Disclaimers of Implied Warranty in the Sale of New Homes

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DISCLAIMERS OF IMPLIED WARRANTY IN THE
SALE OF NEW HOMES

FRONA M. POWELL*

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(1123)
I. Introduction

RECENT decades have witnessed an important development in the law of real property—the recognition and expansion of an implied warranty of quality in the sale of new homes. Retreating from the ancient doctrine of caveat emptor, most courts today recognize the existence of such a warranty, usually called an implied warranty of habitability or an implied warranty of good workmanship, in the sale of a new house by a builder-vendor.1

The implied warranty of habitability generally requires that the house be “fit for habitation,” or meet a test of good workmanship, or both.2 Courts have treated this implied warranty as analogous to a warranty of merchantability in the sale of goods,3 and it is most often applied in sales of new houses by “merchant-like” builders to a first purchaser.4 The warranty of habitability is designed to ensure that a purchaser will get what he expected—a


3. See, e.g., Petersen, 76 Ill. 2d at 40, 389 N.E.2d at 1158.

4. Id. Early cases limited the warranty to sales of new homes by a builder-vendor to a first purchaser, but the warranty has been extended to situations where the policies underlying adoption of the warranty will be served. Subsequent purchasers have been successful in recovering under this theory, as have purchasers of used homes. See, e.g., Barnes v. MacBrown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976); and also Note, Indiana's Implied Warranty of Fitness for Habitation, supra, at 489-90 (distinguishing cases holding that implied warranty of habitability should not extend to subsequent purchasers and purchasers of used homes); Note, Real Property—The Implications of Implied Warranty Protection for Used Housing, supra note 1, at 525-26 (citing authority which removed privity
house that is reasonably suited for use as a residence,\textsuperscript{5} even if the seller made no express warranties as to quality in the sales contract, and even if the seller expressly refused to grant such express warranties.\textsuperscript{6} The purchaser is not protected against defects which he knows about or which are readily visible upon inspection,\textsuperscript{7} but otherwise the warranty ensures that the consumer has a remedy against the builder-vendor if the house fails to meet the standards of trade for homes in comparable locations and price range.\textsuperscript{8}

Once courts began to recognize an implied warranty in the sale of new residential property, the question of whether a seller could contractually exclude or modify that warranty was certain to arise.\textsuperscript{9} Disclaimers of warranties and limitation of remedy clauses have traditionally been recognized as legitimate ways for sellers and buyers of equal bargaining power to allocate the risks associated with the sale of property, and the Uniform Commercial Code (UCC) specifically recognizes the legitimacy of disclaimers of implied and express warranties in contracts for the sale of goods.\textsuperscript{10} However, disclaimers of implied warranties in general, and of the implied warranty of habitability in particular, raise significant problems for the courts because at least two important policies come into conflict: the principle of freedom of contract, which permits the parties to allocate risks by agreement, and the courts' increasingly active role in protecting the consumer from losses resulting from defective products. The question of whether the purchaser actually knew about, let alone bargained for, the disclaimer provision frequently arises in these cases, especially where the purchaser signed a standardized form contract containing a boilerplate disclaimer clause.\textsuperscript{11} More importantly, there are

\textsuperscript{5} See Petersen, 76 Ill. 2d at 37, 389 N.E.2d at 1156 (quoting Goggin v. Fox Valley Constr. Corp., 48 Ill. App. 3d 103, 106, 365 N.E.2d 509, 511 (1977)).
\textsuperscript{8} See Dixon v. Mountain City Constr. Co., 632 S.W.2d 538 (Tenn. 1982).
\textsuperscript{10} For a further discussion of disclaimer of warranty provisions under the UCC, see infra notes 60-90 and accompanying text.
\textsuperscript{11} See generally A. Farnsworth, CONTRACTS § 4.26 (1982) (discussing advantages, disadvantages and judicial treatment of standardized form contracts);
important policy rationales underlying imposition of the implied warranty of habitability in the sale of new homes, and those policies are not served if a seller can easily exclude such warranty protection in the sales contract.

This article begins with a general discussion of the implied warranty of habitability and the policies underlying its development. The next section addresses the impact of certain provisions of the UCC on the courts' determination of the effectiveness of disclaimers in the sale of real property. The third section examines the criteria for effective disclaimers of the implied warranty of habitability as developed and applied in case law, concluding that in those cases were the disclaimer is effective, policy rationales for imposing implied warranty protection usually are not present. The final section discusses the impact of UCC provisions on warranty disclaimers in real property transactions and makes the argument that UCC provisions should not control because there are significant differences between contracts for sale of real property and contracts for the sale of goods; therefore, courts should address the effectiveness of disclaimers as a question of social policy and hold the builder-vendor liable for any substantial latent defects in new residential structures regardless of general contractual disclaimer language. General disclaimers of the warranty of habitability in the sale of new homes by a builder-vendor should be void as against public policy.

II. NATURE OF THE IMPLIED WARRANTY OF HABITABILITY IN SALES OF REAL PROPERTY

A. Rationales for Imposition of the Implied Warranty

The ancient doctrine of caveat emptor, or "buyer beware," placed the burden to discover any defects in the quality of real property on the purchaser. The doctrine developed in agrarian societies where the land, rather than structures, was more valuable.12 Since one could readily observe conditions of land and structures were much simpler, it was reasonable to presume that both landlord and tenant, or seller and purchaser, had equivalent access to knowledge of the conditions of the property.13 Because

Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529 (1971).

12. See Note, Real Property—The Implications of Implied Warranty Protection for Used Housing, supra note 1, at 518.

the law presumed that the parties had equal knowledge and bargaining power, it was reasonable to place the risk of any defects on a purchaser, although the builder-seller could be liable in the case of fraud or misrepresentation.\textsuperscript{14}

However, the nature of the housing market began to change substantially in the middle of this century, and the doctrine of \textit{caveat emptor}, especially in the sale of new homes, became an anachronism, patently out of harmony with modern home-buying practices.\textsuperscript{15} Following World War II, an overwhelming demand for new housing led to the mass-production of houses by builder-vendors who sold a house and lot as one product, and hurried construction and shoddy materials often resulted in poor quality.\textsuperscript{16} Purchasers of homes with substantial latent defects often found that they had no remedy against the builder-vendor, even though the builder-vendor was in a superior position to know about a defect and to bear the cost of correcting it.\textsuperscript{17} As a result, courts began to reshape and redefine the law to afford relief to purchasers who otherwise would have no remedy under the traditional doctrine of \textit{caveat emptor}. One commentator capsulized this growing disenchantment with the doctrine of \textit{caveat emptor} in an article urging the adoption of an implied warranty of habitability: "Strangely, the law places the entire risk as to quality upon the party to the transaction with less knowledge or opportunity for knowledge of the condition of the premises."\textsuperscript{18}

Imposition of an implied warranty of habitability in the sale of new houses recognizes that in the typical case, the purchaser and builder are not on equal footing, and to apply the rule of \textit{caveat emptor} to an inexperienced buyer in favor of a builder who is engaged daily in the business of building and selling homes is patently unfair.\textsuperscript{19} Residential structures today are much more complex than in the past, making structural defects more difficult to discover, while few purchasers have the expertise, opportunity or ability to inspect a house for anything but the most obvious defects.\textsuperscript{20} To require a buyer to obtain an express warranty to

\textsuperscript{15} Humber v. Morton, 426 S.W.2d 554, 558 (Tex. 1968).
\textsuperscript{16} See Bearman, supra note 1, at 542.
\textsuperscript{17} See Conyers v. Molloy, 50 Ill. App. 3d 17, 19, 364 N.E.2d 986, 988 (1977); see also Haskell, supra note 1, at 653; Note, \textit{Real Property—The Implications of Implied Warranty Protection for Used Housing}, supra note 1, at 516-17.
\textsuperscript{18} Haskell, supra note 1, at 637.
\textsuperscript{20} See Rutledge v. Dodenhoff, 254 S.C. 407, 414, 175 S.E.2d 792, 795
protect himself in this situation is often unrealistic. Most purchasers simply do not have the sophistication necessary to protect themselves by bargaining for express warranties in the sales contract, and this is especially true when the purchaser is asked to sign an intricate, standardized form contract provided by the vendor. Even if the contract does contain certain express warranties, these are often limited as to duration or particular remedies.

Imposition of an implied warranty of quality in the sale of new homes also encourages good construction practices and discourages sloppy "fly by night" work in the industry, a problem especially evident in the mass production of development homes. By requiring a builder-vendor to comply with the building code in the area where the structure is located and to build the home in a good and workmanlike fashion, courts set minimum standards of good workmanship which discourage the unscrupulous operator and purveyor of shoddy work.

In early cases establishing warranty protection for the purchaser of a new home, courts also recognized that the difference between the law of personal property and the law of real property had become so great as to be indefensible. In some ways, the builder or seller of new construction is not unlike the manufacturer or merchandiser of goods. Under provisions of the UCC and its predecessor, the Uniform Sales Act, an implied warranty of merchantability and, in some cases, a warranty of fitness for a particular purpose, exists in the sale of goods. Common sense tells us that the purchaser of a home should be entitled to at least as much protection as the purchaser of a walking stick or a kitchen

(1970); Humber v. Morton, 426 S.W.2d 554, 561 (Tex. 1968). This is especially true of structural defects which may not be observable once the building is completed.

21. Haskel, supra note 1, at 642.

22. The contract most often used in sales of newly constructed homes by builder-vendors is a standard form real estate sales contract that often contains no warranties applicable to the construction of the house. See, e.g., Dixon v. Mountain City Constr. Co., 632 S.W.2d 538, 540 (Tenn. 1982).


mop. For all these reasons, a majority of states today recognize an implied warranty of habitability or good workmanship in the sale of new homes by a professional builder-vendor.

B. History of Development of the Implied Warranty

The rule imposing liability under an implied warranty of fitness for human habitation was first adopted in the United States in 1957 in a case where a defective sewer line caused flooding in the basement of a house. Although that case limited the warranty to sales of houses still under construction, courts have extended the warranty to include finished homes because there is no rational basis for the application of a different rule when the home is completed.

Nor have courts been reluctant to extend warranty protection in cases where policy rationales underlying the warranty are met. For example, many courts have extended warranty protection to include subsequent purchasers if the subsequent purchaser can show that the defect was latent and traceable to the original builder. The logic which has diminished the role of privity of contract in the development of products liability law has been used in these cases where a builder-vendor's implied warranty is extended beyond the first purchaser; public policy has compelled a change in the common law because there is no longer the usual privity of contract between the user and the maker of a manufactured product. Therefore, public policy demands that the privity requirement be relaxed. The extension of a builder-vendor's liability to subsequent purchasers has been defended for several reasons. First, a home which is only two or three years old should, like a new home, meet minimum tests of habitability and good workmanship. Second, a builder-vendor could too easily avoid liability if that builder only needed to occupy the home a short time to defeat privity and thereby avoid imposition of liabil-

28. See Wawak, 247 Ark. at 1095, 449 S.W.2d at 923.
33. See Barnes, 264 Ind. at 229, 342 N.E.2d at 620.
ity under the warranty. 34 While extension of a builder’s liability to a subsequent purchaser is often justified, it raises the question whether an exclusion or disclaimer of the warranty in the first contract of sale effectively disclaims warranty protection for the subsequent purchaser. 35

The historical development of an implied warranty in sales of new residential property indicates that the warranty is firmly established and that expansion will likely continue because there are strong consumer interests at stake. Purchase of a home is usually the most expensive purchase most people make. It therefore seems only fair to put the burden of repairing defects in construction on the person who is responsible for the defects, is in a position to repair them and is able to spread the costs of the repair. 36

C. Nature of the Implied Warranty

The implied warranty of habitability or good workmanship, like the warranty of merchantability in the sale of goods, is designed to guarantee that the purchaser gets what he bargained for—a house that is habitable and meets standards of good workmanship. 37 The warranty requires that the property be “fit for habitation,” 38 and the standard to be applied in determining whether or not there has been a breach is one of reasonableness in light of surrounding circumstances. 39 The age of the home, its maintenance and the use to which it has been put are all factors entering into this factual determination. 40 Although sales provisions of the UCC do not apply to sales of real property, 41 many courts have likened the implied warranty of habitability to the im-

34. See Park v. Sohn, 89 Ill. 2d 453, 463, 433 N.E.2d 651, 656 (1982).
37. See Haskell, supra note 1, at 635.
38. Different states may use different terms such as “habitability,” “fitness” or “workmanlike manner.” See Comment, Buyer Protection in the Sale of New Housing in Illinois: The Implied Warranty of Habitability, 56 CHI.-KENT L. REV. 1123, 1124 n.9 (1980).
40. Id.
IMPLIED WARRANTY DISCLAIMERS

plied warranty of merchantability in the sale of goods.42 Like the implied warranty of merchantability, which does not require a perfect product but only one of reasonable quality or fitness, an implied warranty of habitability does not require that a home be perfect. It does require, however, that a home be fit as a shelter, safe and aesthetically satisfying.43 Most courts hold that the warranty lasts for a “reasonable duration,” the length of which depends on the circumstances and nature of the defect.44

Warranties of habitability and reasonable workmanship are not created by any representation of the builder-vendor and exist independent of any such representations.45 In what is clearly analogous to the warranty of merchantability under the UCC, courts are most likely to recognize the warranty when the sale is a commercial sale of a new home by a “merchant-like” builder-vendor to a consumer-purchaser.46

The warranty is limited to latent defects in the property and


U.C.C. § 2-314 provides:

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

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promise or affirmations of fact made on the container or label if any.

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


44. Note, Indiana’s Implied Warranty of Fitness for Habitation, supra note 1, at 492; Note, Real Property—the Implications of Implied Warranty Protection for Used Housing, supra note 1, at 529.


does not extend to defects of which a purchaser has actual notice or which he should have discovered upon inspection. But it is not very difficult for the purchaser to prove the defect was latent, or not discoverable, since one of the rationales underlying the warranty is the assumption that the purchaser is not knowledgeable in construction practices and must rely on the integrity and skill of the builder-vendor. Courts assume that the ordinary purchaser is not an expert, and defects which would not be apparent to the ordinary purchaser upon reasonable inspection are covered by the implied warranty. For example, the requirement of reasonable inspection does not mean that the purchaser must crawl into the crawl space beneath the house or climb on the roof to evaluate the soundness of its structure.

III. DISCLAIMERS OF THE IMPLIED WARRANTY

One of the fundamental policies underlying American contract law is the notion of freedom of contract and the right of the parties to negotiate the terms of their deal without intervention by the courts. Under this theory, the parties should be able to exclude implied warranty protection at the time of sale or construction of the house through a contract disclaimer clause. However, given the important policies underlying the imposition and expansion of implied warranty protection in the sale of new homes, courts are reluctant to permit sellers to escape their obligations under the warranty through a simple disclaimer clause in the sales contract. As a result, the disclaimer defense is fraught with difficulty.

Most of the contracts for sale of real property today are standardized form contracts, and "boilerplate" exclusion or disclaimer clauses may be included in the pre-printed standardized forms. The use of such standardized contract forms are commonplace today in many kinds of transactions, and there may be economic benefits to society in the use of such forms. But in the

48. Id.
49. Id. at 23, 476 A.2d at 433.
51. See Abney, supra note 9, at 141.
52. A. FARNSWORTH, supra note 11, § 4.26, at 293.
53. Id.
usual case, the consumer does not read the form, or, if he does, he thinks that he cannot vary its terms.\textsuperscript{54} Just as a purchaser often lacks the bargaining power or sophistication to negotiate for express warranties in the sales contract, so he lacks the bargaining power and sophistication to freely negotiate a waiver of implied warranty protection in the sales contract.\textsuperscript{55} Moreover, the purpose of an implied warranty of habitability is to protect a purchaser’s reasonable expectation that he will receive a well constructed and habitable house, and it is difficult to believe that he would knowingly and voluntarily waive that guarantee except in unusual circumstances.\textsuperscript{56} Few people like the idea that a seller can specifically disclaim a warranty that the house is habitable or conforms to the standards of good construction.\textsuperscript{57}

No court has yet declared contractual disclaimers of the implied warranty of habitability void as against public policy, although these clauses are clearly not favored by the courts.\textsuperscript{58} There are good reasons not to permit disclaimers in sales of real property as a matter of public policy. However, the fundamental principle of freedom of contract and the fact that disclaimers of implied warranties in the sale of goods are expressly permitted under the UCC have influenced courts to permit, at least in theory, contractual disclaimer of the implied warranty of habitability.\textsuperscript{59}

A. Relevant Provisions of the UCC

Even though only applicable in sale of goods cases, certain UCC provisions are frequently cited by courts in real property cases as indicative of a state’s general policy regarding contractual disclaimers.\textsuperscript{60} For example, many courts have relied on section 2-316, “Exclusion or Modification of Warranties,” for guidance in

\textsuperscript{54} See Slawson, supra note 11, at 530.
\textsuperscript{55} See Haskell, supra note 1, at 642.
\textsuperscript{56} In the sale of a used home, such a situation might occur where a purchaser was on notice that the home did not meet the requirements of the local building code, and the price of the house reflected this fact. See Raynor v. United States, 604 F. Supp. 205 (D.N.J. 1984).
\textsuperscript{57} See Abney, supra note 9, at 141.
\textsuperscript{59} For a further discussion of cases where implied warranty disclaimers have been held to be effective, see infra notes 142-55 and accompanying text.
\textsuperscript{60} See, e.g., Schepps v. Howe, 665 P.2d 504, 509 (Wyo. 1983).
determining the criteria to impose on disclaimers of the implied warranty of habitability. Section 2-317, "Cumulation and Conflict of Warranties Express or Implied," and section 2-719, "Contractual Modification of Limitation of Remedy" may also come into play.\textsuperscript{61} A purchaser also may argue that the contractual disclaimer is unconscionable: Like UCC section 2-302, section 208 of the Restatement (Second) of Contracts permits a court to refuse to enforce a contract or contract term which it finds unconscionable.\textsuperscript{62}

In interpreting and applying the language of these UCC sections in real property sales contracts, courts have used many of the same techniques and have encountered many of the same problems as in sale of goods cases. Courts with a sympathetic view toward consumers have been able to limit the effectiveness of disclaimers in sale of goods cases, despite the specific UCC language, by applying principles of unconscionability and liberally construing certain terms in the UCC which seem open to flexible interpretation.\textsuperscript{63} Thus it is not surprising that courts have found similar ways to render disclaimers in real property sales contracts ineffective.

1. \textit{Express Disclaimers of Implied Warranties (UCC 2-316(2))}

The rule that determines whether a disclaimer of implied warranty protection is effective in sale of goods cases is set out in section 2-316. Section 2-316(2) provides:

\begin{itemize}
\item[61.] For a further discussion of these UCC provisions, see \textit{infra} notes 64-95 and accompanying text.
\item[62.] \textit{Restatement (Second) of Contracts} § 208 (1981) states:
If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.
U.C.C. § 2-302 provides:
(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.
\end{itemize}
Subject to subsection (3) [enumerating instances where no implied warranties exist], to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

It is first important to note that this section expressly permits disclaimers of implied warranties of merchantability and fitness. But despite what appears to be specific language permitting exclusion or modification of warranties, the application of this provision by the courts has been among the most unpredictable in the UCC.\(^{64}\) This is true because courts simply do not favor disclaimers, especially where the plaintiff is an injured consumer, and thus have utilized discretion-inviting terms such as "reasonable," "consistent" and "circumstances" in this and other sections to exercise almost boundless discretion.\(^{65}\) In sale of goods cases, a court may also rely on UCC section 2-302 which permits the court to refuse to enforce the contract or any clause if it finds it to have been unconscionable at the time it was made.\(^{66}\)

In contracts for the sale of real property, most courts begin their discussion of disclaimers of the implied warranty of habitability by addressing the question, sometimes quite literally, in terms of the requirements of section 2-316(2). This section, as quoted above, requires that to exclude the implied warranty of merchantability, the language of the disclaimer must mention "merchantability," and if in writing, must be conspicuous. One court has held that in real estate sales contracts, a disclaimer of implied warranty should use the language "implied warranties of merchantability and fitness" rather than "warranty of habitability" because these terms are more meaningful.\(^{67}\)

There are no hard and fast rules as to what other kind of language is required for effective disclaimer of implied warranty

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\(^{64}\) Id.

\(^{65}\) Id.

\(^{66}\) Id. § 4-6, at 160-63.

under the UCC. Special language is probably sufficient—in sales of goods cases most clauses fail not because they are improperly worded, but because they are inconspicuous or unconscionable. On the other hand, if a court simply finds that the language of the disclaimer is, on its face, insufficient to be an effective disclaimer, that ends the question without further inquiry.

The requirement of "conspicuousness" means that the clause must be set out from the rest of the contract provisions in some obvious way, such as capitalization, different typeface, contrasting color, or by some other attention-drawing devices. Location is also an important factor. Disclaimers on the back of a document or obscured in many pages of fine print have been held invalid because of lack of conspicuousness. Some courts place similar requirements on disclaimers in the sale of real property.

In sale of goods cases, the UCC defines "conspicuousness" in terms of a reasonable person against whom it is to operate. Therefore, inquiry into the buyer's relative bargaining strength and commercial sophistication is probably appropriate. The same is true in real property cases. In sale of goods cases a "mild controversy" exists over whether actual knowledge of the disclaimer by an unsophisticated purchaser is required, or whether a seller must actually bring the provision to the buyer's attention.

In real property cases, some courts have suggested that the buyer

68. To exclude the implied warranty of fitness for a particular purpose, general language which is in writing and conspicuous is sufficient. See U.C.C. § 2-316 comment 4 (1987).


70. This is true in sale of real property cases as well. See, e.g., Conyers v. Molloy, 50 Ill. App. 3d 17, 364 N.E.2d 986 (1977). In Conyers, the contract contained the following language: "There are no warranties on either house except those manufacturers warranties that are in effect." Id. at 18, 364 N.E.2d at 987. The court stated, "[T]o our view, the alleged waiver here was overbroad, too general and too unspecific to adequately put the plaintiffs on notice that they were waiving their warranty of habitability." Id. at 21, 364 N.E.2d at 989.


73. U.C.C. § 1-201(10) provides that a term is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. "A printed heading in capitals . . . is conspicuous. Language in the body of a form is conspicuous if it is in large or other contrasting type or color . . . ." U.C.C. § 1-201(10) (1987).

74. J. White & R. Summers, supra note 63, § 12-5, at 443-44.
is required to put the purchaser on notice of the disclaimer, holding that "[a] disclaimer does not negate an implied warranty unless it is brought to the attention of the buyer and agreed to by him." 75

2. "As Is" Disclaimers (UCC 2-316(3)(a))

In addition to a specific contractual disclaimer of implied warranties under section 2-316(2) in contracts for the sale of goods, the UCC also provides that all implied warranties are excluded by expressions like "as is," or "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. 76 This section is supposed to apply in situations where the circumstances surrounding the transaction sufficiently notify the buyer that no implied warranties are made or that a certain implied warranty is excluded. 77 This in turn raises the question whether an ordinary consumer who lacks knowledge of the effect of an "as is" disclaimer should be allowed to bring an action for breach of implied warranty because he did not understand the legal consequence of the language. At least one court in a sale of goods case held that he should. 78 In real property cases, the purchaser's knowledge and understanding of the meaning of the "as is" phrase may be an important factor in the court's determination whether the language is sufficient to disclaim the

75. Colsant v. Goldschmidt, 97 Ill. App. 3d 53, 56, 421 N.E.2d 1073, 1076 (1981). Requiring actual knowledge by the buyer is of course a way to protect the consumer-purchaser, but it can raise problems of factual proof. For this reason, some commentators have argued in sale of goods cases that the UCC draftsmen intended "rigid adherence" to the conspicuousness requirement in U.C.C. § 2-316, in part to avoid these kinds of arguments. J. White & R. Summers, supra note 63, § 12-5, at 444.


77. U.C.C. § 2-316, comment 6 states:

The exceptions to the general rule set forth in paragraphs (a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.


78. See Knipp v. Weinbaum, 351 So. 2d 1081, 1084-85 (Fla. Dist. Ct. App. 1977), cert. denied, 357 So. 2d 188 (Fla. 1978). This approach is justified under U.C.C. § 2-316(c)(a) because the phrase "unless the circumstances indicate otherwise," gives a court discretion in determining whether such a disclaimer should be enforced. The fact that comment 7 to this section refers to such terms in the context of commercial usage as "understood to mean that the buyer takes the entire risk," is further ammunition for a consumer/purchaser, who may argue that he did not know the meaning of the phrase in its ordinary commercial usage. See J. White & R. Summers, supra note 63, § 12-6, at 448.
implied warranty of habitability.\(^{79}\)

In cases under the UCC, although not explicitly required by section 2-316(3)(a),\(^{80}\) most courts hold that an “as is” disclaimer must also be conspicuous. The same is true in real property cases.\(^{81}\) In addition, under the UCC, a seller cannot disclaim all warranties because, at a minimum, a disclaimer cannot reduce the seller’s obligation with respect to the description of goods. The goods must be, in essence, what the seller has agreed to sell.\(^{82}\) There are no real property cases holding a disclaimer ineffective on this basis.\(^{83}\)

3. Cumulation and Conflict of Warranties: Does an Express Warranty Exclude an Implied Warranty?

In a case where a builder-vendor provides an express warranty in the sale of a house, he may argue that the express warranty supersedes or negates any implied warranty of habitability. In these cases, a court may look to section 2-317 of the UCC for guidance. Section 2-317(c) provides that “express warranties displace inconsistent implied warranties other than an implied warranty of fitness of a particular purpose.”\(^{84}\) However, a court has a

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79. The question whether a purchaser should not only know about but also understand the effect of an “as is” disclaimer in order for it to be effective was raised in Schoeneweis v. Herrin, 110 Ill. App. 3d 800, 443 N.E.2d 36 (1982). In that case, the buyer, Schoeneweis, sought damages from the builder-vendor for the costs of remedying defects in concrete work and shortage in the size of the house. The contract contained an “as is” clause, but Schoeneweis said he did not think he was waiving construction defects when he signed the contract. Because he could offer a plausible alternative explanation to the sense in which “as is” was intended, the court held the agreement was not an effective disclaimer of the implied warranty. This was so, even though the seller had argued that the phrase “as is” is commonly used and easily understood. Suggesting that the phrase was ambiguous, the court held that the seller could not show that waiver of the warranty protection was in fact the agreement reached. Id. at 805-07, 443 N.E.2d at 41-42.

80. J. White & R. Summers, supra note 63, § 12-6, at 450.


82. J. White & R. Summers, supra note 63, § 12-6, at 449-50. A court that wants to find a disclaimer ineffective despite the language of § 2-316(3)(a) can also rely on comment 4 to § 2-313 which essentially states that a court cannot give literal effect to a clause that purports to disclaim all warranties. Id.

83. Presumably, a court in a situation where a purchaser had not seen the house before purchase (as when it is to be constructed to specification), could take the same approach and require a builder-vendor to provide a house which is substantially the same as that described.

84. U.C.C. § 2-317 states:

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is
great deal of discretion in determining whether an express warranty is "inconsistent" with an implied warranty under this section.\textsuperscript{85}

In sale of goods cases, most courts treat an express warranty separately from any attempted disclaimer of implied warranty of merchantability. The implied warranty is construed as cumulative, rather than "inconsistent" with any express warranty.\textsuperscript{86} Under this theory, most courts permit recovery under an implied warranty after expiration of an express warranty, even though allowing recovery after the express warranty has expired might seem inconsistent to the average buyer.\textsuperscript{87} In real property cases, courts follow a similar approach and consistently reject the argument that an express warranty precludes or limits the scope of an implied warranty of habitability. Any waiver of implied warranty protection requires language which is clear and unambiguous, conspicuous and made with the purchaser's knowledge.\textsuperscript{88}

4. Limitation of Remedies (UCC 2-719)

A different question is raised when a seller argues that a contract clause limits a remedy, rather than excludes warranty protection altogether. UCC section 2-719 authorizes limitation of remedies in sale of goods cases, and section 2-719(3) specifically permits limitation or exclusion of consequential damages unless the limitation or exclusion is unconscionable.\textsuperscript{89} A buyer of goods

\textsuperscript{85} J. White & R. Summers, supra note 63, \S 12-7, at 461.
\textsuperscript{86} Id. at 458.
\textsuperscript{87} Id. at 462.
\textsuperscript{89} U.C.C. \S 2-719 provides:

1. Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article,
can find ways around this provision in the UCC. For example, he might argue that a stipulated remedy was not "exclusive" but rather "in addition" to other remedies, that an exclusive remedy "fails of its essential purpose" under section 2-719(2), or that limitation of consequential damages is unconscionable.90

In the sale of real property, at least one court has held that a limitation of liability clause should be treated no differently than a clause which purports to exclude or disclaim an implied warranty of habitability, and the same requirements should apply. In Col sant v. Goldschmidt,91 Colsant bought a townhouse from Goldschmidt. The contract contained an express warranty which was subject to the following qualification: "Builder does not assume responsibility for any secondary or consequential damages caused by any defects."92 When rain leaked into the basement of the Colsant home, the builder promptly repaired a blocked drain tile and no further leakage occurred. It cost Colsant $684.33 to have the basement carpet dried out and the pad replaced, and he sued the builder for that expense.93

Goldschmidt, the builder, argued that under the UCC, section 2-719 is less strict in allowing a limitation of remedies than in allowing a disclaimer of warranties.94 However, the Illinois Court of Appeals affirmed the judgment of the trial court awarding Colsant damages for the ruined carpet, stating that the same require-

as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.


92. Id. at 54, 421 N.E.2d at 1075.
93. Id. at 55, 421 N.E.2d at 1075.
94. Id. The builder argued that the official comment to U.C.C. § 2-719 states: "Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect." Id. at 57, 421 N.E.2d at 1076 (quoting U.C.C. § 2-719 comment 1).
ments applied as in disclaimer or exclusion of warranty cases, and the clause failed to meet the requirements of conspicuousness and specificity.95

B. General Requirements for Effective Disclaimers of Implied Warranty in the Sale of Real Property

While a court may look to particular UCC sections for guidance in real property cases, the requirements for determining the effectiveness of implied warranty disclaimers in real property transactions have developed in case law. In real property cases, courts generally apply the same criteria to disclaimers of the implied warranty of habitability in several different circumstances—when the disclaimer is "express," when it is implied through the use of an "as is" or "in its present condition" clause, when a seller gives an express warranty which purports to exclude or limit the implied warranty, and when the purported disclaimer is actually a limitation of remedies clause.

A review of the case law indicates there may be as many as eight different requirements for effective disclaimers of implied warranty protection in the sale of real property. Not all of these requirements must be met in every case, and many appear in combination with others. What is clear is that in many instances, conspicuousness alone will not save the disclaimer, although an inconspicuous disclaimer is almost certain to be ineffective in excluding an implied warranty of habitability.96

The express requirement of conspicuousness under UCC section 2-316 is not applicable to disclaimers of implied warranty in real property sales contracts, but courts do require that at a minimum any disclaimer be written so that it is reasonable to conclude that the buyer has read the language.97 As in sale of goods cases, this means that the size of the print, location of the clause

95. The court called the limitation of remedies clause a “disclaimer.” Id. at 55, 421 N.E.2d at 1075. When it applied the requirements for effective disclaimer, the clause failed to meet the test: the clause was not conspicuous. It was located in the last line of the second paragraph amidst other clauses of the same small-sized type. The clause did not mention habitability and did not explain the consequences of the disclaimer. Id. at 57, 421 N.E.2d at 1077.


97. See, e.g., Tassan, 88 Ill. App. 3d at 589, 410 N.E.2d at 909.
in the contract, and whether it is in bold or contrasting color is relevant to that determination.\textsuperscript{98} A disclaimer clause located with other clauses on the back of a standard form contract, in the same small print as all other clauses of the contract, will be ineffective to disclaim an implied warranty of habitability.\textsuperscript{99}

In addition to the usual requirement of conspicuousness, courts require that the disclaimer be specific. Specificity means that the disclaimer must not be "over-broad" or too general,\textsuperscript{100} or that it specifically must mention the word "habitability" or refer to a particular defect in the property.\textsuperscript{101} A disclaimer which states "there are no warranties on either house except those manufacturer's warranties that are in effect" is too general and unspecific to meet this requirement.\textsuperscript{102} The disclaimer language should also be clear and unambiguous,\textsuperscript{103} and easily understood.\textsuperscript{104}

Some courts require evidence that the parties actually negotiated the disclaimer, or that the agreement was made with the purchaser's actual knowledge of the disclaimer,\textsuperscript{105} especially when the disclaimer is a boilerplate clause in a standardized form contract.\textsuperscript{106} The disclaimer clause will be strictly construed against the seller, who is presumed to have drafted the contract or at least to have provided it to the less sophisticated purchaser.\textsuperscript{107}

\textsuperscript{98} See MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Ct. App. 1977).

\textsuperscript{99} See, e.g., Tusch Enter. v. Coffin, 113 Idaho 37, 46, 740 P.2d 1022, 1031 (1987); Colsant v. Goldschmidt, 97 Ill. App. 3d 55, 57, 421 N.E.2d 1073, 1077 (1981); Tassan, 88 Ill. App. 3d at 589, 410 N.E.2d at 909; MacDonald, 555 S.W.2d at 919.

\textsuperscript{100} See, e.g., Conyers v. Molloy, 50 Ill. App. 3d 17, 21, 364 N.E.2d 986, 989 (1977).


\textsuperscript{102} Conyers, 50 Ill. App. 3d at 21, 364 N.E.2d at 989.


\textsuperscript{104} See Larson, supra note 9, at 245 (citing Schoeneweis v. Herrin, 110 Ill. App. 3d 800, 806, 443 N.E.2d 36, 41 (1982)).


\textsuperscript{106} See Ecksel, 360 Pa. Super. at 128, 519 A.2d at 1025.

\textsuperscript{107} See, e.g., Tusch Enter. v. Coffin, 113 Idaho 37, 45, 740 P.2d 1022, 1030 (1987); Petersen v. Hubschman Constr. Co., 76 Ill. 2d 31, 43, 389 N.E.2d 1154, 1159 (1979); Colsant, 97 Ill. App. 3d at 56, 421 N.E.2d at 1076; Ecksel, 360 Pa.
Considering all the requirements which may apply to disclaimers in real property transactions, it is not surprising that there frequently is at least one basis on which a court may find a disclaimer ineffective. There are enough different requirements (or at least requirements that look different) so that even if the disclaimer passes one test, it can fail another.\(^{108}\) In some cases, the tests themselves seem to conflict. For example, the requirement that a disclaimer be clear and easily understood might well conflict with the requirement that it also specifically and fully explain the consequences of the disclaimer.

The terms themselves also invite discretion: terms like "conspicuous," "clear," "unambiguous" and "specific" are descriptive terms which do not tell a seller exactly what kind of clause will pass a judicial test. These terms describe, rather than prescribe, conclusions. Often these requirements function not so much as tests for effectiveness of the disclaimer but as bases upon which the court can state an opinion which is actually a reflection of the policies underlying the creation of implied warranty protection. In those cases where implied warranty protection is most appropriate—as where a first purchaser buys a new house from a merchant-like builder-vendor—a contractual disclaimer is least likely to be effective. A look at some of the cases involving disclaimers of the implied warranty in the sale of residential property should illustrate this point.

C. Cases Where the Disclaimer Was Ineffective

As a general rule courts do not favor disclaimers of implied warranties. As noted previously, disclaimers of the implied warranty of habitability, especially in the sale of new residential property, are construed strictly against the vendor.\(^{109}\) In most cases,

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\(^{108}\) For example, in Ecksel, the majority of the court found that the release language was "broad and all-encompassing," and there was no evidence that the release was negotiated by the parties. Ecksel, 360 Pa. Super. at 128, 519 A.2d at 1025. A concurring judge found that the language was not ambiguous, but rather inconspicuous, stating "the fatal defect in the release is that it is buried in the middle of a standard form contract in the same print size and type as the rest of the contract." Id. at 135, 519 A.2d at 1029 (Rowley, J., concurring).

\(^{109}\) See, e.g., Colsant, 97 Ill. App. 3d at 56, 421 N.E.2d at 1076 (holding disclaimer does not negate implied warranty without buyer's knowledge and consent); Herlihy v. Dunbar Builders Corp., 92 Ill. App. 3d 310, 316, 415 N.E.2d 1224, 1228 (1980) (holding disclaimer invalid because obscure); Ecksel, 360 Pa. Super. 119, 519 A.2d 1021 (holding implied warranty of habitability cannot be created by representation of builder).
especially where the builder is a merchant-like vendor of new residential property, contractual disclaimers are ineffective to exclude an implied warranty of habitability. These may be characterized as (1) cases where a vendor contends that an express warranty excludes the implied warranty; (2) cases where the contract contains an “as is” or “in its present condition” clause; and (3) cases where contract language expressly disclaims implied warranties.

1. Express Warranty Cases

The simplest disclaimer problem arises in those cases where a seller argues that an express warranty supersedes or excludes any implied warranty. As previously discussed, an express warranty is generally ineffective to disclaim an implied warranty of habitability absent any other specific disclaimer language in the contract.

Even in a case where the express warranty specifically excludes protection for a particular defect, the disclaimer may be ineffective if the defect in the structure is substantial. For example, in Belt v. Spencer, the Belts purchased a new house from Spencer, the builder. The Belts signed a contract which contained a provision stating that the seller agreed to provide “a Standard 1-year Warranty except for cracking of concrete flatwork.” Soon after the

110. An express warranty of quality arises when the seller explicitly assures the purchaser of a fact upon which he legally may rely. See, e.g., Dittman v. Nagel, 43 Wis. 2d 155, 160, 168 N.W. 2d 190, 193 (1969). In theory, the purchaser and seller bargain for inclusion of all the terms and conditions in the sales contract, and the purchaser can protect himself against defects in the property or ensure a certain standard of quality by bargaining for express warranties in the sales contract. In this case it was bargained that a well on the property produce an adequate supply of water. Id. at 157, 168 N.W. 2d at 192.

111. The notion that an express warranty does not preclude or is not inconsistent with an implied warranty of habitability is generally the rule in the sale of real property as in the sale of goods. For a further discussion of this notion, see supra notes 84-88 and accompanying text.

For example, in Bridges v. Ferrell, 685 P.2d 409 (Okla. Ct. App. 1984), Ferrell built a single-family residence which he sold to another party who subsequently resold it to the Bridges. The original contract stated that the seller provided a one-year “builder’s warranty,” and the contract for resale of the house provided that the warranty would be transferred to the Bridges. After the Bridges took possession, they discovered structural problems in the house and sued Ferrell for breach of implied warranty of habitability. Ferrell argued that the express warranty should determine the extent and duration of his responsibility. However, the court held that an express warranty, rather than superseding or excluding an implied warranty, was actually an added guarantee inserted into the contract to extend, rather than limit, liability for faulty construction, and it did not prescribe the owners’ exclusive remedy. Id. at 411.


113. Id. at 228, 585 P.2d at 923 (emphasis added).
Belts took possession, Spencer responded to the Belts’ complaints and requested that a subcontractor regrade the backyard. As a result of an expansive soil condition, cracks began to appear in the basement floor after the regrading, and the floor slab heaved and cracked. In addition, a foundation wall and walls in the upper floors cracked, supported columns heaved, the upstairs floors warped, a window broke, and the driveway slab heaved.\footnote{114. \textit{Id.} at 229, 585 P.2d at 924.}

The Belts sued Spencer for breach of implied warranty and Spencer in turn argued that the express warranty disclaimer relieved him of liability for the defects under any implied warranty. The appellate court affirmed judgment for the Belts, stating that the language limiting an implied warranty must be clear and unambiguous, and a disclaimer for “cracking” of concrete flatwork did not disclaim liability for the “heaving” which occurred.\footnote{115. \textit{Id.} at 231, 585 P.2d at 925.}

Although “cracking” and “heaving” are not synonymous terms, the concrete in the house purchased by the Belts clearly cracked when it heaved. Despite the fact that liability for a particular defect was specifically disclaimed, the court affirmed judgment for the purchaser because there was no express mention of an implied warranty disclaimer in the contract. The court relied on the fact that the term “heaving” implies a more violent defect than cracking. The extent of the damage to the house as a result of the defect and a desire to protect an innocent purchaser against the builder-vendor were clearly critical factors in the court’s decision.\footnote{116. The trial court had determined that the disclaimer referred to cosmetic defects especially and did not exclude liability for substantial defects. \textit{Id.} at 230-31, 585 P.2d at 925. The appellate court did not necessarily disagree with this interpretation, but concluded that “even if the disclaimer protected the defendant from liability for all ‘cracking’, the defendant would still be liable for the damage that did occur.” \textit{Id.} at 231, 585 P.2d at 925.}

\textit{Belt v. Spencer} illustrates a court’s general reluctance to permit a contractual disclaimer of an implied warranty when a first purchaser sues a builder-vendor for substantial latent defects that occur in a new home. The Belts were exactly the type of purchasers that the implied warranty of habitability was designed to protect: first purchasers of a new house built by a professional builder-vendor. The defects in the house were unknown and not easily discoverable by the purchaser. The contract executed by the parties was a printed form contract.\footnote{117. \textit{Id.} at 228, 585 P.2d at 923.} Because of all these circum-
stances, the court was clearly inclined to afford implied warranty protection to the purchasers, even though the contract language in this case appeared to disclaim any warranty protection for the type of defect which occurred. In *Belt v. Spencer*, the nature of the transaction and the relationship of the parties, rather than the precise language of the disclaimer in the contract, was the actual basis for the court’s decision. The court recognized this in its decision when it stated that even if the disclaimer had protected the builder from liability for all cracking, it would still hold the builder liable for the kind of damage that occurred.118

2. **"As Is" and "In Its Present Condition" Disclaimers**

Rather than expressly disclaiming warranty protection, a real estate contract may contain a provision that the property is sold "as is," or "in its present condition."119 As in cases involving the sale of goods, if there is no other express language of disclaimer and the language is not conspicuous, these provisions are usually ineffective to disclaim an implied warranty.120 The usual rationale is that contractual terms such as "as is" or "in its present condition" do not constitute a clear and unambiguous disclaimer of the implied warranty of habitability because these terms standing alone fail to notify the purchaser that he is giving up warranty protection. This is especially true if there is no agreement by the parties as to the meaning of the phrase121 or if there are other reasonable interpretations of the meaning of the language.122

118. *Id.* at 291, 585 P.2d at 925.

119. For a discussion of "clear and unambiguous" disclaimers, see *supra* notes 73-80 and accompanying text. Under U.C.C. § 2-316 "clear and unambiguous" disclaimer provisions may be effective to disclaim implied warranty protection in sale of goods cases. See U.C.C. § 2-316 (1987).

120. In such cases, the rationale is similar to that stated in express warranty cases—the average purchaser would not understand or interpret the provision as an agreement to waive implied warranty protection and to accept the house with an unknown latent structural defect. See *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795, 800 (Mo. 1972).

121. See, e.g., *Davis v. Bradley*, 676 P.2d 1242, 1245 (Colo. Ct. App. 1983) (although plaintiffs were aware of presence of "as is" clause in contract, there was no agreement as to its meaning). The trial court found that the clause did not limit the implied warranties of workmanlike construction and habitability in any respect since the plaintiffs intended only that the Bradleys would be relieved of any obligation to perform further work on the house, not that they would be relieved of their obligation to have performed already completed work in conformance with the building code. *Id.*

122. See, e.g., *Schoeneweis v. Herrin*, 110 Ill. App. 3d 800, 443 N.E.2d 36 (1982) (court held parties intended phrase "as is" to refer to state of completion of house rather than disclaimer of warranties). The *Schoeneweis* court also noted that both parties were laymen, and that warranties were not expressly discussed.
As in *Belt v. Spencer*, the question of whether the circumstances are such that warranty protection should exist is a significant factor distinguishing those cases where an "as is" disclaimer is effective from those where it is ineffective. In those cases where a new house is sold "as is" to a consumer-purchaser by a professional builder, where there are no objective reasons for the purchaser to suspect any latent defects in the structure, the disclaimer is most likely to be found ineffective because it is unclear or unspecific.  

For example, in *Casavan v. Campopiano*, the Casavants purchased a one-year-old house from the Campopiano and Recamp Enterprises, Inc. Six months later the Casavants discovered that the roof of the house was sagging, and they sued the Campopianos for breach of an implied warranty of habitability for the defective roof. Remo Campopiano had been engaged in the business of building houses for twenty years, while Mr. Casavant, on the other hand, had a ninth-grade education and had purchased a house on only one previous occasion. The contract contained a clause which provided that the premises would be delivered "in the same condition in which they now are," excluding

*Id.* at 804, 443 N.E.2d at 40. For a recent discussion of this case and other Illinois cases, see Anderson, *supra* note 9.

123. Even in a sale of a used residence, where the builder-vendor cannot show that the original purchaser knowingly waived the warranty, an "as is" clause may not prevent recovery by subsequent purchasers. In *Swaw v. Ortell*, 137 Ill. App. 3d 60, 484 N.E.2d 780 (1984), for example, the Swaws sued several defendants seeking to recover on various theories for structural defects in their home. Among other things, the Swaws alleged that the builder Presley-Chicago, Inc. (Presley), successor to Allied Homes, Inc., was liable for breach of implied warranty. The house had a prior history of structural and foundation problems, and in 1973, Allied repurchased the house from Rakers, its second purchaser, because of the continuing serious structural problems. *Id.* at 65, 484 N.E.2d at 784. After an intervening tenancy, in 1975 Presley sold the house to the Ortells "as is" for $36,500. In 1978 the Swaws purchased the house from the Ortells for $64,900. *Id.* at 66, 484 N.E.2d at 784. Presley argued that the Swaws had no cause of action for breach of implied warranty of habitability because the Swaws had purchased the house from the Ortells who purchased it from the builder "as is." The court said it did not need to resolve the issue whether or not a waiver by a prior purchaser waived that cause of action as to all subsequent purchasers because Presley failed to show that the Ortells knowingly waived the implied warranty of habitability. According to the court, Presley failed to show a conspicuous provision which fully disclosed the consequences of its inclusion and that such was in fact the agreement reached. *Id.* at 71, 484 N.E.2d at 788.

124. 114 R.I. 24, 327 A.2d 831 (1974). The facts indicated that upon completion of the basic structure of the house, the Campopianos rented it to a married couple who intended to purchase the house as soon as they were able to secure the necessary financing. Sometime within a year after taking possession, the tenants vacated the premises, and shortly thereafter the house was sold to the Casavants. *Id.* at 25, 327 A.2d at 832.
reasonable use and wear and unavoidable casualty damage.\textsuperscript{125} 

The court considered this provision to be one of doubtful meaning which should be construed strictly against the Campopianos. It also noted that in sale of goods cases, courts are reluctant to construe "acceptance in present condition" clauses as sufficient grounds for exclusion of implied warranties unless the language is used with specific reference to its effect. The rationale for holding that the disclaimer was ineffective was that the language did not meet the requirement of specificity.\textsuperscript{126} However, the court acknowledged its desire to effectuate the policies underlying the implied warranties of habitability and reasonable workmanship by construing the provision strictly against the builder-vendor.\textsuperscript{127}

3. \textit{Express Disclaimers of Implied Warranty Protection}

In some cases a contract contains a "boilerplate" merger clause which contains language to the effect that the written agreement is the entire agreement between the parties and no other warranties have been made or shall be binding on the parties.\textsuperscript{128} Even in this situation, if the language of the agreement specifically fails to exclude the implied warranties, the disclaimer

\textsuperscript{125} The clause in the contract provided: "Full possession of the said premises, free of all tenants is to be delivered to the party of the second part at the time of the delivery of the deed, the said premises to be then \textit{in the same condition} in which they now are, reasonable use and wear of the buildings thereon, and damage by fire or other unavoidable casualty excepted." \textit{Id.} at 27-28, 327 A.2d at 833 (emphasis added by court).

\textsuperscript{126} \textit{Id.} at 28, 327 A.2d at 834.

\textsuperscript{127} \textit{Id.} at 28, 327 A.2d at 833.

\textsuperscript{128} A "merger" clause is a clause in the contract which merges prior negotiations into the writing as, for example, "[t]his writing contains the entire agreement of the parties and there are no promises, understandings, or agreements of any kind pertaining to this contract other than stated herein." \textit{See} A. Farnsworth, \textit{supra} note 11, § 7.3, at 458. Under the parol evidence rule, a merger clause may prohibit the introduction of evidence of an express warranty not contained in the writing, regardless of whether the clause is effective to disclaim any implied warranties. If a court determines that the written contract for sale was "fully integrated," then even consistent additional terms to that agreement are inadmissible. \textit{Id.} at 451-52. For example, in Tusch Enter. \textit{v.} Coffin, 113 Idaho 37, 740 P.2d 1022 (1987), the purchaser of duplexes sued the builder and sellers because of structural defects. Among other things, the purchasers alleged that the sellers breached the express warranty that the duplexes were well-constructed. \textit{Id.} at 43, 740 P.2d at 1028. Both the earnest money agreement and the real estate contract contained "merger" clauses, which was one fact indicating to the court that the parties intended the contract to be a complete and exclusive statement of the terms of the agreement. \textit{Id.} at 44, 740 P.2d at 1029. As a result, the court found that the evidence of the warranty was properly excluded, and the action for breach of express warranty was properly dismissed. \textit{Id.} at 45, 740 P.2d at 1030. However, the same contract language was insuffi-
may be ineffective because it lacks specificity.\textsuperscript{129}

If the clause specifically refers to implied warranties, as in "no warranties, whether oral, implied or otherwise have been made," the disclaimer may still be ineffective because it is inconspicuous or fails to mention "habitability."\textsuperscript{130} Thus, an express disclaimer which is located on the back of a standard form contract, which does not mention "habitability" or explain the consequences of the disclaimer, may be ineffective to exclude implied warranty protection.\textsuperscript{131}

Even if a conspicuous, specific, express disclaimer of the implied warranty of habitability is effective against a first purchaser, the disclaimer and express warranty provision in the original sales contract may not preclude an implied warranty action by the second purchaser. In Nasti v. Wood Brothers Homes,\textsuperscript{132} the Nastris were second purchasers of a house constructed by Wood Brothers Homes. The house was sold in February 1978 to a couple

\textsuperscript{129} For example, in Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 202, 225 S.E.2d 557, 567 (1976), the contract, on a standard printed form used by the seller, contained the following provision: "Buyer hereby acknowledges that he has inspected the above described property, that no representations or inducements have been made other than those expressed herein, and that this contract contains the entire agreement between all parties hereto." The seller argued this language was effective to exclude an implied warranty of habitability. The court disagreed, stating that the language purported to exclude only "representations or inducements." Since the implied warranty of workmanlike quality does not exist by reason of representation or inducement, there is no waiver. \textit{Id.} at 202, 225 S.E.2d at 568.

\textsuperscript{130} In Conyers v. Molloy, 50 Ill. App. 3d 17, 364 N.E.2d 986 (1977), the Conyers purchased a house from Molloy, the builder. The Conyers alleged that there was lack of ventilation in the attic which caused water damage in the house. The contract contained the following provision: "There are no warranties on either house except those manufacturers' warranties that are in effect." \textit{Id.} at 18, 364 N.E.2d at 987. The Conyers argued that this language did not waive the implied warranty of habitability, but, even if it did, the waiver was void as against public policy. The court reversed the trial court's dismissal of Conyers' complaint by finding that the contract disclaimer was insufficient to adequately disclaim the implied warranty. The court did so by finding that the provision was overbroad, too general and too unspecific. While it agreed that all of the arguments in favor of the implied warranty would support the proposition that it should not be so easy to avoid, the court refused to go so far as to hold that disclaimers of warranty are void as against public policy, even though "freedom of contract is not so broad as it might once have been." \textit{Id.} at 22, 364 N.E.2d at 990.

\textsuperscript{131} For a further discussion of the conspicuous and specificity requirements, see supra notes 100-04 and accompanying text.


who in turn sold it to the Nastris in March 1980. The contract between the first purchasers and Wood Brothers Homes contained a lengthy provision that included an express limited warranty for one year and specifically excluded any other warranties, express or implied, including the warranty of fitness for habitation. When cracks in the foundation occurred as a result of settlement because the residence was built on "collapsible" soil, the Nastris sued the builder for breach of implied warranty of construction in a workman-like manner and habitability. The builder contended that the disclaimer in the contract with the first purchasers negated the implied warranty.

The appellate court did not agree. Noting that the instrument was a contract of adhesion and might be unenforceable on that basis, and that an express warranty for a limited time cannot displace the implied warranty of habitability, the court directly addressed the question as one of public policy. Finding that the purpose of the implied warranty of habitability is to protect innocent purchasers and hold builders accountable for their work, the court held that any attempted disclaimer of the implied warranty of habitability is void as against public policy as to an innocent subsequent purchaser.

The Nastris court squarely placed the responsibility for substantial defects in a newly constructed home where it belongs—on the builder-vendor. By framing the question in terms of public policy, the court put builder-vendors on notice that they may be potentially liable to subsequent purchasers for substantial latent defects in the home, regardless of contractual disclaimers in the original sales contract.

If the policies underlying implied warranty protection for purchasers of new homes are to be effectuated, the Nastris decision

133. Id. at 440, 690 P.2d at 159.
134. Id.
135. The Nastris also alleged that the builder was liable under the theory of strict liability and negligence. Id.
136. Id. at 441, 690 P.2d at 160.
137. Id. (citations omitted).
138. Id. at 442, 690 P.2d at 161.
139. Id. at 443, 690 P.2d at 162.
140. Many courts have extended warranty protection to subsequent purchasers who purchase a house that is only about four years old. See, e.g., Barnes v. MacBrown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976). The Nastris decision mandates that even if the builder-vendor effectively disclaims the implied warranty as to the first purchaser, he may still be liable to a subsequent purchaser. Nastris, 142 Ariz. at 443, 690 P.2d at 162.
is clearly justified. There is no other way to ensure that warranty protection is not waived by a first purchaser as to an innocent subsequent purchaser. As to first purchasers, so long as courts are unwilling to find disclaimers of the implied warranty of habitability void as against public policy, there will be cases where the disclaimer meets all legal criteria and thus is effective to exclude implied warranty protection.  

D. Cases Where the Disclaimer Was Effective

Although less frequent, there are cases where contractual disclaimers have been found effective to exclude an implied warranty of habitability in the sale of real property. In most of these cases, the parties were more equal partners in the bargaining process or the property was commercial investment property. In one case, the contract language met all the requirements established by the court for effective disclaimer and thus the disclaimer was enforced. In another case, a court found the disclaimer effective by relying on what it regarded as fundamental policies of freedom of contract in sale of goods cases.

1. Cases Where Policies Underlying the Implied Warranty Were Not Served

In cases where the property is commercial, rather than residential, and the sellers and purchasers are commercial parties with equal bargaining power, there are fewer reasons to extend warranty protection to a purchaser and more reasons to permit contractual disclaimers of warranty protection.

An example of such a case is Frickel v. Sunnyside Enterprises, Inc., in which the Frickels purchased an apartment complex for investment purposes. Sunnyside Enterprises had not built the property for resale but for its own ownership and management. The contract was not a form contract but one expressly tailored to the transaction, and it contained a disclaimer clause. When

146. The clause stated:
the Frickels learned that the building's foundations were inadequate and improperly designed, they brought suit for breach of implied warranty of habitability.

The court first determined that there was no implied warranty under these circumstances because the rationales supporting the implied warranty doctrine were not met.\textsuperscript{147} It also found the contractual disclaimer effective to exclude any implied warranty protection because the language of the disclaimer was clear and unambiguous.\textsuperscript{148} It noted that the buyers had sought out the property, had had ample opportunity to inspect the property, and had their own attorney. In the typical transaction between the average home-buyer and the vendor-builder of new houses, the parties are in an inherently unequal bargaining position. Where the purchasers are experienced and in a position to seek expert help, as in this instance, the court said there are no policy reasons to impose upon the sellers a guaranty that the parties neither negotiated nor expected.\textsuperscript{149}

An "as is" disclaimer also can be an effective waiver of the implied warranty of habitability when the seller is not a builder-vendor but rather an amateur builder who builds a house for his own occupancy.\textsuperscript{150} A purchaser of residential property for invest-

The purchaser agrees that full inspection of said real estate has been made and that neither the seller nor his assigns shall be held to any covenant respecting the condition of any improvements thereon nor shall the purchaser or seller or the assigns of either be held to any covenant or agreement for alterations, improvements or repairs unless the covenant or agreement relied on is contained herein or is in writing and attached and made a part of the contract.

\textit{Id.} at 716, 725 P.2d at 423.

\textsuperscript{147} \textit{Id.} at 718-19, 725 P.2d at 424-25.

\textsuperscript{148} \textit{Id.} at 721, 725 P.2d at 426.

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} See, e.g., Schepps v. Howe, 665 P.2d 504 (Wyo. 1983). In this case, a house was placed on the market, listed, advertised and sold by the Howes on an "as is" basis, and the asking price for the partially completed residence declined over the time between listing and sale. When numerous problems arose, the Schepps brought an action for fraud and breach of implied warranty, and the trial court entered summary judgment for the Howes because the purchasers could not have relied on any false representation by the sellers. The trial court further held that no warranty of habitability attached to the sale of a home by an amateur builder not intending to engage in a commercial venture. \textit{Id.}

The Wyoming Supreme Court was unwilling to find that as a matter of law an implied warranty would not apply under these circumstances. Rather, it held that the proper ground for affirming the trial court on the implied warranty claim was on the basis of waiver. The court relied on U.C.C. § 2-316(c) as indicative of the state's policy. \textit{Id.} at 509. It was undisputed that the disclaimer was brought to the attention of the Schepps and agreed to by them. There is almost no other discussion of the rationales on which the effectiveness of the warranty disclaimer was based. \textit{Id.}
ment purposes also may have greater difficulty maintaining an action for breach of implied warranty where the contract contains an “in its present condition” disclaimer. These cases demonstrate that courts are generally more likely to recognize the effectiveness of a disclaimer of warranty in circumstances where rationales supporting implied warranty protection are not present, as in cases where the parties’ bargaining power is equal. In these cases, courts are more likely to support the policy favoring freedom of contract and are less likely to intervene in contracts allocating risks by the parties.

2. Cases Relying on Freedom of Contract

At least one court has held an implied warranty disclaimer valid on the basis of the parties’ freedom of contract and the purchaser’s duty to read what he signs, citing a sale of goods case for the proposition that the parties have a right to make a one-sided contract if they choose. In *G-W-L Inc., v. Robichaux*, the Robichauxs brought suit under the Texas Deceptive Trade Practices Act for defects in a new house purchased from builder-vendor G-W-L, Inc. (“Goldstar”). The jury found that Goldstar had failed to construct the roof in a workmanlike manner and that the house was not merchantable at the time of completion, and the court of appeals affirmed that decision.

The Texas Supreme Court reversed the lower courts’ judgments, finding that a provision in the promissory note signed by the Robichauxs which stated there were no warranties, express or implied, was effective to disclaim any implied warranty of habitability. The court stated that the language in the promissory note waiving the implied warranty was clear and free from doubt

151. See Tibbitts v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967). The court held that a contract clause stating that the buyer accepts the property “in its present condition” was sufficient to disclaim the implied warranty. In *Tibbitts* the properties included two subdivision lots with houses and an adjacent vacant parcel. The evidence also showed that the Openshaws, the purchasers, had waited for nearly three years before registering their complaint. The trial court had dismissed the Openshaw’s counterclaim on that basis, and the supreme court affirmed its decision both for the purchaser’s lack of timeliness and on the basis of the disclaimer.


153. *Id.* at 392.

154. *Id.* at 393. The entire provision stated: This note, the aforesaid Mechanic’s and Materialmen’s Lien Contract and the plans and specification signed for identification by the parties hereto constitute the entire agreement between the parties hereto with reference to the erection of said improvements, there being no oral
and that the parties to a contract had an obligation to protect themselves by reading what they had signed.\textsuperscript{155}

The majority in Robichaux based its decision on a policy favoring freedom of contract and ignored the policy considerations underlying creation of the implied warranty of habitability or good workmanship in the sale of new homes. The implied warranty of habitability was created to protect purchasers like the Robichaux, who reasonably expected their house to be built in a good and workmanlike manner and that the builder will be held accountable if it is not. By allowing Goldstar to escape liability through the use of a disclaimer clause in a promissory note, the majority effectively eliminated implied warranty protection for many purchasers who, like the Robichaux, may sign form contracts without understanding the implications of such waiver language. The result is that sophisticated builders can escape accountability through the use of such waiver language and thus the responsibility imposed by the warranty is too easily avoided.

Three judges dissented in this case, arguing that because of the important policy considerations underlying creation of the warranty, a court should not consider the warranty waived except by very express and specific language which reflects that the buyer knew the implied warranty did not attach to the sale of the home.\textsuperscript{156} The minority position recognized that it is awkward to reason that a buyer has rights under the implied warranty, and then declare that these rights can be taken away without his knowledge.\textsuperscript{157}

The logic of the minority position in Robichaux subsequently prevailed in 1987 in Melody Home Manufacturing Co. \textit{v.} Barnes,\textsuperscript{158} where the purchasers of a modular pre-fabricated home sued the manufacturer. In Melody, the purchasers, the Barneses, filed an action against the manufacturer, Melody Homes, for breach of implied warranty under the Texas Deceptive Trade Practices Act, alleging that the manufacturer had failed to construct the home in a good and workmanlike manner and had failed to repair contin-

\textsuperscript{155} See Note, Real Property—Implied Warranty of Fitness and Habitability—Contract Language Stating No Warranties, Express or Implied, is Effective Disclaimer of Implied Warranty of Fitness and Habitability in Sale of New House by Builder-Vendor, 15 St. Mary's L.J. 673, 686 (1984); see also Anderson, supra note 9, at 540.

\textsuperscript{156} 741 S.W.2d 349 (Tex. 1987).
ual leaks in the home. In affirming the judgment for the Barneses, the Texas Supreme Court held that an implied warranty that repair or modification services of goods or property will be performed in a good or workmanlike manner may not be disclaimed. In overruling Robichaux to the extent it conflicted with this opinion, the Texas Supreme Court supported the public policy arguments raised by the dissent in Robichaux and stated that there are important policies underlying the implied warranty which should not be easily avoided. The court noted that a consumer continues to expect that the services he receives will be performed in a good and workmanlike manner regardless of the small print in the contract, and a disclaimer allows the service provider to circumvent this expectation and encourages shoddy workmanship.

So long as disclaimers are not uniformly void as against public policy, a contract disclaimer which meets all the tests set out by the courts may be enforced even though enforcement will not serve the policies underlying creation of the warranty. However, the protections provided by the implied warranty of habitability and the rationales underlying its development are too important to permit exclusion of warranty protection through contract disclaimer. A builder-vendor should not be permitted to exclude that warranty protection in sales of new residential property, however clear and conspicuous the disclaimer. For the reasons next discussed, disclaimers in the sale of new residential property by a builder-vendor should be declared void as against public policy.

159. Id. at 351.
160. Id. at 355.
161. Id. The court stated that an actionable implied warranty will further the policy of giving consumers an efficient and economical means of securing protection from poor quality services. Id. at 355 n.9.
162. Id. at 355.
163. See Country Squire Homeowners Ass’n v. Crest Hill Dev. Corp., 150 Ill. App. 3d 30, 501 N.E.2d 794 (1986). In this case, a townhouse homeowners organization sued the Crest Hill Development Corporation, a builder-developer, for damages resulting from breach of implied warranty. The disclaimer was conspicuously located in the three-page contract, printed in large-size print, and used plain non-technical language. The disclaimer also used the terminology suggested by the state’s supreme court—"the implied warranties of merchantability and fitness." The court felt it had little choice but to find that the disclaimer was, as a matter of law, part of the agreement between the parties. Id. at 33, 501 N.E.2d at 797.
IV. **Argument: Disclaimers in the Sale of New Residential Property by Builder-Vendors Should be Declared Void as Against Public Policy**

There are several reasons why a general disclaimer of the implied warranty of habitability in the sale of new residential property by a builder-vendor should be void as against public policy. One reason for the courts' reluctance to declare these disclaimers unenforceable is the fact that disclaimers of implied warranties are specifically permitted in sale of goods cases under the UCC.\(^\text{164}\) There are, however, good reasons to distinguish the sale of new residential property from the sale of goods. The fact that disclaimers of implied warranty protection are permitted under the UCC does not necessarily justify their enforcement in the sale of new residential property.

\[A. \text{ Rationales Distinguishing Sale of Goods Cases} \]

In his insightful article examining unconscionability and the UCC,\(^\text{165}\) Professor Leff notes that subject matter has effect on the form it takes and the legal rules which are developed to define that form: "'[W]idgets and Blackacre are not the same, are not dealt with by parties in the same way and (at least arguably) ought not to be treated identically in the law.'"\(^\text{166}\)

Land and chattels are different, and different rules should and do apply to their sale.\(^\text{167}\) The law recognizes that real property has great and lasting value, and that transactions in land are almost always of significance.\(^\text{168}\) Land is unique, and the supply of land is limited. Even though a house may resemble a manufactured good, the land upon which it sits does not. For example, if a toaster is defective, it can be replaced with another toaster, but a house cannot be replaced with another house somewhere else because its location and the land on which it sits are fundamental to its value.

Unlike most manufactured goods, a house and land can be

\[^{164}\text{For a discussion of disclaimers in "sale of goods" cases, see supra notes 50-83 and accompanying text.}\]

\[^{165}\text{Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485 (1967).}\]

\[^{166}\text{Id. at 555 (footnote omitted).}\]

\[^{167}\text{For example, contracts involving the sale of land are required to be in writing under the Statute of Frauds, while, on the other hand, contracts for the sale of goods (at least relatively inexpensive goods) are not. See A. Farnsworth, supra note 11, § 6.5, at 397.}\]

\[^{168}\text{Id.}\]
expected to increase in value over time. Frequently a used or "pre-owned" house will cost more than when it was built. Unlike the purchase of most manufactured goods, the purchase of a house is a major investment, and substantial latent defects in the house diminish not only the purchaser's expectations of use and enjoyment of the home, but also his expectation of its long-term investment value.

It may make sense to allow a manufacturer to disclaim warranty protection on a toaster or a fountain pen, since a consumer can always shop around for another one, but the same is not true in the purchase of a house. The market may be limited, especially if the purchaser desires a particular type of house in a particular location. Each house is unique, and a purchaser often will not have a choice between identical or even substantially similar products because he desires a particular type of house in a particular neighborhood or school district.

The purchase of a house is much more likely to be a once-in-a-lifetime transaction, and the relationship between the seller and buyer is different as a result. A purchaser may buy countless goods, often from the same merchant-seller, but he is much less likely to purchase another house from the same builder-vendor. When that builder-vendor is "merchant-like" because he is in the business of selling houses, his reputation is of course very important. But the builder-vendor is less likely than the merchant to expect the same purchaser to return for another transaction in the future, and thus the builder may be less motivated to satisfy that particular purchaser. A manufacturer-seller of goods may provide express warranties and choose not to disclaim implied warranties in order to be competitive with other manufacturer-sellers in the market, but the same concern may not be present for the builder-vendor.

In imposing implied warranty protection in the sale of new homes, courts recognize that an unsophisticated purchaser may not understand the need to protect himself through specific contractual language. Presumably that same unsophisticated purchaser may not understand the effect of a disclaimer clause in the sales contract. For this reason, to allow a builder-vendor to escape liability for selling a new house that fails to meet a reasonable test of habitability and good workmanship through disclaimer language in the contract, however conspicuous or clear, should not be permitted. The value, uniqueness, and endurance of the property, its significance to the purchaser, and the
nature of the relationship between the parties is different in sales of real property, and strict analogy to sale of goods cases is inappropriate. While disclaimers may be a legitimate device for allocating risks in the sale of goods, they are inappropriate in sales of new houses by a builder-vendor. The parties should, of course, be permitted to negotiate waiver or disclaimer of specific defects known to the purchaser because the implied warranty only protects against unknown latent defects in the property. But general contractual disclaimers of implied warranty protection should not be permitted, however conspicuous or clear they may be.\textsuperscript{169}

Most real estate contracts today are standardized contract forms.\textsuperscript{170} In the usual case, a consumer never even reads the form, or reads it only after he has signed it.\textsuperscript{171} In addition, it may never occur to the purchaser that a disclaimer clause in the contract may allow the builder to escape liability for faulty workmanship. The purchaser who signs such a contract may not know about, let alone understand, the meaning of a particular clause. This problem is usually addressed through the requirements of conspicuousness and knowledge, and disclaimer clauses which are buried in mounds of standardized contract language will fail because they cannot meet these requirements.

But the tests of conspicuousness are often unclear and ill-defined: the rules are developed in a case-by-case basis and depend on such factors as length of the document, position of the clause, language and even bargaining power of the parties. Using a test of conspicuousness, specificity and knowledge leads to uncertainty by the seller and increased litigation by aggrieved purchasers who must prove the requirements were not met in their given case.

\textsuperscript{169} This argument is not new. In 1965 one author wrote: "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." Haskell, supra note 1, at 654 (emphasis added).

\textsuperscript{170} A. FARSWORTH, supra note 11, § 4.26, at 293. Most, but not all, real estate contracts are standardized contract forms. The use of standardized contract forms has increased so much that today the typical agreement is made on a standard pre-printed form. While there are economic arguments that favor the use of such forms, there is also the concern that "formishness" can be a vice when one party has monopolistic powers, as in some merchant-consumer relationships. Id. at 293-302.

\textsuperscript{171} Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 HARV. L. REV. 529, 530 (1971).
**Implied Warranty Disclaimers**

B. *Policy Against Subterfuge*

The question of whether warranty disclaimers in the sale of real property should be permitted is a question of social policy and should be addressed as such. Policing these contract disclaimer clauses on a case-by-case basis using criteria such as "conspicuousness," and "specificity" enables courts to avoid addressing the social policy questions involved.\(^{172}\) If a fair price demands a sound product, then a rule disallowing disclaimers in cases of sale of new residential property is justified and should be imposed.

Holding disclaimers unenforceable in contracts for the sale of new homes would eliminate the uncertainty that now arises when a contract for the sale of a new home contains a disclaimer clause. This uncertainty leads to more litigation and increased costs for both parties. As things now stand, the builder-vendor cannot know whether he will be responsible for latent defects in the house until litigation resolves the question. Moreover, even if the disclaimer is effective as to the first purchaser, he still may be liable to a subsequent purchaser for latent defects in the property.\(^ {173}\)

Unconscionable disclaimer clauses are unenforceable in sale of goods cases,\(^ {174}\) and by analogy the same theory could be used to invalidate disclaimers in sales of real property.\(^ {175}\) However, it is very difficult to define what level of bargaining misbehavior must be reached to warrant judicial invalidation under this theory, and the theory raises the same problems inherent in a case-by-case approach. More importantly, it is the level of responsibility of the builder-vendor, and not the dynamics of the bargaining process, which courts should address. Disclaimers in sales of new residential property by a merchant-like builder-vendor should be invalid because of the importance of the policies favoring recognition of the implied warranty. Concerns for freedom of contract can be met by permitting disclaimer of known specific defects in

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172. *See* Leff, *supra* note 165, at 515. Leff writes: "On the other hand, if one decides to police contracts on a clause-by-clause basis, he finds that he has merely substituted the highly abstract, 'unconscionable' for the possibility of more concrete and particularized thinking about particular problems of social policy." *Id.*


174. Some find it "frankly incredible" that U.C.C. § 2-302 is applicable to warranty disclaimers, but such is the case. Leff, *supra* note 165, at 523.

the property, but general disclaimers of implied warranty protection should not be permitted. If the builder-vendor does not remain liable for substantial latent defects in new residential property, the important policies underlying creation of the warranty are too easily defeated. The courts' attempts to deal with the problem by invalidating disclaimers through application of requirements or tests avoid addressing the real question—whether, as a matter of policy, the builder-vendor should ultimately bear responsibility for latent defects in the structure.

By holding disclaimer clauses in contracts for sale of new residential property unenforceable, the responsibility for latent defects will be placed properly on the builder-vendor, who is in the best position to know about, repair and bear the financial risk for such defects. The purchaser then will be assured of receiving what he is entitled to expect—a new house free of substantial latent defects. After all, it was for these reasons that the warranty was first recognized.

V. Conclusion

Today a majority of states recognize an implied warranty of quality in the sale of new homes. This implied warranty of habitability or good workmanship is designed to protect the average purchaser who lacks the ability and expertise to inspect for and discover defects in a new house. Like the implied warranty of merchantability in the sale of goods, the implied warranty of habitability protects the reasonable expectations of the parties. The purchaser expects and should be entitled to receive a house that is structurally sound, habitable and free from hidden defects.

The important policy considerations underlying the recognition and expansion of an implied warranty of habitability in the sale of new homes must co-exist with long-standing American notions of freedom of contract and the ability of parties to freely negotiate the terms of their agreement.176 Contractual disclaimers of the implied warranty of habitability create problems for the courts because the policies underlying imposition of the warranty often conflict with policies favoring freedom of contract. No doubt the trend favoring freedom of contract has declined in this century as the free enterprise system has declined and state regu-

176. Contract law as it developed in the 19th century was dominated by the notion of freedom of contract, because freedom to make enforceable bargains was thought to maximize the good to society as a whole as well as an individual's freedom. See A. Farnsworth, supra note 11, § 1.7, at 21.
lation of contracts has increased, but the presumption remains that parties should be able to agree to allocate risks by contract and to exclude implied warranty protection. To determine the effectiveness of a disclaimer, therefore, courts still look to the particular circumstances of a case to see whether the clause was freely negotiated.

Factors like conspicuousness, specificity and clarity are frequently given as the bases for a court's decision as to whether a disclaimer of implied warranty protection is effective. But in most cases the effectiveness of the disclaimer depends not only on the actual contract language, but on factors such as the kind of property sold, the relationship and relative bargaining power of the parties and the sophistication of the purchaser. The more compelling the reasons for imposing implied warranty protection, as where the purchaser is unsophisticated and inexperienced and the seller is a merchant-like builder, the less likely it is that a court will enforce the disclaimer.

The use of criteria such as "conspicuousness" and "specificity" to determine the effectiveness of disclaimers in these cases allows courts to avoid confronting the issue in terms of the real policy issues presented—whether the builder-vendor should be liable for latent defects in the structure as against an innocent purchaser. Where the builder-vendor is in a position of superior expertise and bargaining power, and the property is new residential property, the disclaimer is almost always held invalid on the basis of one or more criteria established by the court. A better approach in these cases would be for courts to address the issue directly as one of public policy and hold that disclaimers in contracts for sale of a new residence by a builder-vendor to a first purchaser are void.

By holding disclaimers void as against public policy, the builder-vendor would know that he is responsible for any substantial latent defects in the property, regardless of contract language. The price of the house would presumably reflect this fact. It would resolve the question of whether a subsequent purchaser is bound by disclaimer in the original contract. Most importantly, the policies underlying the warranty would be served and the innocent and unsophisticated purchaser protected.

No court has yet gone so far. In most real property disclaimer cases, courts look for guidance to sale of goods cases

177. Id. at 22.
which are governed by provisions of the UCC. UCC section 2-316 specifically permits disclaimers of implied warranty protection in the sale of goods if certain requirements are met, and many courts find the UCC provisions indicative of a state's policy on disclaimers in general. Requirements such as conspicuousness clearly reflect UCC criteria. There are, however, important distinctions between sales of new residential property and sales of goods. Real property has lasting value and it is unique. Its supply is limited. If the structure is defective, it cannot be replaced easily by another structure somewhere else because its value and usefulness depends on its special location. Furthermore, the purchase of a new house is likely to be a once-in-a-lifetime purchase. As a result, there are fewer reasons for a builder-vendor to warrant the quality of the product than in goods cases where the seller hopes to attract the purchaser back for subsequent purchases.

The important policies underlying warranty protection for the purchaser of a new house from a builder-vendor simply outweigh the policies favoring freedom of contract in these cases. A seller and purchaser should be permitted to allocate risks for specific known defects in the structure, but general disclaimers of implied warranty protection should not be permitted. By addressing the question as one of public policy, rather than by applying discretion-inviting criteria, the courts would squarely place the responsibility for latent defects in new housing where it belongs—on the builder-vendor, who is in the best position to discover the defect, repair it and bear the cost of that repair. In this way, the important purposes of the implied warranty of habitability in the sale of new homes will be served.

178. See, e.g., Petersen v. Hubschman Const. Co., 76 Ill. 2d 31, 389 N.E.2d 1154 (1979). The majority writes, "It would more accurately convey the meaning of the warranty as used in this context if it were to be phrased in language similar to that used in the Uniform Commercial Code, warranty of merchantability, or warranty of fitness for a particular purpose." Id. at 41-42, 389 N.E.2d at 1158.