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WHAT IS THE APPROPRIATE STATUTE OF LIMITATIONS FOR THE IMPLIED WARRANTY OF HABITABILITY?

David A. Larson*

The implied warranty of habitability requires that residences be constructed (and in some cases maintained) in a safe and workmanlike manner. Some jurisdictions do not recognize this warranty under any circumstances. Even among jurisdictions which do recognize the warranty there is disagreement as to its scope. A number of courts hold

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1. In a significant majority of jurisdictions the implied warranty of habitability has been recognized in leases of residential real estate as well as in sales of said real estate. At least forty jurisdictions have recognized the implied warranty as an element of landlord-tenant law. Mallor, The Implied Warranty of Habitability and the "Non-Merchant" Landlord, 22 DuQ. L. Rev. 637, n. 3 (1984). For instance, it has been held that, "the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition." Javins v. First National Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970).

2. The implied warranty of habitability was explained by the North Carolina Supreme Court in that, "the vendor . . . shall be held to impliedly warrant . . . the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction." Hartley v. Ballou, 286 N.C. 51, 62, 209 S.E.2d 776, 783 (1974).

that a transfer of property by the first purchaser terminates the implied warranty of habitability. A growing minority of states, however, have adopted the position that when the original purchaser of a residence from a builder/vendor transfers that residence to a second purchaser, the implied warranty of habitability is also transferred to the second purchaser.

This article will focus upon those jurisdictions that do allow the implied warranty of habitability to be transferred to subsequent purchasers. The jurisdictions that have extended the implied warranty of habitability will first be examined in order to identify the specific theories that have been asserted in order to allow the extension of protection. Then efforts to construct or identify appropriate statutes of limitations consistent with these theories will be analyzed. The article will also briefly examine the question of whether a disclaimer can be used to prevent an action based upon the implied warranty of habitability.

Several reasons exist for the particular emphasis of this article. Although it is still the minority one, the position that subsequent purchasers should be protected by the implied warranty of habitability is clearly gaining strength, and ten jurisdictions to date have adopted this rule, including seven in the last four years. Two other jurisdictions have issued opinions suggesting they may extend the warranty in the future. The decision to extend the implied warranty of habitability is

7. In a recent case, the North Carolina appellate court stated, "although we need not address the question as to whether an implied warranty should be extended to subsequent purchasers of the property, we note that the logic of this holding would apply to such situations." Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555, 560 n.1 (1984). In Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041 (Colo. 1983), the court stated that while a subsequent purchaser could not sue under a breach of warranty theory, that purchaser would be able to allege negligence. The Colorado court carefully drew a distinction between actions based upon negligence and actions based upon breach of an implied warranty. The Cosmopolitan Homes, Inc. court stated that the implied warranty action is a contract action and that the essential element of privity did not exist when a

[Vol. 7:689]
consistent with the Uniform Land Transactions Act.\(^8\) The author believes that the arguments in favor of extending the implied warranty of habitability are the better reasoned ones and that additional states will adopt this position. Accordingly, the question of what is the appropriate statute of limitations will continue to grow in importance.

The problem of determining what should be the statute of limitations when the implied warranty of habitability is extended to subsequent purchasers raises issues that also concern states which have adopted the implied warranty of habitability only for direct purchasers. Thus, even if a particular state has not extended the implied warranty of habitability to subsequent purchasers, much of this discussion will be directly relevant.

**THE NATURE OF THE IMPLIED WARRANTY OF HABITABILITY**

Historically, a purchaser of a new home which was to be used as a residence had essentially no protections beyond those existing as covenants in the deed.\(^9\) The doctrine of merger was applied in real estate transactions in such a fashion that even if there were promises contained in the contract for sale, they were not held binding unless they also appeared in the deed.\(^10\) The merger doctrine led to harsh results for many home buyers. For instance, in *Traverse v. Long*\(^11\) the Ohio Supreme Court addressed the question of whether a dissatisfied plaintiff should be allowed recovery for damages arising out of a residential real estate purchase. The court stated:

Where those (defective) conditions are discoverable and the purchaser has the opportunity for investigation and determination without concealment or hindrance by the vendor, the purchaser has no just cause for complaint even though there are misstatements and misrepresentations by the vendor not so reprehensible in nature as to constitute fraud.\(^12\)

The Ohio court was merely citing the popular rule of the day, that

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\(^10\) Id. at 797.

\(^11\) 165 Ohio St. 249, 135 N.E.2d 256 (1956).

\(^12\) Id. at 252, 135 N.E.2d at 259.
of caveat emptor. The recognition of an implied warranty of habitability, however, has provided protection for the home purchaser. When a residence contains deficiencies in workmanship, design, and materials, recovery has been allowed in order to "afford home buyers protection from overreaching by comparatively more knowledgeable builders-vendors."  

Courts have experienced significant difficulty in determining the limits of the implied warranty of habitability. A particularly troublesome question has been whether the implied warranty of habitability should be extended to subsequent purchasers. In attempting to answer this question courts have become entangled in the problem of whether an action based upon breach of the implied warranty of habitability should be characterized as a tort or a contract action.

This characterization has significant consequences. If the implied warranty of habitability is characterized as a tort, an issue is raised as to the nature of the damages that can be recovered. There has been a long standing debate as to whether economic losses should be awarded in tort actions. The debate can be summarized by reviewing two familiar cases arising in New Jersey and California respectively, Santor v. A. & M. Karagheusian, Inc. and Seely v. White Motor Co.

In Santor the plaintiff was dissatisfied with carpeting which had been manufactured by the defendant. He sued under an implied warranty theory for the loss in value due to the defects. Recognizing his right to recovery, the court stated that it would have been an acceptable alternative for the plaintiff to sue under strict liability in tort. The Santor court concluded that it could not determine why a defendant's responsibility should be regarded differently depending upon the type of damage caused by a defective product.

On the other hand, in Seely the plaintiff purchased a truck manufactured by the defendant. The truck had defective brakes which led to an accident involving only property damage. Whereas the Supreme Court of California did allow recovery based upon a warranty theory, the opinion has been used to support the view that strict liability in tort should not be available to compensate for the loss suffered when one receives a defective or inferior product. Rather, contract theory should

15. 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).
17. Id.
be relied upon to satisfy the economic expectations of the parties in commercial transactions.¹⁸

A clear problem is presented for any jurisdiction that has adopted the *Seely* rule. Typically, a suit for breach of the implied warranty of habitability is simply a claim that the purchaser did not receive the type of home that he or she was entitled to receive. In other words, the claim is a classic one of mere economic loss. If a breach of the implied warranty of habitability is then defined as a tort cause of action, these damages cannot be recovered.

Partially as a result of this "economic loss" limitation in tort actions, courts have tended to identify the implied warranty of habitability as a contract action. Once this identification has been made, another problem arises. It was long ago established in cases such as *Winterbottom v. Wright*¹⁹ that privity of contract is a necessary requirement in an action to recover damages. Thus, if the implied warranty of habitability is identified as a contract action, how can recovery be extended to subsequent purchasers who do not have privity with the original builder/vendor? On the other hand, if the action is determined to be one in tort, how can the plaintiff recover for mere economic loss?

The matter is further complicated when one comes to the question that is the focus of this article. Statutes of limitations are frequently drafted in terms of tort law or contract law. Although a court may avoid making a tort or contract characterization when determining whether an implied warranty of habitability exists, it is much more difficult to avoid having to make a characterization as to which kind of action is involved when it comes to selecting an appropriate statute of limitations. Because statutes of limitations tend to be drawn in terms of either contract or tort causes of action, courts can find themselves making one kind of characterization initially, when they first recognize the existence of an implied warranty of habitability as either a tort or contract cause of action, and then struggling to remain consistent in selecting an appropriate statute of limitations.

There does exist a certain class of statutes, however, that some courts have looked to in order to resolve their dilemma. Many jurisdictions have enacted special statutes of limitations that relate to actions for damages for injury to person or property or wrongful death caused by deficiency in design, planning, supervision of construction or con-

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struction of improvements to real property. A number of courts have turned to this statute of limitations in an effort to settle their conceptual problem with the implied warranty of habitability. Yet in so doing these courts have encountered a completely new set of problems.

**DO IMPROVEMENT STATUTES AVOID THE CONTRACT/TORT DILEMMA?**

In the recent case of *Daugaard v. Baltic Co-op Building Supply Association*, the South Dakota court examined a type of statute which, at least on its face, appears perfectly suited to be used as a statute of limitations for the implied warranty of habitability. Commonly referred to as improvement statutes, the South Dakota version provided that:

No action to recover damages for any injury to real or personal property, for personal injury or death arising out of any deficiency in the design, planning, supervision, inspection and observation of construction, or construction, of an improvement to real property . . . may be brought against any person performing . . . more than six years after substantial completion of such construction.

In an attempt to determine the validity of the statute, the court directed its attention to South Dakota Constitution Article 6, Section 20. This article stated that “courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay.” The South Dakota court, citing the United States Supreme Court in *Boddie v. Connecticut*, asserted that what the Constitution requires is an opportunity for people to pursue their rights in a meaningful time and in a meaningful manner. The court then concluded that the statute in question was unconstitutional in that it was basically a “statute of nullification which stamp(s) out our citizens’ causes of action before they accrue.”

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22. Id. at 424 n.2; citing S.D. Codified Laws Ann. 15-2-9.
23. Id. at 424.
24. Id.
26. 349 N.W.2d at 425-26. See also Daugaard v. Baltic Co-op. Bldg. Supply Ass’n, 349 N.W.2d at 425. The Supreme Court of South Dakota notes that similar legislation was held unconstitutional in the following cases: Jackson v. Mannesmann Demag Corp., 435 So. 2d 725 (Ala. 1983); Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 A.2d 288 (1983); Bolick v. American
Although these statutes on their face may appear to clearly cover the implied warranty of habitability, they obviously do not always withstand constitutional challenge. Limitation statutes of this nature have been held unconstitutional based upon theories of equal protection and lack of due process.\(^{27}\) There is not, however, agreement as to the unconstitutionality of these types of statutes. Other jurisdictions have held such statutes to be constitutional. In *Bouser v. City of Lincoln Park*\(^ {28} \) the Court of Appeals of Michigan examined section 600.5839 of the Michigan Compiled Laws\(^ {29} \) which stated that, "[n]o person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death . . . more than six years after the time of occupancy of the completed improvement, use or acceptance of such improvement."\(^ {30} \) The court confirmed the constitutionality of the statute by developing a distinction between statutes of abrogation and statutes of limitation. The court asserted that, "it is well settled that the Legislature of this state has the authority to abolish a cause of action which has not accrued."\(^ {31} \) The clear language of the statute prohibited any action six years after occupancy or acceptance of the improvement. The statute did not concern itself with when a cause of action might accrue. Accordingly, the plain language of the enactment led the court to the conclusion that the legislature had simply intended to abrogate any cause of action arising under the statute after the six year period had run and that such legislative action was permissible.\(^ {32} \) Whereas South Dakota would probably characterize such a statute as one of "nullification" and hold it unconstitutional, Michigan prefers the label "abrogation" and holds such statutes constitutional.

Even if a court recognizes the constitutionality of one of these improvement statutes, additional problems may arise. In *Donovan v.*

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30. Id.


32. Id. at 172-73, 268 N.W.2d at 334-35.
Pruitt, the Washington court made an effort to apply a statute similar to the ones cited above. This statute stated that, "[a]ny cause of action which has not accrued within six years after such substantial completion of construction, or within six years of such termination of services, whichever is later, shall be barred."

The court explained that this was not truly a statute of limitation. Rather, it merely provided a time period within which the cause of action must accrue and it did not establish a limitation period from accrual to the commencement of the action. The court cited Bouser v. City of Lincoln Park and concluded that this was a "statute of abrogation."

The Washington court determined that because statutes of abrogation can withstand constitutional challenge and are not limitation statutes, a court must then proceed and identify an actual statute of limitations. The court first examined whether the Washington six year statute of limitations addressing actions "upon a contract in writing, or liability express or implied arising out of a written agreement," should be applied to an action brought by purchasers of a new house for breach of the warranty of fitness for occupancy. The court rejected this alternative and stated that this cause of action did not arise out of a written contract but instead came into existence by virtue of a common law duty of strict liability that the builder/seller owed to the first purchaser/occupant.

The case is important in several respects. Because it refused to identify the cause of action as one arising in contract, the Washington court was not bound to a contract statute of limitations. By classifying the improvement statute as a statute of abrogation, the court avoided a constitutional challenge. Additionally, the Washington court created the possibility of extending the implied warranty of habitability to subsequent purchasers. As a result of refusing to identify the action as one based upon contract theory, the court can avoid a lack of privity problem whenever it does finally choose to extend the warranty.

Thus, the beginning of a workable approach appears to have been presented. One can argue that improvement statutes should not be regarded as statutes of limitation but rather should be regarded as stat-

37. Id. at 327, 674 P.2d at 206 (citing WASH. REV. CODE § 4.16.040(1)).
38. Id. at 328, 674 P.2d at 207.
utes of abrogation. This latter characterization can assist a court in avoiding a claim of unconstitutionality.

Yet the Donovan decision does not go far enough. Once an improvement statute has been characterized as a statute of abrogation, a court must then continue its analysis and attempt to identify a statute of limitations. On the facts before it, the Donovan court did not have to make such an identification. Because the court refused to apply the six year contract statute of limitation and because the time period had expired for all of the remaining statutes of limitations, the plaintiff's action was barred under any of the remaining state statutes of limitations regardless of which statute was selected.

Thus, courts can read improvement statutes as statutes of abrogation and avoid claims that they are favoring special groups by applying a special statute of limitations. In this way a court can at least narrow its choice of statutes of limitations. It can now avoid the problem of choosing whether an improvement statute on the one hand, or a tort or contract statute of limitations on the other, should be the appropriate statute of limitations. The choice is narrowed to the contract or tort statute of limitations. Unfortunately, however, this is merely back to square one. The court is once again left with the contract or tort choice.

**WILL A MORE DETAILED IMPROVEMENT STATUTE SOLVE THE PROBLEM?**

A number of improvement statutes give hope that the contract/tort choice can be avoided because they include separate statutes of limitations within their text. For instance, the improvement statute in Colorado states that, "[a]ll actions against any architect, contractor, engineer, or inspector brought to recover damages for injury to person(s) . . . shall be brought within two years after the claim for relief arises . . . but in no case shall such an action be brought more than ten years after the substantial completion. . . ." This statute would appear to resolve any problems in that it seems to be both a statute of abrogation and a statute of limitations.

But leaving aside for a moment the fact that by drafting such a statute one may have raised equal protection or due process claims by including a special (and usually shorter) limitation period within a statute of abrogation, the case of *Duncan v. Schuster-Graham Homes*,

Inc. illustrates how reluctant a court may be to apply such statutes. In Schuster an action was brought alleging breach of an implied warranty of habitability. The court examined whether the Colorado improvement statute should be applied. The plaintiffs were merely claiming damages relating to deficiencies in the house itself. They sought the cost of repairing the deficiencies or the difference between the value of the house they actually received and the value of the house they would have had if it had been as warranted.

The court observed that the plaintiffs apparently did not seek damages for injuries to person or property caused by those deficiencies. Consequently, the case should be regarded as an action arising from a contract of sale. Declaring that warranties are contractual in nature, the court refused to apply the improvement statute and instead turned to the general six year statute of limitations for contract actions.

The Colorado court expressed obvious concern for the fact that under the improvement statute the plaintiffs would be restricted to a two year effective statute of limitations contained within a ten year statute of accrual. In an effort to avoid such a short statute of limitations, the Colorado court asserted that the improvement statute could not apply because it was clear from its language that the statute was not meant to apply to simple actions seeking damages for structural deficiencies. The court declared that by using traditional tort terminology “injury to person or property” the Colorado legislature must have intended to exclude situations such as the Donovan case.

The Colorado court’s efforts to simply avoid this two year statute of limitations are painfully obvious. While suspect in principle, this reasoning does not cause a particular problem in Colorado at the present time because Colorado has not yet extended the implied warranty of habitability to subsequent purchasers. Colorado has thus not had to resolve the lack of privity problem which results from the characterization of the implied warranty of habitability as a contract action. If Colorado does decide to extend the warranty, however, the lack of privity between the builder/vendor and the subsequent purchaser must be addressed.

If a court categorizes the implied warranty of habitability as a

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40. 194 Colo. 441, 578 P.2d 637 (1978).
41. Id. at 447, 578 P.2d at 641.
42. Id. at 446, 578 P.2d at 641.
43. Id. at 445, 578 P.2d at 640.
44. See, Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1043 (Colo. 1983) wherein the court repeated that, “[w]e have limited the class of purchasers entitled to the contractual protection of the implied warranty to first purchasers.”
contract action it should, in order to remain consistent with contract principles, rule as the Missouri court did in Clark v. Landelco. The Missouri court held that when second purchasers are not in privity of contract with the original vendor they will be barred from bringing suit based upon a theory of implied warranty of habitability.

While perhaps sound in principle, this conclusion leaves a subsequent purchaser in a helpless position. In Clark the court stated that there is no cause of action for damages due to deterioration or loss of bargain resulting from a builder's alleged carelessness or negligence in the construction of a residence if one is only pursuing a tort claim. In other words, there cannot be any economic loss recovery in a tort action.

A subsequent purchaser in Missouri has been stripped of any chance of recovery. According to the Missouri court, an action for breach of the implied warranty of habitability is a contract action. It will thus not be available to subsequent purchasers because there is no privity of contract. Yet when turning to possible tort theories, one is faced with the proposition that a purchaser is not entitled to recovery in tort for mere deterioration or deficient workmanship. Consequently, a subsequent purchaser will have no relief of any nature.

In spite of the need for principled judicial reasoning, other jurisdictions have looked at improvement statutes and attempted to avoid rather harsh rules stating that a plaintiff has only as few as two years from the date when he or she discovered or should have discovered the defect in which to initiate a lawsuit. The development of a line of cases in Minnesota illustrates the aversion of some courts to improvement statutes. In Kittson County v. Wells, Denbrook & Assocs. Inc., the county brought an action to recover against an architect and construction contractor alleging breach of warranty and negligence in the design and installation of a new finish on the courthouse. The court examined the assertion that Minnesota Statute section 541.05(1) should apply. The statute declared that:

No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property . . .

45. 657 S.W.2d 634 (Mo. Ct. App. 1983).
46. Id. at 636 (citing Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978)).
47. 657 S.W.2d at 635.
48. Id. at 636.
49. 308 Minn. 237, 241 N.W.2d 799 (1976).
50. Minn. Stat. § 541.05(1) (1965).
shall be brought against any person . . . more than two years after discovery thereof, nor, in any event more than ten years after the completion of said construction.51

The Supreme Court of Minnesota determined that this statute did not apply in the instant case. The court reasoned that although the statute did not use the term "tort," it did contain several references which strongly suggested the legislature intended the statute to apply only to tort actions. First, the statute referred several times to injuries to person or property.52 Second, the statute required that said injury arise out of the "defective and unsafe" condition of the improvement.53 Third, the statute referred to defective and unsafe conditions "constituting the proximate cause of the injury."54 Thus, the court concluded, the statute was clearly borrowing from tort law and not from contract or warranty law.55

The Kittson court referred to the Catholic University Law Review56 for authority that over 30 jurisdictions had recently enacted statutes of this nature.57 The court decided that the Minnesota statute was part of a trend to protect architects and builders from the large product liability judgments of the 1960's and consequently the statute should be limited to tort actions. If the Minnesota Legislature had intended the Minnesota statute to cover actions sounding in contract or in warranty it would have included broader language. Thus, the appropriate statute was not the improvement statute but rather the general six year statute of limitations.58

This aversion to improvement statutes was further evidenced in Caledonia Community Hospital v. Liebenberg Smiley.59 There the court spelled out more clearly that Minnesota Statutes section 541.05 did not apply to either contract or tort claims by an owner against those persons who contracted with the owner for the design and construction of an improvement to real estate.60 The Caledonia court actu-

51. Id. at subd. 1.
53. Id., 241 N.W.2d at 801.
54. Id. at 241, 241 N.W.2d at 801-02.
55. Id. at 241, 241 N.W.2d at 802.
58. Id. at 243, 241 N.W.2d at 802.
59. 308 Minn. 255, 248 N.W.2d 279 (1976).
60. Id. at 258, 248 N.W.2d at 280.
ally went beyond what was established in the Kittson County case. Although the Caledonia case cites Kittson County for the proposition that section 541.05(1) should not apply to tort claims, the Kittson County court actually stated only that Minnesota Statutes 541.05(1) does not apply to actions sounding in breach of contract and warranty.

What the Minnesota court did in Caledonia bordered on the absurd. Whereas it is questionable whether an improvement statute should be limited to just tort actions, at least there is some basis for such a limitation. In Caledonia the Minnesota Supreme Court simply ignored the Minnesota improvement statute altogether. The court refused to apply it even to a cause of action sounding in tort. The effort to avoid applying improvement statutes containing short statutes of limitations had reached its most extreme level.

Perhaps fortunately, the following year the Minnesota Supreme Court addressed the question of whether or not the statute could withstand a constitutional challenge. In Pacific Indemnity Co. v. Thompson-Yeager, Inc., the court found the statute unconstitutional because it granted "immunity from suit to a certain class of defendants, without there being a reasonable basis for that classification." The statute placed absolute time limitations upon damage claims against certain persons who constructed or designed improvements to real estate but excluded other persons against whom third parties might bring claims should they incur injury.

Thus, the final step in Minnesota's treatment of the improvement statute was to declare the statute unconstitutional. Recognizing that the rejection of the improvement statute left a void that needed to be filled, the Minnesota Legislature enacted statute section 327A.02 which states that in every sale of a completed dwelling the vendor shall warrant to the vendee that during a one year period from and after the warranty date the dwelling shall be free from defects caused by non-compliance with building standards; during a two year period the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems; and during the ten year period from and after the warranty, the dwelling shall be free

61. Id., 248 N.W.2d at 280.
62. Kittson County v. Wells, Denbrook & Assocs., Inc., 308 Minn. at 243, 241 N.W.2d at 802.
63. 260 N.W.2d 548 (Minn. 1977).
64. 260 N.W.2d at 555.
65. Id.
from major construction defects. Minnesota has drafted what appears to be merely a statute of abrogation. Assuming this is the case, there remains uncertainty as to what is the appropriate statute of limitations.

Oregon avoided its improvement statute in a manner similar to that pursued by Minnesota. Although not reaching the point of declaring its statute unconstitutional, the Oregon Court of Appeals in Beveridge v. King considered applying the state's improvement statute, which stated that an action to recover damages had to be commenced within two years from the date of injury as well as within ten years from substantial completion of the construction. The Beveridge court, however, asserted that the action was one for breach of contract for the sale of improved real property and that it was instead governed by the Oregon statute for contract actions, which established a longer, six year period of limitations.

The Oregon court relied upon Securities Intermountain, Inc. v. Sunset Fuel Co. The Securities Intermountain court had concluded that the improvement statute did not apply to a claim of financial loss arising from breach of contract and had stated that the language "injuries to . . . a person or to property" was meant to encompass "personal injuries" but not financial losses such as a reduced value of the completed project due to unsatisfactory performance of the work. However, the Securities Intermountain court had distinguished its case from a case in which a warranty of "workmanlike" performance and due care was pleaded as an implied term. The court in Beveridge was addressing a claim that there had been a breach of an implied term of the agreement, yet the court still refused to apply the improvement statute to the implied warranty cause of action.

WHAT HAPPENS WHEN THE WARRANTY IS EXTENDED TO SUBSEQUENT PURCHASERS?

In spite of the privity problems, courts have continued to identify the implied warranty of habitability as a contract right even when extending the warranty to subsequent purchasers. In the recent Texas

67. Id.
69. Id. at 587, 623 P.2d at 1133. The Oregon court sets out OR. REV. STAT. § 12.135(1) in n.1.
71. 289 Or. 243, 611 P.2d 1158 (1980).
72. Id. at 251, 611 P.2d at 1162.
73. Id. at 263, 611 P.2d at 1169.
case of *Gupta v. Ritter Homes, Inc.*\(^74\) the court concluded that an im-
plied warranty of habitability and good workmanship is implicit in a
contract between a builder/vendor and an original purchaser and is au-
tomatically assigned to a subsequent purchaser.\(^75\) The court stated that,
"this interpretation of an implied warranty as a contract remedy is con-
sistent with our holding in *Humber* and our recent holding in *G.W.L. v.
Robichaux* where we discussed the implied warranty of habitability ex-
plicitly in terms of contract law."\(^76\)

The conflict as to which theory to use, tort or contract, led the
Indiana court in *Barnes v. Mac Brown & Company, Inc.*\(^77\) to assert
that the logic which compelled the rejection of privity of contract in
products liability law compels the same type of change in the area of
real property. The court stated that the traditional requirement of priv-
ity between a builder/vendor and a purchaser was an outmoded one.\(^78\)
The contention that there should be a distinction between economic loss
and personal injury damages was found to be without merit. This con-
clusion permitted the court to extend the implied warranty of habitabil-
ity to a subsequent purchaser and additionally allowed the court to per-
mit recovery for economic loss.

The Indiana court, however, did not adequately explain how it
could avoid the traditional contractual requirement of privity and
stopped short of identifying this as either a cause of action in strict
liability in tort or another type of tort cause of action. The dissent in
*Barnes* responded to this lack of analysis and claimed that because this
was not a tort case the extension should not be allowed. Rather, the
case was properly governed by the law of contracts and sales and not
the law of torts.\(^79\)

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**IF IT IS A CONTRACT, IS IT AN ORAL OR WRITTEN
CONTRACT?**

If a court does determine that a breach of an implied warranty of
habitability results in a contract action but that lack of privity is of no
concern when extending the warranty to subsequent purchasers, that
court must still answer additional questions. If an action for breach of
an implied warranty is considered a contract action, the decision has to

\(^74\) 646 S.W.2d 168 (Tex. 1983).
\(^75\) *Id.* at 169.
\(^76\) *Id.*
\(^77\) 264 Ind. 227, 342 N.E.2d 619 (1976).
\(^78\) *Id.* at 229, 342 N.E.2d at 620.
\(^79\) *Id.* at 231, 342 N.E.2d at 621.
be made whether this action arises out of a written contract. For example, in Texas a court was confronted with two different statutes of limitations that might apply depending upon whether an implied warranty action arose out of a written contract or whether it arose out of an oral contract.  

In *Certain-Teed Products Corp. v. Bell*, the Texas court focused upon an implied warranty arising out of a contract to build a house. The contract to build a house was in writing. Thus, the court stated, the suit was not based upon a failure to do something the petitioner had orally promised to do but rather upon a failure to do in a good and workmanlike manner that which the petitioner had agreed in writing to do. The court concluded that a warranty which the law implies from the existence of a written contract is as much a part of the writing as any express terms of the contract. Any action to enforce such a warranty would be governed by the statute pertaining to written contracts.

Not all courts agree with Texas, however. The Missouri Court of Appeals was faced with a similar question in *Ruhling v. Robert Dawes Construction Co.* In *Ruhling*, the plaintiffs filed suit to recover for defects in workmanship in the construction of a residence. The court observed that the plaintiffs' action was for breach of an implied warranty of fitness of the property for use as a residence. An inspection of the exhibits indicated that there was no express warranty involved. The Missouri court rejected a claim that the proper statute of limitations was section 516.110 of the Missouri Statutes, which stated that a ten year statute of limitations shall apply to any "action upon any writing, whether sealed or unsealed...." Instead the court applied a five year statute of limitations which covered "all actions upon contracts, obligations, or liabilities, express or implied, except those mentioned in section 516.110. . . ."  

The Oklahoma court in *Elden v. Simmons*, where the court extended the implied warranty of habitability to a subsequent purchaser,
agreed with the Texas court and identified a breach of this warranty as a suit upon a written contract. The court stated that this action fell clearly within the first section of title 12, section 95 of the Oklahoma Statutes, which provided that, "actions upon any contract or agreement or promise in writing may be maintained within five years after the cause of action shall have accrued." The court stated that the requirement of privity as a prerequisite to suit on an implied or express warranty was an antiquated notion and alluded to a case decided under the Uniform Commercial Code for the position that privity was not necessary to a suit in warranty.

The Illinois appellate court in Cooper v. United Development Co. held that an action on this type of implied undertaking constitutes an action on an unwritten contract and must be brought within the applicable Illinois five year limitation period. The Cooper case involved condominium owners bringing an action against a developer, contractor, subcontractor and beneficial owner for breach of the implied warranty of habitability.

Inconsistencies exist even within the same state. In another Illinois case, Schoenrock v. Anden Corp., homeowners filed a complaint against the builder alleging a defect in the sewer pipe construction. The defendant had constructed and sold the house in 1977 and the plaintiffs filed their small claims complaint in February of 1983.

The defendant asserted that the plaintiffs should be barred from obtaining relief because the implied warranty of habitability did not extend liability to a builder for defects which did not manifest themselves until two to six years after the sale. Plaintiffs testified that they never reported the problem because two plumbers had diagnosed the possible cause of the problem as a mere buildup of debris in the pipes.

The defendant argued that builder/vendors do not guarantee a home for its lifetime and that a claim manifesting itself so late should not be encompassed within the implied warranty of habitability. The defendant cited Redarowicz v. Ohlendorf in support of the position that the implied warranty of habitability extended to a subsequent pur-

90. Id. at 742 n.1.
92. Elden v. Simmons, 631 P.2d at 742.
93. Id.
95. Id. at 858-59, 462 N.E.2d at 635.
97. 465 N.E.2d at 147.
98. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).
chaser but was limited to latent defects which manifested themselves within a reasonable time after the original purchase of the home.99

The Schoenrock court was thus requested to select the applicable statute of limitations. Section 13-214(a) of the Illinois Revised Statutes100 provided that “[a]ctions based upon tort, contract, or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction . . . shall be commenced within 2 years from the time the person bringing an action . . . knew or should reasonably have known. . . .”101 The Schoenrock court concluded that this section applies in actions seeking recovery under the implied warranty of habitability theory for defective construction of a home. The court also cited Paragraph 13-214(b),102 to the effect that, “no action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 12 years have elapsed from the time of such act or omission.”103

The Illinois Appellate Court for the Second District in Schoenrock determined that the Illinois improvement statute was the appropriate statute. The statute should be read so as to provide a twelve year accrual period with a two year statute of limitations from the point the plaintiff knew or should have known of the wrongful act or omission. Yet the First District in Cooper had applied the five year statute of limitations for unwritten contracts.

The inconsistency within Illinois, unlike the inconsistencies between states, can be explained. Although exact dates of execution and completion of the condominiums involved in Cooper are not clear from the appellate opinion, it is clear that the completion was more than five years before 1982 because the case was dismissed. The improvement statute in Illinois104 did not take effect until November 29, 1979.105 Because the cause of action arose in Cooper before November 29, 1979, the court did not apply the improvement statute and instead turned to the five year statute of limitations.

100. ILL. REV. STAT. ch. 110, § 13-214(a) (1981).
101. Id.
103. Id.
Confusion not only exists as to which statute should be selected as the appropriate statute of limitations, but also as to when the limitation period begins to run. In the Missouri case of *Lato v. Concord Homes, Inc.* the original purchasers/plaintiffs asserted that their cause of action did not accrue until they were able to discover the defect. The Missouri court, however, rejected the discovery test and instead reaffirmed its position that the "capable of ascertainment" test should be used for determining when the period of limitations begins to run." The court stated that plaintiffs' allegations of implied warranty, "accrued when they first became aware that damage was occurring, a date alleged to be 'several months after moving into their new home' on March 28, 1968." The Missouri appellate court then applied a five year period of limitation rather than a ten year period of limitation. Missouri, if one recalls, did not apply its ten year period because that is applicable only to actions upon a writing. Missouri is one of the states holding that this cause of action is not upon a writing.

If anything is consistent in this area of the law it is the fact that when one moves between jurisdictions the law consistently changes. The method of determining when a cause of action for breach of an implied warranty of habitability accrues supports this rule of inconsistency.

The Supreme Court of Alabama in *Stephens v. Creel* adopted a different position than Missouri. It determined that a cause of action based upon the implied warranty accrues and the statute of limitations begins to run on the date of completion of the performance. The court stated that it is the failure to construct the house in a workmanlike manner that constitutes the breach. The Alabama court reaffirmed the rule set out in *Sims v. Lewis* that under no circumstances would the time limitations within which to file suit for implied warranty extend beyond the period allowed for filing suit on an express warranty (six years).

The dissent in *Stephens* argued that the majority had selected an

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106. 659 S.W.2d 593 (Mo. Ct. App. 1983).
107.  Id. at 594-95.
108.  Id. at 595.
109.  See supra notes 45-47.
110.  429 So.2d 278 (Ala. 1983).
111.  Id. at 280.
112.  374 So.2d 298 (Ala. 1979).
113.  Stephens v. Creel, 429 So.2d at 281 (citing Sims v. Lewis, 374 So.2d at 305).
inappropriate rule for the beginning date of the running of the statute of limitations. It stated that the majority opinion assumed that the breach of the contract and the accrual of the cause of action occurred simultaneously. The date of the breach, however, is not necessarily the accrual date of the action. The key is not the breach but rather the actionable breach. The dissent cited *West Pratt Coal Co. v. Dorman* for the proposition that it is the actionable breach that accrues the cause of action.

The dissent observed that according to the majority it was the failure to construct the house in a workmanlike manner that constitutes the breach. The dissent objected and stated that one must focus upon the question as to when the breach became actionable. One must ask what would happen if the homeowners filed suit the day following the completion of their house for breach of warranty. Any alleged damages would be purely speculative at that point. Consequently, no breach could be shown because the cause of action simply had not yet accrued.

The logic of the dissent is difficult to escape. It appears as though a purchaser in Alabama would be well advised to initiate suit on the day the house is completed. Of course, that purchaser will have little chance of success in most cases because there are no discoverable damages. It is unfair to assert that a limitation period begins to run at a time when a plaintiff/purchaser will have absolutely no chance of success when bringing an action.

The *Stephens* opinion relies heavily upon *Sims*, cited above. In the *Sims* case the Alabama court stated that the length of the statute of limitations should be a reasonable period. It was the *Sims* court that announced that an implied warranty should be recognized in the sale of homes. *Sims* established a confusing standard, however. On the one hand, *Sims* suggested that the implied warranty of habitability should cover a reasonable period of time. On the other hand, the court stated that the jury must answer the question whether a defect was discoverable within a “reasonable” period.

The Alabama court is thus confusing the problem of determining the date of accrual and the problem of determining the length of the

115. 161 Ala. 389, 49 So. 849 (1909).
117. Id. at 284.
118. Id. at 286.
119. Sims v. Lewis, 374 So. at 305.
120. Id.
WARRANTY OF HABITABILITY

period of limitation. *Sims* declared that in no event would a plaintiff be allowed to file suit for implied warranty beyond a six year period. Yet it is not clear from what point in time the six years begin to run. It is possible to argue that the period begins to run after a reasonable period has passed within which the defect should have been discovered. One can also argue that the *Sims* court declared that a plaintiff will have no more than six years to sue from the date of completion and that if it would be reasonable to bring an action in less than six years the plaintiff must do so. In *Stephens*, the Alabama court at least clarified the date from which the statute of limitations begins to run; that being, the date of completion. The problem, however, is that the statute may begin to run before there is anything for the plaintiff to discover.

While it may not resolve the uncertainty, it is of interest to examine the manner in which other jurisdictions are settling the question as to when the limitations period begins to run. The Illinois court in *Schoenrock v. Anden Corp.* reviewed the case under the Illinois improvement statute, which became effective in November of 1979. The court stated that under the improvement statute a plaintiff will have two years to bring suit from the time the plaintiff knew or should reasonably have known of the problem. The Illinois improvement statute, if one recalls, sets out that such an action may not be brought when more than twelve years have elapsed from the time of the act or omission.

Several courts that have extended the implied warranty of habitability to subsequent purchasers have adopted "reasonable" limitation periods. In *Terlinde v. Neely*, however, the South Carolina court did not begin to discuss the problems that arise in determining an appropriate limitation period for the implied warranty of habitability. The court stated that the length of "[t]ime for latent defects to surface . . . should be controlled by the standard of reasonableness and not an arbitrary time limit created by the Court."

Thus, it is unclear whether the court was saying that the cause of

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121. *Id.*
124. *See supra* note 104.
125. *Id.*
127. *See supra* note 102.
129. 271 S.E.2d at 769.
action has to accrue within a reasonable time period. If that is the case the court must still select a limitation statute. One does not know whether the court is saying that the cause of action expires after a reasonable time has passed within which the plaintiff has or should have discovered a defect, or whether the court is saying that the limitation period itself is a reasonable period and that it begins to run from the date of transfer or completion. A simple statement that the implied warranty of habitability lasts a reasonable time does not begin to provide adequate information for purchasers and builder/vendors attempting to distribute loss and negotiate price.

In Blagg v. Fred Hunt Co., Inc., the Arkansas court also held that a builder/vendor’s implied warranty of fitness for habitation extends to subsequent purchasers for a reasonable length of time. Yet it is not clear whether this means that the subsequent purchaser will have a “new” reasonable length of time to discover the defect in addition to the reasonable period of time the original purchaser had. One does not know whether one should combine the amounts of time to equal only one reasonable period of time. If an improvement statute is available and applied such that an original purchaser may have an accrual period allowing up to twelve years from the time of completion to initiate a lawsuit, is the subsequent purchaser to be left with far less time? A limitation period that is “reasonable” simply leaves too many questions for a subsequent purchaser.

The Wyoming court in Moxley v. Laramie Builders, Inc. also extended the implied warranty of habitability to subsequent purchasers while stating that it would exist for a reasonable period of time. And once again one is left with a situation in which one does not really have any accurate idea as to what the statute of limitations is for subsequent purchasers. This criticism has nothing to do with the fact that the period of “reasonableness” implies some uncertainty. Rather it addresses the uncertainty remaining as to questions such as those set out in the preceding paragraph. Those are questions which could and should be answered. Stating that the implied warranty of habitability will continue for a reasonable period of time gives very little guidance and creates a situation that will result in serious discrepancies between jurisdictions.

130. 272 Ark. 185, 612 S.W.2d 321 (1981).
131. Id. at 187, 612 S.W.2d at 322.
132. 600 P.2d 733 (Wyo. 1979).
133. Id. at 736.
A very abrupt way to terminate an implied warranty of habitability is to enforce a disclaimer. Although not directly related to the issue of limitation periods, disclaimers can deprive a subsequent purchaser of a cause of action just as effectively as can an elapsed limitation period and thus disclaimers deserve at least brief mention. Consider the situation where a builder/vendor disclaims a warranty of habitability and thus accepts a lower price in exchange for not having to worry about the condition of the home in the future. Should a subsequent purchaser be permitted to initiate suit against the builder/vendor even though the builder/vendor did not receive consideration for the granting of this protection? On the other hand, should an unassuming subsequent purchaser be prejudiced as a result of the waiver of warranty rights by the original purchaser?

The question of whether there can be disclaimers even for original purchasers has not yet been resolved as case law can be found supporting both sides of the issue. For instance, in *G.W.L. Inc. v. Robichaux*, the Texas court stated that language waiving the implied warranty of habitability must be clear and free from doubt. Implicit in this statement is the recognition that the warranty can be disclaimed.

Yet even if a disclaimer was clear and free from doubt, it might not be brought to a subsequent purchaser’s attention. If disclaimers are allowed and recognized against subsequent purchasers, the disclaimer should be required to be recorded in the same manner as encumbrances on the property are recorded. Only in this manner can one guarantee that the disclaimer or waiver will be brought to the attention of the subsequent purchaser.

Several courts have required not only that the waiver be express but also that the waiver be brought to the attention of the purchaser and that the purchaser understand the significance of the waiver. In a subsequent purchaser situation it is unlikely that the first purchaser/seller will have similar concerns about the waiver. Because the first purchaser/seller is not a potential target under the implied warranty of habitability as it has generally been defined, the first purchaser/

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134. 643 S.W.2d 392 (Tex. 1982).
135. *Id.* at 393.
seller has no reason to be concerned whether a disclaimer is regarded as effective. In fact, the first purchaser/seller may very well try to avoid bringing the disclaimer to the attention of subsequent purchasers. The disclaimer may raise a question in the buyer's mind and consequently lower the price of the house.

When first purchasers/sellers realize they are not subject to suit under the implied warranty of habitability, they have no reason to care whether or not an effective disclaimer was created. It would be naive to expect a first purchaser/seller to take the initiative and explain a disclaimer. It is not in his or her self-interest to do so and furthermore, even if one was so inclined he or she may not have the information and sophistication to adequately explain the disclaimer. Some courts have hesitated to enforce disclaimers against original purchasers and a concern has been the presumption that this first purchaser did not have the sophistication to understand the disclaimer. To say that the first purchaser has an obligation to explain the nature of the disclaimer to a subsequent purchaser might assume more knowledge than the first purchaser possesses.

At least one court has suggested that it might enforce the disclaimer against a subsequent purchaser. The Oklahoma Court of Appeals in Bridges v. Ferrell focused upon a situation in which a defendant built a single family residence and sold it to a private party who then subsequently resold the house. The real estate purchase contract for the resale of the home to the plaintiffs provided that the "builders' warranty [is] to be transferred to buyer." However, the original contract for sale stated that the seller was provided only a one year warranty period. The court stated that the mere existence of an express warranty providing for specified protection for a limited period of time does not displace the obligation arising under the implied warranty of habitability. Rather, if one is going to relieve a builder/vendor from his obligation under an implied warranty of habitability there must be clear and conspicuous language evidencing the builder/vendor's disclaimer of its obligations. The court was thus suggesting that if the disclaimer had been properly drafted, it could have been asserted.


140. Id. at 410.

141. Id.
against the subsequent purchaser. The Oklahoma court stated that it was in agreement with the majority of courts holding that a knowing disclaimer of the implied warranty will not be considered against public policy.\textsuperscript{142} The problem with this position, however, is that it will be difficult to establish a knowing waiver on behalf of the subsequent purchaser.

If one is reluctant to recognize even a clear and conspicuous disclaimer, that reluctance will most certainly grow when one considers the validity of an “as is” disclaimer. There has been limited discussion as to whether or not an “as is” disclaimer should be sufficient for the implied warranty of habitability.\textsuperscript{143} A strong argument can be made that such a disclaimer should not be recognized against subsequent purchasers. In \textit{Schepps v. Howe},\textsuperscript{144} however, the court recognized an “as is” disclaimer in the context of certain other facts. In \textit{Schepps} it was not contested that the sale of the house had consistently been referred to as an “as is” sale. The “as is” disclaimer had been clear in the listing, the advertising and the sale transaction itself.\textsuperscript{145} It also was not disputed that this disclaimer had been brought to the attention of the appellants and agreed to by them.

When one considers whether an “as is” disclaimer should be recognized as effective against the subsequent purchaser, one must be reminded that not all courts have recognized an “as is” disclaimer even in the original transaction. In \textit{Davies v. Bradley},\textsuperscript{146} the Colorado court was confronted with an “as is” disclaimer. The court stated that any disclaimer of the warranty of habitability must contain an express provision to that effect and the limitation must be “clear and unambiguous.”\textsuperscript{147} The court added that even where it can be shown that the plaintiffs were aware of the presence of such a clause, if there was no agreement as to its meaning it will not be binding.

In the subsequent purchaser situation it is quite possible that there may not be either a clear understanding as to the meaning of the “as is” disclaimer or even knowledge of its existence in the contract. As mentioned earlier, it may not be perceived to be in the first purchaser/seller’s best interest to even point out the existence of such a disclaimer. Allowing such a term of art to be recognized in such a signifi-

\begin{footnotes}
\item[142] \textit{Id.} at 410-411.
\item[144] 665 P.2d 504 (Wyo. 1983).
\item[145] \textit{Id.} at 509.
\item[146] 676 P.2d 1242 (Colo. 1983).
\item[147] 676 P.2d at 1245.
\end{footnotes}
cantd transaction may do a great injustice to an unwary purchaser.

**JUDICIAL INNOVATION**

The Illinois case of *Redarowicz v. Ohlendorf*\(^{148}\) might appear to provide a workable model for handling the implied warranty of habitability. The *Redarowicz* court stated that the warranty of habitability is a creature of public policy and a product of judicial innovation.\(^{149}\) Unlike the case of *Cosmopolitan Homes, Inc. v. Weller*\(^{150}\) wherein the Colorado court stated that the implied warranty of habitability and fitness arises from the contractual relation between the builder and the purchaser,\(^{151}\) the court in *Redarowicz* stated only that the implied warranty of habitability had its roots in the execution of the contract for sale.\(^{152}\) The Illinois court emphasized that the cause of action exists independently of the contract for sale and that consequently privity of contract is not required.\(^{153}\)

When a court identifies the implied warranty of habitability as a distinct doctrine it can avoid a number of the problems that arise when one attempts to characterize the cause of action as either tort or contract. However, if that is what the court is doing, it should do so clearly and expressly and make an attempt to define this new cause of action. The dissent in *Redarowicz* made a similar observation. The dissent stated that the majority in *Redarowicz* was actually turning the action into a tort in the nature of strict liability.\(^{154}\)

If this is to be regarded as a tort action, familiar problems must be addressed. Earlier, the Illinois court in *Moorman Manufacturing Co. v. National Tank Co.*\(^{155}\) had held that recovery for economic loss could not be had under strict liability in tort. It is possible that even if this were regarded as a tort action there could be an exception made for recovering economic loss under the implied warranty of habitability. But if that is what the court is doing, it is establishing precedent for the position that it may be permissible to recover economic loss in other tort actions. If the court is simply creating a new theory of recovery, one needs to know more about its conceptual roots and its accrual date

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148. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).
149. *Id.* at 183, 441 N.E.2d at 330.
150. 663 P.2d 1041 (Colo. 1983).
151. 663 P.2d at 1045.
152. Redarowicz v. Ohlendorf, 92 Ill. 2d at 183, 441 N.E.2d at 330.
153. *Id.*, 441 N.E.2d at 330.
154. *Id.* at 187, 441 N.E.2d at 332 (Ryan, C.J., dissenting).
155. 91 Ill. 2d 69, 435 N.E.2d 443 (1982).
WARRANTY OF HABITABILITY

and limitation period.

Negligence and strict liability in tort might be available to a plain-
tiff as distinct theories of recovery. If the case arises in a jurisdiction
such as Arkansas, where the court has adopted the view of Justice
Francis set out in Santor v. A & M Karagheusian, Inc., the theory of
strict liability in tort will allow recovery for economic loss. In fact,
the Arkansas court in Blagg v. Fred Hunt Co., Inc., as well as courts
in New Jersey, the District of Columbia, and California, have
accepted the claim that the theory of strict liability in tort is available
against vendors of defective homes. If one is going to accept strict lia-
ability in tort as a viable option, one should go one step further and
explain whether this action is the same as an implied warranty of hab-
ability action. One should consider whether it is desirable for the im-
plied warranty of habitability to evolve into a strict liability in tort ac-
tion. As long as the distinctions between these two theories of recovery
are not clear, difficulty will arise as to what is the appropriate statute
of limitations and what is necessary for a prima facie case.

CONCLUSION

In conclusion, a number of changes can be made in order to make
the area of implied warranty of habitability more predictable and more
principled. First, courts can recognize the distinction between accrual
dates and limitation dates. Courts should make an effort to identify the
accrual date for the implied warranty of habitability and the subse-
quent period of limitation. The more logical choice for an accrual date
is the date on which the purchaser discovered or should have discovered
the defect. To select the completion date of the house as the appropri-
ate date is to create a situation where the statute begins to run at a
time when the plaintiff could not have initiated a lawsuit.

Second, courts should reach a consensus on the theoretical basis of
the implied warranty of habitability. Is it a contract action, is it a tort
action, or is it something else? As long as the implied warranty of hab-
ability is identified as a contract action, one will have to struggle with
privity problems. If the warranty is identified as a tort action, one will

156. 44 N.J. 52, 207 A.2d 305 (1965).
158. Id.
struggle with economic loss questions. The implied warranty of habitability should be recognized as a judicial innovation and perhaps be interpreted as implied warranties are interpreted under the Uniform Commercial Code. The requirement of privity should be dropped and purchasers should be allowed to recover for mere deterioration or loss of benefit in the purchase of the home.

Third, legislatures should be encouraged to enact statutes that are more specific than improvement statutes and which expressly define the terms and conditions of the implied warranty of habitability. There is an ongoing question as to the constitutionality of improvement statutes. On their face, however, improvement statutes appear to be the most appropriate source to determine the applicable statute of limitations. As long as a question remains as to the constitutionality of improvement statutes, however, the plight of the subsequent purchaser will be one of uncertainty.

Fourth, all jurisdictions should adopt the rule that subsequent purchasers are entitled to receive the implied warranty of habitability. Granted that this is premature as not every jurisdiction has recognized the implied warranty of habitability for initial purchasers, the better rule is to clearly acknowledge the right for the first purchaser and then allow that purchaser to transfer it to a subsequent purchaser.

Fifth, courts should be reluctant to acknowledge disclaimers in the situation of subsequent purchasers. If the disclaimers are recognized they should be clear, unambiguous and specific. Courts should require some proof that a disclaimer was explained and understood by the subsequent purchasers. There should also be a requirement that the disclaimer be recorded as are other encumbrances. An effective disclaimer can have a serious effect on the value of the property to a subsequent purchaser.

Finally, an examination should be made as to whether or not strict liability in tort is a preferred method for recovering for defects in homes. An obvious problem is that if a jurisdiction does not recognize economic loss damages in tort, strict liability would not be available. However, if economic losses can be recovered through tort actions, courts should begin to consider whether or not strict liability in tort should be extended to sales of defective homes. One should also keep in mind that if one is going to accept strict liability in tort as equivalent to the implied warranty of habitability, one may have difficulty recogniz-

Courts should avoid the type of language found in *Donovan v. Pruitt* where the court asserted that the implied warranty does not arise out of documents. Rather, according to the *Donovan* court, the warranty comes into existence by operation of law by virtue of a common law duty of strict liability that the builder/vendor owes to the first purchaser. Language of this nature simply confuses the distinction between a recovery in strict liability in tort and a recovery under the implied warranty of habitability.

Perhaps the best route for courts to take is to recognize the implied warranty of habitability as a distinct judicial innovation and follow at least some of the rules that have been set out for implied warranties in the sale of goods. Primarily, the courts should abolish the privity requirement, as they did with the implied warranties in goods situations, and allow subsequent purchasers to recover in spite of lack of privity. Recognizing an obligation to proceed in a manner that builds upon precedent and that is logically linked to well established theories, such as contact and tort, courts have unfortunately led themselves into an area where they contradict themselves and create significant disparities between different jurisdictions. This is an area where the legislature should assume responsibility. It should step in and draft a statute of limitations for the implied warranty of habitability in order to relieve the courts of their continuing struggles.

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164. Restatement (Second) of Torts § 402A comment m (1965).
166. Id. at 328, 674 P.2d at 207.