created implied warranty do not clearly describe the scope of the subdivision developer's warranty (read "duty") to the purchaser. One might conclude from reading the early cases such as *Hoye, House, Gay v. Cornwall*, 6 Wash. App. 595, 494 P.2d 1371 (Div. 2, 1972), and *Allen v. Anderson*, 16 Wn. App. 446, 557 P.2d 24 (Div. 1, 1976), that the warranty is a warranty of fitness for the intended use of habitation. In contrast, the Condominium Act contains three distinct warranties: a warranty of fitness, a warranty of

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<sup>6</sup> The implied warranty has its origin in tort. If the warranty had its origins in the contract of sale of real property, one would suspect it would be susceptible to the doctrine of merger in the deed.

<sup>6</sup> Section 445 also contains warranties that (i) the unit at conveyance will be in the same condition as it was at the time of contract, and (ii) existing uses in residential units, if continuation is contemplated by the parties, comply with applicable law. RCW 64.34.445(1) and (3).

merchantability and a warranty of code compliance. RCW 64.34.445(2)<sup>7</sup> Given the murkiness of the Washington common law jurisprudence, it is tempting to the developer to believe that the common law warranty is narrower than the statutory warranty. Even the early cases, however, announced the principles necessary for all three of the condominium warranties. The name “implied warranty of habitability” is misleading.

### **1. There Is a Warranty of Fitness.**

Our cases are clear that the implied new home warranty imposes a duty to supply a home that is fit for its intended purpose of habitation. In *Hoye*, the court imposed a warranty “that the completed house would be fit for human habitation.” *Hoye*, 52 Wn.2d 830 at 833. In *House*, the court described it thus: “A person of reasonable prudence would reasonably assume that the house is unsafe for occupancy, it is no longer fit for its intended purpose.” *House*, 76 Wn.2d 428 at 435. In *Klos v. Gockel*, 87 Wn.2d 567, 554 P.2d 1349 (1976), the court stated: “The gist of the implied warranty is that the resulting building will be fit for its intended use, *i.e.*, habitation.” 87 Wn.2d 567 at 571.

### **2. There May Be a Warranty of Merchantability**

Our cases are less clear about whether the implied new home warranty is also a warranty of merchantability. In *Frickel v. Sunnyside Enterprises, Inc.*, 106 Wn.2d 714, 725 P.2d 422 (1986) Justice Pearson (dissenting) stated: “As it now exists, the implied warranty is one of habitability.” 106 Wn.2d 714 at 732. Justice Pearson then argued to expand the warranty to include merchantability. *Id.* at 733. Many of our cases state that the warranty does not extend to defects in workmanship. In *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 745 P.2d 1284 (1987), the court stated:

*Klos* does not support an extension of the doctrine of implied warranty of habitability for mere defects in workmanship. The *Klos* court denied recovery to the plaintiffs holding that: “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.”

109 Wn.2d 406 at 417. The court in *Klos*, however, quoted the following passage from a North Carolina case, *Hartley v. Ballou*, 209 S.E. 2d 727 (1976):

If he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that . . . the dwelling . . . 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.

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<sup>7</sup> Section 445 also contains warranties that (i) the unit at conveyance will be in the same condition as it was at the time of contract, and (ii) existing uses in residential units, if continuation is contemplated by the parties, comply with applicable law. RCW 64.34.445(1) and (3).

*Klos*, 87 Wn.2d 567 at 570. Similarly, in *Hoye*, supra, the court quoted a South Carolina case, as follows:

It 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, and, if a party furnishes specifications and plans . . . he thereby impliedly warrants their sufficiency for the purpose in view.

*Hoye*, 52 Wn.2d 380 at 383, quoting *Hill v. Polar Pantries*, 64 S.E.2d 885 (1951). These authorities impose a warranty of merchantability (workmanship) and seem at odds with the statement in *Stuart*.

However, in an unpublished opinion captioned *Erikson v. Reynolds*, 2002 WL 31630815,<sup>8</sup> Division II of the Court of Appeals dismissed a breach of implied warranty claim on the grounds, among other things, that the implied warranty does not include a warranty of workmanlike quality. *Id.* at 2. Thus, although it seems logical that defects in workmanship that affect the habitability of the house are covered, there is no clear guidance on issues of simple workmanship outside the condominium context. For condominiums, however, as discussed below, there is a clear warranty of workmanship.

### **3. There May Be a Warranty of Code Compliance.**

Our cases have stated that the implied warranty is also a warranty of compliance with at least some building codes. In *Allen v. Anderson*, supra, the court approved the following jury instruction, stating that it “finds support in *Klos v. Cockle*”:

When a builder sells a new building which he has constructed, there is an implied warranty to the purchaser that the building was built in compliance with local building codes and ordinances.

*Id.* at 448. The opinion in *Klos v. Gockel*, however, says nothing about code compliance.

This statement in *Allen* could not be dismissed, however, after *Atherton Condominium Apartment Owners Association Board of Directors v. Blume Development Company*, 115 Wn.2d 506, 522, 799 P.2d 250 (1990). In that case, the court dismissed arguments that the implied warranty only applied to defects which made the homes presently unsafe. It held that the alleged defects, which were failures to comply with building code provisions relating to fire resistance, violated the implied warranty:

The alleged building code violations are neither trivial or aesthetic concerns, nor those involving procedural breaches. Rather, the alleged building code violations concern fundamental fire safety provisions regarding the construction of Atherton’s floors and ceilings. As such, the alleged defects are within the purview of the

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<sup>8</sup> Remember that unpublished opinions have no precedential value in court.

implied warranty of habitability and should not have been dismissed on summary judgment as a matter of law.

*Atherton* seems to stand for the proposition that building code violations violate the warranty of habitability if they render the home unfit for its intended use. The court did not, however, take pains to thus limit its holding.

While it appears that Washington only recognizes an implied warranty of habitability, other jurisdictions recognize warranties of merchantability and code compliance. The seeds of those additional warranties are planted in our case law, however, and, as will be discussed below those additional warranties are already set forth in our Condominium Act. Developers may one day have to eat the fruit of those seeds if the court expands the implied warranty.

#### **D. The Elements of a Claim For Breach**

As developed by the courts since *House*, a claim for breach of the implied warranty requires: (i) a buyer who is the first occupant of (ii) a new home purchased from (iii) a seller who is a commercial builder, and (iv) defects that render the home unfit for its intended purpose of habitation. *E.g., Burbo v. Harley C. Douglass, Inc.*, 125 Wash. App. 684, 693, 106 P.2d 258 (Div. 3, 2005). This paper examines these elements in the following sections.

##### **1. Who Qualifies As a Purchaser/Occupant?**

In *House*, the court stated:

We apprehend it to be the rule 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.

76 Wn.2d 428 at 436. The warranty does not extend to the first purchaser. It extends to the first intended occupant.

A number of later decisions state that the plaintiff must purchase the home from the builder. For example, in *Vigil v. Spokane County*, 42 Wash. App. 796, 714 P.2d 692 (Div. 3 1986), the court stated:

To prove a cause of action for breach of the implied warranty of habitability, a plaintiff must show that he was the first purchaser-occupant of the dwelling, he bought it from the builder, and the alleged defect rendered the dwelling unfit for occupancy.

42 Wash. App. 796 at 800. This is incorrect. Although there is a requirement for a sale, there is no requirement of a sale from the builder to the first occupant.

In *Gay v. Cornwall*, *supra*, Elmo Cecil Willoughby, a builder, agreed to build a house on a lot owned by a party named Childs. After construction began, Childs sold the lot to Cornwall. Prior to completion, Cornwall sold the lot to Gay. Gay had no written contract with Willoughby. Her contract was with the Cornwalls. Elmo Cecil Willoughby argued that there could be no warranty without privity. The court stated:

We hold that in the instant situation, privity between plaintiff and defendant builder is not a prerequisite to imposing liability on that builder whose completed product is unfit for the purpose contemplated by the parties. . . . There is no dispute that Mrs. Gay, the plaintiff, was the first to occupy the premises, and, though she was not its first purchaser, she was, nevertheless, the first purchaser-occupant of the house.

6 Wash. App. 595 at 597-98. The warranty flows to the first person to purchase and occupy the house, whether that person bought the house from the builder or not. Even though the implied warranty sounds in contract, it does not arise from the contract. Therefore, there is no requirement for privity between the builder-vendor and the purchaser-occupancy.

It is worth noting however, that although privity is not required, the warranty does not extend to subsequent purchaser/occupants. Our courts have not accepted invitations to expand the warranty to subsequent occupants of the home. In *Frickel*, supra, the dissenters urged the court to expand the warranty to subsequent purchasers. 106 Wn.2d 714 at 729-30. One year later, in *Stuart v. Coldwell Banker*, supra, the Supreme Court rejected that invitation, stating that it had not been anxious to extend the implied warranty beyond its present boundaries. 109 Wn.2d 406 at 415.

A number of other states have extended the implied warranty to subsequent purchasers either judicially or by statute. See, the unpublished opinion in *Hansen v. Residential Development, Ltd.*, 2005 WL 1871127 (Division I, 2005) in which subsequent purchasers of a home urged the court to extend the warranty to subsequent purchasers. *Id.* at 2. The *Hansen* court grudgingly refused to do so on the basis of stare decisis. *Id.* at 3. We do not, however, have to look outside the state to find an extension of the implied warranty to subsequent purchasers.

As discussed below, the implied warranties of Washington Condominium Act flow to subsequent owners, not just the first owners.

## **2. What Constitutes a New Home?**

The implied warranty only attaches to new homes. In *Klos v. Gockel*, supra, the court stated:

It is true that for purposes of warranty liability, the house purchased must be a 'new house,' but this is a question of fact. The passage of time can always operate to cancel liability, but just how much time need pass varies with each case.

87 Wn.2d 567 at 571.

We have two cases in Washington where purchasers of apartment buildings asserted a breach of the implied warranty of habitability. It seems obvious that a purchaser of an apartment building is in a different situation than a home buyer. First, the apartment buyer generally is not buying the building as a home but as an investment. Second, apartments are not mass produced and sold in the same

manner as homes. Finally, apartment purchasers, given the amount of money involved, sophistication of the parties and participation of lawyers, are generally in a better position to know about the risks of construction and to protect themselves from those risks. The courts have recognized these factors but have failed to clearly rely on the first factor: that the buyer is not purchasing as a residence.

In *Allen v. Anderson*, supra, the Andersons built (apparently, they built it themselves) a 4-unit apartment building with the intention of living in one unit and renting the others. They never listed it for sale. The Allens made an unsolicited offer to buy it after considering renting one of the units. 16 Wn. App. 446 at 447. After discovering defects in the building, the Allens sued for breach of implied warranty. The case went to a jury and the court gave the following two jury instructions:

When the builder of a new building sells it to a purchaser, he impliedly warrants that the foundations supporting it are firm and secure and that the building is structurally safe for human occupancy.

When a builder sells a new building which he has constructed, there is an implied warranty to the purchaser that the building was built in compliance with local building codes and ordinances.

*Id.* at 448. Both instructions refer to “a new building” rather than a new home. The jury found for the Allens and the court entered judgment for \$2,500. (The level of damages suggests that this might not have really been an uninhabitable structure).

On appeal, the court affirmed the first instruction based on *House*. It affirmed the second, saying it “finds support in *Klos v. Gockel*.” This holding is baffling because there is no support for a warranty of code compliance in *Klos*, which does not even mention building codes.

*Allen* is a troubling case for two reasons. First, it completely overlooks the fact that the building was not a home. The trial court committed error by instructing the jury that the warranty applied to all buildings.<sup>9</sup> The court seems to have completely overlooked the fact that no home was involved.

Second, although the court discussed the issues of whether the Allens were in the business of building and selling homes and whether this building was built for sale, the court also dismissed a claim under the Consumer Protection Act, holding that this was an isolated sale with no impact on the public interest. *Id.* at 447. If it was an isolated, one-time sale, how could the Andersons be in the business of building and selling apartments? The *Allen* case is troublesome for its neglect of obvious issues and its lack of clarity.

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<sup>9</sup> Ten years later, in *Frickel*, supra, the dissenters argued that the implied warranty should be extended beyond new homes to include all buildings. 106 Wn.2d 714 at 723. Perhaps they had not read *Allen*.

In *Frickel v. Sunnyside*, supra, Frickel bought a 40-unit apartment complex from Sunnyside. Sunnyside was a builder of apartments for its own account. This building was not built for resale and was not on the market. The buyer's realtor approached the sellers and negotiated a sale. The lawyers negotiated a contract. *Id.* at 715-16.

The court held that the implied warranty did not apply because the building was not built for the purpose of sale. *Id.* at 718-19. The court then rejected an invitation to extend the warranty to these facts. It reasoned that public policy was different in this scenario because there was not an unequal bargaining position, and because the seller had not held the building out for sale, and because the sale contract was not a contract of adhesion. *Id.* at 425-26. Curiously, the court took the trouble to state:

We do not hold that an implied warranty of habitability can never attach to the sale of an apartment complex. Rather we hold that such warranty does not exist under the facts of this case.

*Id.* It is not clear why the court kept this door unlocked.<sup>10</sup>

### **3. Who is a Commercial Builder?**

In *Hoye*, the defendant was a home builder who sold lots and built the homes from plans offered to and chosen by the buyer. *Hoye*, 52 Wn.2d 830 at 831. In *House*, the defendant was a partnership between a real estate broker and a contractor. *House*, 76 Wn.2d 428 at 429. They agreed to build the house for a customer. *Id.* Although defendants in these cases were both in the business of selling homes, neither court limited the implied warranty to commercial builder-vendors.

In *Klos v. Gockel*, however, the court took up that issue. Mrs. Gockel was the widow of a house builder. She had worked in the family business. It was their practice to buy several lots, build on one lot, occupy the first house until they had completed homes on the remaining lots then sell the first home. When her husband died, she stated that she would retire, but she built three homes and occupied one of them. She did not contemplate selling this house and lived in it for a year. During the year, however, she fell down the stairs twice and decided to build a rambler. At that time, the other two houses had been sold. *Id.*

After selling the house, there were issues with soil subsidence. In reversing a judgment for the plaintiffs based on the implied warranty, the court stated:

The essence of the implied warranty of suitability or habitability 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.

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<sup>10</sup> Perhaps the majority also failed to read *Allen*.

*Id.* at 570. The court found that her intention in building the house was to live in it. It held that the seller's contemplation of eventual sale was not enough to impose the warranty.

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. . . . Nothing in appellant's conduct . . . should have created any sort of belief by respondents that this was a commercial sale.

*Id.* at 570-71.

In *Allen v. Anderson*, *supra*, the Andersons built (apparently, they built it themselves) a 4-unit apartment building with the intention of living in one unit and renting the others. They never listed it for sale. The Allens made an unsolicited offer to buy it after considering renting one of the units. 16 Wn. App. 446 at 447. After discovering defects in the building, the Allens sued for breach of implied warranty. The court stated that the implied warranty requires the vendor to be a commercial builder and the structure to be built for sale, not personal use. *Id.* at 448. Because the trial court had not resolved either of these factual questions, the court reversed and remanded for resolution of those issues. *Id.*

In *Boardman v. Dorsett*, 38 Wash. App. 338, 685 P.2d 615 (Div. 3 1984), the Dorsetts agreed to buy a house built by Mr. Boardman. The buyers were dissatisfied with the quality of the house and refused to release \$1,000 that had been held back at closing. The seller sued to collect and the buyers counterclaimed for breach of the implied warranty. The court dismissed the counterclaim on the ground that Mr. Boardman was not a commercial builder. It noted that he was not a licensed contractor and had only built one other house-which was his family home. 38. Wash. App. 338 at 341-42.

#### **4. What Defects Render A Home Unfit For Habitation?**

We have no clear guidelines as to what will violate the warranty. Instead we have examples which serve to set rough boundaries. In *Atherton*, *supra*, the court stated:

The entire realm of defects which are within the purview of this implied warranty has not been precisely defined. Instead, 'a more precise definition of the scope of this warranty must await delineation on a case by case basis.'

116 Wn.2d 506 at 519. Whether a defect renders a home unfit for habitation is an issue of mixed law and fact for the jury to decide. In *Burbo*, *supra*, the court stated:

Whether the implied warranty of habitability accommodates a particular construction defect must be resolved on a case-by-case basis. That is, we follow the general rule that the applicability of an

implied warranty to a particular set of facts is a mixed question of law and fact to be determined by the trier of fact.

125 Wash. App. 684 at 694.

***a. The Home Does Not Have to Be Uninhabitable.***

It is clear that the house does not have to be unlivable to be unfit. A number of defendants have argued that there was no violation of the implied warranty because the buyer could still live in the house. This argument is frequently based on *Klos v. Gockel*, supra. In that case the yard surrounding the house settled and slipped although the house, which was constructed on pilings, did not. In holding that there was no breach of the implied warranty, the court noted, among other things, that the buyers had not moved out of the house. *Klos*, 87 Wn.2d 567 at 571.

In *Luxon v. Caviezel*, 42 Wash. App. 261, 710 P.2d 809 (1985) (overruled on other grounds) the court put to rest the notion that the buyer must move out. In that case the house suffered from water seepage and from an inadequate septic system. The septic system was designed for a two bedroom house, but the house was sold as a four bedroom house. Relying on an Oregon case, the court held that the septic defects violated the implied warranty, presumably because the system backed up and overflowed. As to the seepage, the trial court found that a portion of the residence was impaired by the seepage and that it was unhealthy. The court found that the defects violated the implied warranty. The court stated:

While the Supreme Court in *Klos* . . . attaches importance to the purchasers having not moved out of the house, the case does not specifically require a purchaser to leave a home before breach of the implied warranty of habitability can be proved.

42 Wash. App. 261 at 266.

In *Burbo*, supra, the house suffered from a leaky roof and structural problems. The buyer never moved out. The court framed the issue before it as whether breach of the implied warranty requires that the house be literally unlivable. 125 Wash. App. 684 at 689. It answered the question thus:

We have rejected the notion from *Klos* that a homeowner must have moved out of the house in order to prevail on an implied warranty of habitability.

*Id.* at 697.

In a similar vein, our courts hold that the house does not need to be presently unsafe. In *Atherton*, supra, the owners in a condominium project claimed that various defects violated the one-hour fire resistivity standards and profoundly affected the safety of the building in a fire. 115 Wn.2d 506 at 512. The court below dismissed their claims stating that although the building may be less safe in a fire than it should be, on an everyday basis, it could still be used for its intended purpose. *Id.* at 519. On appeal the developer argued that since the

defects were neither egregious nor structural, the warranty was not violated. *Id.* at 520. The Supreme Court rejected both of these arguments noting that the conditions rendered affected the fundamental safety of the dwellings. *Id.*

***b. Conditions Outside The Home Itself Are Covered if They Affect The House.***

The implied warranty covers conditions outside the house that affect the house. In *House*, the house was properly designed and built but the soils and groundwater affected the stability of the slope. 76 Wn2d 428 at 430-31. These conditions violated the implied warranty. On the other hand, in *Klos*, there were also slope stability issues. In that case, however, the lot had been excavated and foundation of the house was built on pilings. Consequently the house was hardly affected by the slope movement. 87 Wn.2d 567 at 569. The court held that the house was habitable. *Id.* at 571.

In *Stuart v. Coldwell Banker*, *supra*, the owners of condominium units sued the builder-vendor for breach of implied warranty of habitability due to defects in the design of exterior decks and walkways that exposed them to rot. The project was built on a hillside and for some units the walkways were the only way means of ingress and egress. The court stated:

The warranty does not provide recovery for defects in exterior, nonstructural elements adjacent to the dwelling unit. . . In the case at bar, some of the damaged areas were decks, similar in use to the patio area in *Klos*. Others were walkways that may have comprised the sole means of access to the apartments, although the record fails to make this clear. As to the access walkways, one could plausibly argue that the defects occurred in an essential portion of the dwelling unit itself.

109 Wn.2d 406 at 416-17. The court remanded the case to the trial court for a determination of which walkways were so impaired that the sole means of access to the unit was dangerous. The issue is whether the exterior defect affects the use of the home.

***c. The Defects Don't Need To Be Egregious But Must Be More Than Mere Defects In Workmanship***

In *Atherton*, *supra*, the court rejected the argument (based on language in earlier cases such as *Stuart*) that the warranty was only breached if the defects were 'egregious.' It stated:

The interpretation of the implied warranty at issue here has been left to a case-by-case basis. In a vacuum, strongly worded phrases like 'egregious defects' could easily be construed as unnecessarily constrictive. However, as is frequently the case in appellate interpretation, applying earlier formulas in a new factual context creates new shading, new shadows.

116. Wn.2d 506 at 520. The court also stated, however that the warranty does not extend to mere defects in workmanship or require a perfect dwelling. *Id.* at 522. As will be explained below, in the context of the Condominium Act, mere defects in workmanship are covered.

**d. Some Building Code Violations Are Covered**

In *Atherton*, *supra*, the court also stated that some violations of building code could violate the implied warranty. It noted that other courts have imposed liability for “fundamental deviation” from the building code, but not for “procedural” or “aesthetic” code violations. *Id.* at 524. It held that the violations in the building were fundamental. The opinion is not helpful in explaining what code violations violate the warranty because there are no standards for what is fundamental. From the fact that only some deviations from code violate the warranty, it should be clear that the implied warranty does not contain a warranty of building code compliance. Perhaps the best way to analyze the issue would be to ask whether the building code violations render the house unfit for its intended purpose of habitation. That is, after all, the warranty at issue.

**IV. The Implied Warranties in Condominium Sales**

**A. The Warranties Imposed on Condominium Builders Include Habitability and Merchantability**

The Condominium Act codifies an implied warranty as to condominiums. Those warranties are broader than the judicial warranties. The implied warranties are set forth in Section 445, “Implied Warranties of Quality”, which states, in relevant part:

- (1) A declarant and any dealer warrants that a unit will be in at least as good condition at the earlier of the time of the conveyance or delivery of possession as it was at the time of contracting, reasonable wear and tear and damage by casualty or condemnation excepted.
- (2) A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be:
  - (a) Free from defective materials;
  - (b) Constructed in accordance with sound engineering and construction standards;
  - (c) Constructed in a workmanlike manner; and
  - (d) Constructed in compliance with all laws then applicable to such improvements.
- (3) A declarant and any dealer warrants to a purchaser of a unit that may be used for residential use that an existing use, continuation of which is

contemplated by the parties, does not violate applicable law at the earlier of the time of conveyance or delivery of possession.

(6) Any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality.

The statute contains four separate implied warranties. Section 1 imposes a warranty that the unit will be in at least as good a condition at closing as it was at time of contracting. While this warranty might apply to new construction, it appears that it cannot apply when units are sold before construction. We will not focus on this warranty.

Section 3 imposes a warranty that an existing residential use is legal. This warranty is not likely to apply to new construction since it only applies to existing uses. It is not clear whether this is intended to apply to disallowed uses only or whether it applies to nonconforming uses. We will not focus on this warranty.

Section 2 imposes a warranty of habitability and a warranty of merchantability. The warranty of habitability is similar to the judicial warranty of habitability. Note that it applies to the entire condominium. The warranty of merchantability is essentially a warranty of workmanship and code compliance (although it also includes additional warranties). Unlike the warranty of habitability, the warranty of merchantability only applies to improvements constructed by or for the declarant.

While the judicial implied warranty appears only to be a warranty of fitness, the condominium warranty is of fitness and merchantability. While the judicial warranty of fitness applies only to new homes, the condominium warranty of fitness applies to existing condominiums. While there is probably not (yet) a judicial warranty of merchantability, there is a condominium warranty of merchantability that only applies to the parts of the home constructed by the declarant.

**B. The Implied Warranties Flow to All Purchasers of the Unit.**

Section 6 of the Condominium Act makes it clear that the implied warranties flow to subsequent purchasers of the unit. The builder's liability exposure only ceases with the statute of repose and statute of limitations. As noted, below, the Condominium Act has a four year statute of limitations and clear rules for accrual of causes of action. This is very different from the judicial warranty which only flows to the first purchaser and which is subject to a three-year statute of limitations and, arguably, the construction statute of repose.

**C. The Implied Warranties Are Not Limited To Commercial Builders.**

One other difference between condominiums and subdivision warranties should be pointed out. While the judicial warranty only applies to commercial builders, the condominium warranties apply to the "declarant". The declarant is the person who creates the condominium. RCW 64.34.020(13). There is no requirement that the declarant be a builder. Thus, the declarant in a conversion of an existing

building is subject to the implied warranties. Note, as well, that there is no requirement that a declarant be in the business of creating condominiums.

#### **D. What Standards Apply To The Implied Warranties?**

The warranties of workmanship and code compliance have been of special concern to condominium developers because they are so much broader and all encompassing than the warranty of fitness. Developers need to bring predictability to their warranty exposure. Having a statutory warranty that is decided by a jury is hardly predictable. Thus, developers sought to bring predictability to their transactions.

In *Park Avenue Condominium Owners Association v. Buchan Development, L.L.C.*, 117 Wash. App. 369, 71 P.3d 692 (Div. 1, 2003), the developer argued that the warranties of workmanship and code compliance (and compliance with sound engineering and construction practice) amounted to a warranty of perfection and should only apply to “material” defects. The court rejected that argument, holding that any code violation violated the warranty.

The warranty as to quality of construction for improvements made or contracted for by the declarant . . . is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the condominium suitable for ordinary purposes of real estate of its type.

117 Wash. App. 369 at 380. In response to this ruling, the legislature amended the Condominium Act by adding the following language to RCW 64.34.445:

(7) In a judicial proceeding for breach of any of the obligations arising under this section, the plaintiff must show that the alleged breach has adversely affected or will adversely affect the performance of that portion of the unit or common elements alleged to be in breach. As used in this subsection, an “adverse effect” must be more than technical and must be significant to a reasonable person. To establish an adverse effect, the person alleging the breach is not required to prove that the breach renders the unit or common element uninhabitable or unfit for its intended purpose.

Laws of 2004, Chap 201, Section 5. This language does not affect the warranty of fitness since those defects by definition adversely affect the usefulness of the home. As to the warranties of workmanship and code compliance, it overturns *Park Avenue* and requires that the defect have an impact on the owner.

#### **V. What Measure of Damages Applies?**

In *Gay, Luxon, and Eagle Point Condominium Owners Assn. v. Coy*, 102 Wash. App. 697, 9 P.3d 898 (Div. 1, 2000), the court awarded damages for the cost of repairs. In *Allen* the court stated: “The correct measure of damages for breach of warranty is the cost of repair, not the difference in value before or after.” 16 Wash. App. 446 at 449. In *Hoye*, however, the court stated that the measure of damages was the difference in value of the

house caused by the damages. 52. Wash. 2d 830 at 835. It appears that *Hoye* should not be relied upon for this point.

In *Park Avenue Condominium Owners Association v. Buchan Developers, LLC*, supra, the court held that the “Eastlake Construction” rule (the cost of repair should not be awarded if the cost is clearly disproportionate to the loss in value caused by the defective condition) applied to breach of implied warranty claims under the Condominium Act. This rule normally applies to breach of contract claims. The court held it should apply to breach of implied warranty as well. 117 Wash. App. 369 at 386.

The Condominium Act was amended after the *Park Avenue* case<sup>11</sup> to codify the Eastlake rule. RCW 64.34.445 (8) states:

Proof of breach of any obligation arising under this section is not proof of damages. Damages awarded for a breach of an obligation arising under this section are the cost of repairs. However, if it is established that the cost of such repairs is clearly disproportionate to the loss in market value caused by the breach, then damages shall be limited to the loss in market value.

In *Brickler v. Myers Construction, Inc.*, 92 Wash. App. 269, 966 P.2d 335 (1998), the court affirmed a jury award for breach of the implied warranty consisting of cost of repairs, diminution in value and loss of use of the home. 92 Wash. App. 269 at 272-73. The courts will attempt to make the buyer whole.

The damages available under the Condominium Act, however, appear more limited. The Condominium Act states:

The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by any other rule of law.

RCW 64.34.100. In *Park Avenue*, supra, after noting that this section sets forth the general common law rule for contract damages, the court stated:

Except for the express exclusion of consequential damages, nothing in the WCA indicates any intent to alter the common law damages calculation.

117 Wash. App. 369 at 385-86. It would appear that diminution in value and loss of use damages, such as allowed in *Brickler*, are not available under the Condominium Act.

Finally, it is worth remembering that in 1969 the *House* court affirmed a judgment for rescission and damages based on the implied warranty. 76 Wn.2d 428 at 431. It does not appear that any decisions have subsequently addressed the availability of rescission as a remedy for breach of the implied warranty.

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<sup>11</sup> Laws 2004, ch. 201, § 5. Also known as “Senate Bill 5536”.

## **VI. *The Availability of Attorneys' Fees For Breach***

Most purchase and sale agreements contain an attorneys' fee provision. But the implied warranty is a tort concept that arises from the sale<sup>12</sup>, not the contract.<sup>13</sup> It would seem logical, therefore, that attorneys' fees would not be available to a prevailing home buyer.

In *Brickler*, supra, however, Division II of the Court of Appeals held that, "for purposes of attorneys' fees", the implied warranty arose from the contract. 92 Wash. App. 269 at 273. The court's explanation makes little sense: it relies on the fact that the cause of action is called an "implied warranty" in the contract. That argument was previously disposed of by *Gay* and *Pruitt*.

In *Burbo*, Division III followed suit, citing *Brickler*. The court awarded attorney's fees to the home owner, stating:

Attorney fees are awarded only pursuant to contract, statute, or a recognized ground of equity...The warranty of habitability exists independently of any express terms of the contract for sale. It arises by implication from the sale transaction itself. But the implied warranty of habitability is an implied-in-law term of the contract for sale for the purposes of attorney fees. Here, the purchase and sale agreement provides for attorney fees to the prevailing party in any dispute arising from the sale, including an implied warranty claim.

125 Wash. App. 684 at 701-02.

*The Condominium Act allows for an award of attorney's fees to a prevailing party. RCW 64.34.455. Since the implied warranties are set forth in the Condominium Act, a fee award is available to a prevailing party. See, Eagle Point, 102 Wash. App. 697 at 716.*

## **VII. *What is the applicable Statute of Limitations***

Are claims for breach of the implied warranty of habitability governed by the six-year statute of limitations for breach of written contract? That statute applies to an "action upon a contract in writing, or *liability* express or *implied* arising out of a written agreement." RCW 4.16.040(1). In *Donovan v. Pruitt*, 36 Wn. App. 324, 674 P.2d 204 (1983) the court held that the six-year statute did not apply because the implied warranty is founded on a common law duty of strict liability to the first purchaser-occupant, not the contract. It stated:

Plaintiffs contend the 6-year statute, RCW 4.16.040(1) applies because this is an "action upon a contract in writing or *liability* express or *implied* arising out of a written agreement." We disagree. . . . The warranty did not arise out of any document evidencing the sale; rather, it came into existence by operation of law by virtue of a common law duty of strict liability that the builder-seller owed to the first purchaser-occupant.

In *Bicknell v. Garrett*, 1 Wash.2d 564, 96 P.2d 592 (1939), the court declared that not every liability contractual in nature is governed by this 6-

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<sup>12</sup> *Donovan v. Pruitt*, 36 Wash. App. 324, 674 P.2d 204 (1983).

<sup>13</sup> Thus, as noted above, privity is not required and, as noted below, the three-year statute of limitations applies.

year statute. The court explained that the statute applies to: “Liabilities which are either expressly stated in a written agreement or which follow by natural and reasonable implication from the promissory language of the agreement, as distinguished from liabilities created by fictional processes of the law or imported into the agreement from some external source. . .

*Donovan*, 36 Wash. App. 324 at 327-8. Thus, even though the cause of action sounds in contract, it does not arise from the contract.

The *Donovan* Court did not decide whether the two-year or three-year statute of limitations applied because the plaintiff failed both tests. Two years later, in *Vigil*, supra, the parties conceded at trial that the three-year statute applied to the plaintiff’s implied warranty claim. 42 Wn. App. 796 at 799. The court added in dicta, however, that the three-year statute would apply.

In *Stuart*, supra, the court held that the three-year statute of limitations of RCW 4.16.080(2) applied to claims for breach of the implied warranty. In *Stuart* the owners of condominium units sued the builder-vendor for breach of implied warranty of habitability due to defects in the design of decks and walkways that exposed them to rot. A number of unit owners experienced problems with the decks, and made claims to the condominium association within the first years after buying their units. The board attempted to deflect the owners’ claims, but then decided to sue on behalf of the owners. The board filed suit almost five years after the last unit was sold by Coldwell Banker and more than three years after it had consulted an attorney about the situation. *Id.* at 409-10. It is important to note, however, that *Stuart* involved a multi-phase condominium where decks failed at different times. The court remanded the case with instructions to determine which owners, if any, discovered the elements of their claim within three years of commencing the action.

The statute of limitations is longer for condominiums. For claims arising under the Condominium Act, the applicable statute of limitations is four years. RCW 64.34.452(1).

## **VIII. Does the Statute of Repose Apply to Implied Warranty Claims**

### **A. When does the cause of action accrue**

A cause of action for breach of contract typically accrues at the time of breach. See e.g., *Taylor v. Puget Sound Power & Light Co.*, 64 Wn.2d 534, 537-8, 392 P.2d 802 (1964). A cause of action for a tort accrues at the time of injury unless the plaintiff was ignorant of the injury at the time of the injury. In that case, the cause of action accrues at the time the plaintiff knew or should have known the essential elements of the cause of action. *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985).

But if there is a gap between the injurious act and the plaintiff’s knowledge of the injury, the discovery rule may apply, in which case the statute of limitations accrues at the time the homeowners actually knew or reasonably should have known of the defects that comprised the elements of their causes of action.

*Will v. Frontier Contractors, Inc.*, 121 Wash. App. 119, 124-25, 89 P.3d 242 (2004), citing *Stuart*, 109 Wn.2d at 415. In *Will*, the court dismissed a cause of action for the implied warranty for flooding because the plaintiff waited over three years from the flooding. The cause of action accrues when the plaintiff discovers or should have discovered the elements of the cause of action, not when he realizes he has a right to sue.

Under the Condominium Act a claim relating to a unit accrues, regardless of the purchaser's lack of knowledge, on the date the first purchaser enters into possession.<sup>14</sup> In regard to a common element, it accrues on the latest of the date the first unit was conveyed to a bona fide purchaser, the date the common element was completed, or the date the common element was added to the condominium. RCW 64.34.452(2)(b). If, however an implied warranty extends to future performance or duration of any improvement or component, the cause of action accrues upon discovery of breach or the end of the warranty period, whichever is earlier. RCW 64.34.452(3).

### **B. Does the Statute of Repose Apply?**

A statute of repose limits when a cause of action can accrue. Washington has a statute of repose for claims relating to construction. The statute states:

All claims or causes of action as set forth in RCW 4.16.300 shall accrue, and the applicable statute of limitation 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.

RCW 4.16.310. If a cause of action has not accrued within the time period of the statute, it is barred. If it has accrued by that time, the statute of limitations begins to run from the date of accrual.

In *Donovan v. Pruitt*, supra, the Court held that the statute of repose applied to a breach of implied warranty claim, stating:

Those statutes declare unequivocally that they "apply to all claims or causes of action of any kind . . ." against a person who constructed "any improvement upon real property."

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<sup>14</sup> If a non-possessory interest is conveyed, the claim accrues on delivery of the instrument of conveyance. RCW 64.34.452(2)(a).

36 Wn. App.324 at 326.<sup>15</sup>

Six years after *Donovan*, the Supreme Court delivered an opinion in *Pfeifer v. City of Bellingham*, 112 Wn.2d 562, 772 P.2d 1018 (1989) that calls the validity of *Donovan*'s holding in question.

In *Pfeifer* a builder constructed and sold condominium units. Seven years later a fire broke out and the plaintiff, who leased a unit, was injured when she jumped out of her window. The plaintiff sued for negligent concealment of defects.<sup>16</sup> The issue before the court was whether the statute of repose barred her claims. The court noted that statute only applied to claims "arising from" the person having engaged in construction. It held that the statute of repose did not apply because the cause of action arose from the sale, not from the construction. 112 Wn.2d 562 at 568.

The reasoning of this case could be applied to the implied warranty since the courts have indicated that the warranty arises from the sale of the house.

One other point bears mention. The last sentence of RCW 4.16.300 states:

This section is specifically intended to benefit persons having performed work for which the persons must be registered or licensed under RCW 18.08.310, 18.27.020, 18.43.040, 18.96.020, or 19.28.041, and shall not apply to claims or causes of action against persons not required to be so registered or licensed.

The last sentence of this section was added in 1986 to prevent product manufacturers from escaping product liability.<sup>17</sup> This sentence suggests that the statute does not apply to developers who are not licensed as contractors.

## **IX. *Strategies for Builders to Deal with Warranties***

### **A. Disclaimer of the Implied Warranty**

#### **1. Disclaimers of Implied Warranties Are Allowed but Disfavored**

Our courts have held in a number of cases that disclaimers of implied warranties are allowable, but are disfavored. The cases require that the disclaimers be negotiated or "bargained for," that they be conspicuous and that they be particular.

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<sup>15</sup> RCW 4.16.300 states, in relevant part: "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."

<sup>16</sup> Restatement (Second) of Torts, Section 353 (1965). "A vendor of land who conceals or fails to disclose to his vendee any condition . . . which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee. . . for physical harm caused by the condition after the vendee has taken possession if . . ."

<sup>17</sup> Laws of 1986, Chap 305, Section 703.

The case of *Berg v. Stromme*, 79 Wn.2d 184, 484 P.2d 380 (1971), is useful because it thoroughly states the public policies governing waiver of implied warranties. Mr. Berg wanted a car with enough oomph to tow his horse trailer. He discussed this with his Pontiac dealer who recommend a Pontiac Safari wagon. Mr. Berg ordered the wagon with a large engine and numerous other options. In fact, the options cost almost as much as the base model car. The Safari had numerous problems and Mr. Berg sued for breach of the implied warranty of merchantability. The dealer argued that the warranty had been disclaimed in the written contract of sale signed by Mr. Berg

The disclaimer was contained in fine print on the back side of the contract. The court described it as “a solid mass of even sized and style of printing from top to bottom divided in two columns . . . without indentation for paragraphing.” 79 Wn.2d 184 at 191. There was no place to sign or initial the back side. The court pointed out that although the parties discussed Mr. Berg’s needs and how to meet them, they never discussed the waiver of warranties.

The court held there was an implied warranty of fitness in the new car (citing *House* as persuasive authority!) and that a disclaimer of the implied warranty would not be effective unless it was:

Explicitly negotiated between buyer and seller and set forth with particularity showing the particular qualities and characteristics of fitness which are being waived.

*Id.* at 196. The concept of “explicit negotiation” is not an easy concept to apply in situations such as a car sale or new home sale where the builder requires the buyer to use the seller’s form. It does not mean that the seller or the buyer must concede a negotiating point. Neither the Uniform Commercial Code<sup>18</sup> nor the Condominium Act<sup>19</sup> require that. Instead it means that the disclaimer will not be effective where neither party referred to it in the portion of the contract they reviewed, discussed or signed:

Such waiver, even though printed, should not be allowed to arise from the fine print to haunt the buyer of a new car unless he has agreed to be bound by it with the same degree of explicitness that he bound himself to the other vital conditions of the contract of purchase.

*Id.* at 193-94. The Seller does not have to budge from its refusal to make an implied warranty, but it must make the disclaimer conspicuous, specific and meaningful to the buyer.

Parties to an agreement may make any contract that comports with general law, and if a seller positively and expressly refuses to give any warranty, and the contract is not induced by fraud, no warranty of any

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<sup>18</sup> See RCW 62A.2-316(3)(a) stating that all implied warranties are excluded by terms like “as is” and makes plain there is no implied warranty.

<sup>19</sup> RCW 64.34.450 allows disclaimer of implied warranties in nonresidential settings with words like “as is” and allows disclaimer of specific defects if conspicuous, separately signed, and if particular about the defects and their impact.

kind can be implied by law. (citations omitted). But to come within these principles, the burden is upon the dealer to show with particularity just what the buyer is waiving, that is, which particular defects or conditions the purchaser of a brand new automobile waives. . . Thus, in the sale of a brand new automobile, there does exist an implied warranty of fitness. . . The parties may agree to do more or to do less, but unless there is proof of explicit departure from this norm, the presumption is that the dealer intended to deliver and the buyer intended to receive a reasonably safe, efficient and comfortable brand new car.

*Id.* at 194-95.

In *Olmsted v. Mulder*, 72 Wash. App. 169, 863 P.2d 1355 (1993) Olmsted bought an existing house from Mulder. The septic system failed but not before it contaminated the domestic well, which also went dry. The pre-printed purchase agreement contained warranties that the septic system was in good working order and that the well provided an adequate supply of household water. The seller added an addendum that stated: "Buyers to accept property as is." 72. Wash. App. 169 at 172-73.

The court noted that, because an "as is" clause that negates implied or express warranties operates as a disclaimer and is not favored, the courts have added two conditions for effectiveness: it must be explicitly negotiated or bargained for, and it must set forth with particularity the qualities or characteristics being disclaimed. *Id.* at 176. The court stated:

There is not a wealth of authority on the "bargained for" requirement. Normally, this requirement is applied 'to avoid giving effect to a seller's disclaimer . . . where that disclaimer is in a contract prepared by the seller and contained in fine print or boilerplate. The seller has the burden of demonstrating that such a disclaimer was known to the buyer and bargained for before it will be considered valid and given effect.'

*Id.* at 176-77, citing *Lyall v. DeYoung*, 42 Wash. App. 252, 257, 711 P.2d 356 (1985). The court held that since the Olmsteds knew of the clause, this element was satisfied.

The court reached a different result on the particularity of the disclaimer. The express warranties as to the well and septic system were left unmolested in the contract. The disclaimer was only six words long. The disclaimer did not refer to the express warranties. The purchaser thought the disclaimer applied to the house itself. On these facts, the court found the disclaimer failed to meet the particularity test because it was consistent with the express warranties. *Id.*

Although *Olmsted* dealt with express warranties, similar reasoning could be applied to implied warranties, which are supposed to be the ordinary things that a buyer expects to receive in the home: a disclaimer should not be an unexpected and unbargained for denial of his protected expectations.

This does not mean, however, that the words “as is” are always insufficient. In *Warner v. Design and Build Homes, Inc.*, 128 Wash. App. 34, 114 P.3d 664 (Div. 2, 2005), the Warners sued the builder of their new home after discovering substantial water intrusion, rot and mold. The purchase agreement, which was drafted by their real estate agent, included a provision that the purchasers had inspected the property and agreed to buy it “in its present ‘as is’ condition.” The agreement also contained an inspection addendum. 128 Wash. App. 34 at 36. The Warners had the house inspected, asked for certain repairs, and rejected the recommendation to further inspect the conditions that ultimately caused them damage. *Id.* at 37.

The court held that to be effective the disclaimer must be negotiated or bargained for, and must set forth with particularity what is being disclaimed. It stated that the purpose of these requirements is to protect a buyer, without equal bargaining power, who is forced into signing a contract prepared by the seller that may contain boilerplate and fine print. *Id.* at 40, citing *Olmsted*, supra. The buyers conceded the bargained for element was met because their agent drafted the clause and they knew about it. *Id.*

The buyers argued, however, that the clause was not particular enough to be enforceable. The court cited the UCC for the principle that “as is” and similar phrases that, in common understanding, call the buyer’s attention to the exclusion of warranties operate to exclude all implied warranties. It then held the ‘as is’ clause to be unambiguous because a reasonable person would understand it to waive all implied warranties, including the implied warranty of habitability. “It is thus unnecessary to list warranties, none of which are being made.” *Id.* at 41.

In contrast to the foregoing cases, stands *Burbo*, supra. The portion of the *Burbo* opinion dealing with disclaimer is extremely troubling to any developer, any developer’s attorney or any rational person. The trial court ruled that Mr. Burbo’s implied warranty claim was waived by a disclaimer of warranties in the purchase agreement. The *Burbo* opinion does not describe the language of the agreement or disclaimer. The disclaimer stated: “All warranties not provided for herein, including the implied warranties of habitability, merchantability and fitness for a particular purpose are hereby disclaimed.”<sup>20</sup> It does state, however, the agreement contained a one-year limited warranty and a disclaimer of any implied warranties including the warranty of habitability. 125 Wash. App. 684 at 693. It also states that Mr. Burbo signed the limited warranty agreement and knew that the limited warranty disclaimed implied warranties. *Id.* at 689.

The *Burbo* court held the disclaimer ineffective. It stated:

A seller’s disclaimer of the implied warranty must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for. (citing *Olmsted*). In an action on the implied warranty, the seller must prove these elements (citing *Lyall v. DeYoung*, supra). The disclaimer language here is not conspicuous. It is in the same small print as the rest of the agreement. And the disclaimer was not negotiated. It was a

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<sup>20</sup> *Burbo v. Harley C. Douglass, Inc.* Div. 3, No. 22720-1-III, Brief of Respondent, p. 12.

take-it-or-leave-it “deal breaker.” Mr. Bubo said he saw the disclaimer. But it is, at least, debatable on this record whether he understood its implications.

*Id.* at 693. It should be noted that *Olmsted* requires two criteria for effectiveness, not three. *Olmsted* does not contain the “conspicuous” requirement in *Olmsted*. Moreover, *Burbo*’s holding that the disclaimer was not bargained for is directly contrary to the jurisprudence on this issue. The holding is extremely troubling because the court has misunderstood the “bargained for” requirement to be a requirement of point-by-point negotiation and give-and-take.<sup>21</sup> Under the *Burbo* holding no developer or seller can ever disclaim an implied warranty unless he has actually engaged in concessions and demands over the warranty. Disclaimer is not available to a developer who really wants it. It is only available to a developer willing to do without it. It contradicts the established law of implied warranties in this state.

## **2. Disclaimer in Regard to Condominiums Is Subject to Special Rules**

The Condominium Act limits a declarant’s ability to disclaim the implied warranties in regard to home sales. The Condominium Act states:

(2) For units intended for residential use, no disclaimer of implied warranties of quality is effective, except that a declarant or dealer may disclaim liability in writing, in type that is bold faced, capitalized, underlined, or otherwise set out from surrounding material so as to be conspicuous, and separately signed by the purchaser, for a specified defect or specified failure to comply with applicable law, if: (a) The declarant or dealer knows or has reason to know that the specific defect or failure exists at the time of disclosure; (b) the disclaimer specifically describes the defect or failure; and (c) the disclaimer includes a statement as to the effect of the defect or failure.

(3) A declarant or dealer may offer an express written warranty of quality only if the express written warranty does not reduce protections provided to the purchaser by the implied warranty set forth in RCW 64.34.445.

RCW 64.34.450. This provisions was enacted in its present form in 1986 by Laws 2004, ch. 201, § 5. Also known as “Senate Bill 5536”.

Prior to Senate Bill 5536, the statute was less clear. In *Marina Cove Condominium Owners Association v. Isabella Estates*, 109 Wash. App. 230, 34 P.3d 870 (Div. I, 2001), the developer had provided a warranty that contained “performance standards” for an extremely long list of potential defects. The performance standards stated whether a potential defect would be warranted or not by the developer. At the time, section 450 stated:

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<sup>21</sup> Mr. Burbo’s counsel argued to the court that the disclaimer could not be “bargained for” since the seller would not sell without the disclaimer. *Burbo v. Harley C. Douglass, Inc.* Div. 3, No. 22720-1-III, Brief of Appellant, p. 32.

no general disclaimer of implied warranties of quality is effective but a declarant . . . may disclaim liability . . . for a specified defect . . . if the defect . . . entered into and became part of the basis of the bargain.

The trial court held that the list was so long it amounted to a general disclaimer of the entire implied warranty. On appeal by the developer, the owners also argued that the requirement that a defect be part of the bargain meant that a defect could only be disclaimed if it was known at the time.

The appellate court ruled that a laundry list did not amount to a general disclaimer even if the defects were not yet known, but that the portions of the document that purported to waive other express or implied warranties were unenforceable. 109 Wash. App. 230 at 240. It held, however, that a provision of the developer's warranty that excluded all other express or implied warranties was invalid.

In *Park Avenue*, supra, the court also invalidated the developer's warranty. 117 Wash. App. 369.

In response to these cases, the legislature amended Section 450. The Condominium Act now prohibits disclaimers of the implied warranties unless the disclaimer is conspicuous, is signed by the purchaser, relates to a known defect, describes the defect and describes the effect of the defect.

First it should be noted that the legislature has essentially prohibited a waiver of the implied warranties for condominiums. Only known or suspected defects may be disclaimed. Unknown defects may not be waived. This is more restrictive than the law regarding subdivision homes. Second, it should be noted that these standards seem to be developed to comply with the opinions of the courts relating to disclaimer of common law implied warranties. Their clarity is extremely useful, even though the right to disclaim is limited.

## **B. Drafting Techniques For Disclaimers**

For the attorney drafting home sale documents, the guidance is clear: make it conspicuous, known, and bargained for. Some developers are afraid that conspicuous warranties will harm their ability to sell homes. Experience has shown this fear to be unfounded. Some very successful California home builder clients make buyers sign separate disclaimers on separate pages for every single defect they can think of. It is counterproductive to attempt to minimize the disclaimers. That standard of care is not common here. Yet, in the meantime, here are some suggestions for drafting disclaimers.

### **1. Be Conspicuous.**

The disclaimer must be made conspicuous. This can be accomplished with font type or size, underlining, bold face, or graphic devices. Consider using separate documents for the disclaimers. The point is to make sure the buyer is aware of the disclaimer.

## **2. Must be Known to Buyer**

The buyer must sign the disclaimer. Signatures are required for condominiums and people still buy condominiums every day. There is no reason to avoid signatures on the disclaimers for subdivision homes. The buyer should sign the Warranty Addendum, the disclaimer paragraphs, and an acknowledgement of the disclaimers. Consider cross referencing to the disclaimers in your Standard or Builders Addendum, in your Public Offering Statement, and your Homeowner's and Association Manuals. The cross references should tell the buyer that the warranty is part of the contract and should tell them that when they buy the home they will be waiving their rights to make claims for the implied warranties. Finally, include a covenant (signed by the buyer) in the sales document that obligates the buyer to read the warranty. This is less strange than it might first seem, especially in the condominium context where the buyer has seven days to rescind. Have them sign a promise to read it during those seven days.

## **3. Must be Bargained For.**

Many home builders like to use HBW, 2-10 or other warranty programs due to their popularity with consumers. Those programs tend to work out as text book examples of how not to proceed. Typically, the disclaimers are placed in the midst of a long booklet and are extensive but uninformative. Also, it is typical for the builder to not deliver the warranty booklet until closing (or worse, at move-in), which is long after the bargain was struck and the contract signed. The delivery of the warranty booklet is often overlooked. The builder frequently forgets to have the buyer sign at closing or move in. The sole purpose of the implied warranty is to protect buyers from defects they might not expect. The sole purpose of the law on disclaimers is to make sure that the buyers are fairly apprised of the waiver of their rights and the acceptance of risks about the house.

Make sure the warranty addendum/booklet is delivered when the contract is signed. It can not be part of the bargain if it is before the buyer when they execute. If using a program warranty, make sure your sales contract refers to and incorporates the booklet.

Include in the sales documents an explanation of why the disclaimer is required. Include a statement of what the disclaimer means. Explain that they are waiving legal rights to sue you for damages if the house is not a good house. Give examples of what might go wrong, such as foundation problems or code violations. Explain the consequences of the potential defects.

Give the buyer an opportunity to review and rescind. With condominiums, buyers have a seven-day period after signing the contract to review the Public Offering Statement and rescind the contract. Hardly any buyers walk away at the end of that period. Most home builders do not offer a similar opportunity, but the downside of doing so is small once a person has decided to buy at your project. If you have a rescission period, include an express provisions in the sales contract

giving the buyer the right to rescind if the warranty or disclaimer is unsatisfactory. Explain the right to them and have them sign the provision.

It is impossible to disclaim known defects in a condominium when the building doesn't exist. For pre-sales of condominiums include a provision that explains to the buyer that plans change and defects occur. Give the builder the right to disclaim future defects that become known. Give the buyer the right to rescind if the defect is unacceptable. This hasn't been tested by the courts yet.

### **C. The Use of Contractual Time Limits For Claims**

In *Southcenter View Condominium Owners Assn. v. Condominium Builders, Inc.*, 47 Wash. App. 767, 736 P.2d 1075 (Div. 1, 1986), the unit purchasers brought implied warranty claims 3 years after buying the units. The court dismissed the warranty claims against the builder/seller because they were brought after the expiration of a one-year contractual warranty period. The purchase and sale agreement contained a paragraph providing a one-year warranty against defects and further barring any warranty claims after one year. The agreement stated, in relevant part:

Purchaser acknowledges that no action may be commenced or maintained by Purchaser as to any claim, known or unknown, based upon negligence or warranty, express or implied, against Seller more than one year after . . . [closing].

*Southcenter*, 47 Wash. App. 767 at 769. Similar provisions were included in a separate warranty document and in the condominium declaration. *Id.* at 769-770. The seller also required the buyers to initial every page of the purchase and sale agreement, and to acknowledge receipt of the warranty and condominium documents. *Id.*

The court characterized the case as involving a time limit on suits and distinguished the case from others involving a waiver or exclusion of warranties. *Id.* at 771. The court did not provide any explanation of why such cases should be treated differently. But it did recognize that a time limitation could be invalidated if unconscionable under the UCC. It did not provide clear guidance on how those factors would apply to this contract, but it did show that it was not concerned about the buyer's opportunity to understand the clause or its ability to know about the clause.

In *Griffith v. Centex Real Estate Corporation*, 93 Wash. App. 202, 969 P.2d 486 (1998) the court reached a similar result. In that case it dismissed a class action by home purchasers alleging breach of express warranty concerning the quality of exterior paint. The developer had included a one-year limited warranty and a waiver of all claims except as covered in the limited warranty. 93 Wash. App. 202 at 206-07.

Attorneys for condominium developers took *Southcenter* and *Griffith* to heart during the late 1990s and used such time limits extensively in their warranty documents. In the negotiations over SSB 5536, they agreed to give up that option. The Condominium Act now states:

A judicial proceeding for breach of any obligations arising under RCW 64.34.443, 64.34.445 and 64.34.452 must be commenced within four years after the cause of action accrues . . . Such periods may not be reduced by either oral or written agreement, or through the use of contractual claims or notice procedures that require the filing or service of any claim or notice prior to the expiration of the period specified in this section.

RCW 64.34.452(1). In regard to a condominium sale, a developer may not contractually shorten the time for bringing an implied warranty claim.

#### **D. The Use of Arbitration Clauses**

##### **1. Developers May Require Arbitration of Implied Warranty Claims**

Nothing prohibits a subdivision builder from requiring an owner to arbitrate claims, including implied warranty claims. Developers of condominium homes may only require arbitration of implied (and express) warranty claims if they comply with the requirements of House Bill 1848, which was enacted in 2005. Prior to HB 1848, developers of condominiums could not require arbitration of warranty disputes. *Marina Cove*, supra, 109 Wash. App. 230 at 234-36. The arbitration provisions have been codified in 64 RCW Chapter 55.

##### **2. Unconscionability Issues**

The courts will not enforce arbitration clauses if the effect of enforcement would be unconscionable. In *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash. App. 446, 45 P.3d 594 (2002), Mr. Mendez bought a \$12,000 mobile home on a sales contract. The contract contained a waiver of jury trial and a clause subjecting all disputes to binding and final arbitration before a panel of three arbitrators. He also signed a separate agreement requiring arbitration before a three judge AAA panel. 111 Wash. App. 446 at 451.

Mr. Mendez sued for defects in the home. Palm Harbor sought to compel arbitration. The Court of Appeals refused to enforce the arbitration clause on grounds it was unconscionable because it was prohibitively expensive. The superior court filing fee was \$115. The AAA filing fee was \$2,000. His primary claim was for \$1,500. Mr. Mendez did not finish high school, made less than \$20,000 per year and supported a family of five. In light of the facts, the court refused to enforce the agreement.

Attorneys drafting arbitration provisions should consider provisions to guard against such results, such as minimum arbitration amounts or mandatory venue of certain claims in small claims court.

## **X. Conclusion**

The implied warranties for subdivision homes and condominiums arise from the same body of common law. The statutory condominium warranties offer greater protections to home buyers than the judicial warranties offer to subdivision home buyers. The cases interpreting both sets of warranties contain broad statements. They lack clear and precise definitions of terms. As more law is developed in both areas, the opportunities for cross over will grow. Judges will ask why the type of home purchased should affect the nature of the warranty. Indeed, condominium developers already ask that question. The political battles over Senate Bill 5536 and House Bill 1848 were intense. There are likely to be further attempts to modify the implied warranties by owners and developers.

In an attempt to move the debate away from the implied warranties of quality, Senate Bill 5536 created 64 RCW Chapter 35, "Qualified Warranties" in the hope that the insurance market would create defect insurance policies for condominium owners. If a declarant provides a qualified warranty under the act, the implied warranties of the Condominium Act do not apply. If the program works, it might offer a model for subdivision homes as well.

Until that day, look for the courts to expand the subdivision implied warranties to be more like the warranties for condominiums.