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# The Implied Warranty of Habitability in Illinois: A Critical Review

This article reviews the implied warranty of habitability for Illinois homebuyers from the perspective of counsel for builders and sellers. It also discusses important unanswered questions about the warranty.

**The express promises that any seller makes in a sales contract help establish the nature and scope of the seller's potential liability to the purchaser of its goods. Express warranties are not, however, the only promises that a seller makes. With respect to the sale of goods, like HD TVs and refrigerators, many state legislatures, including Illinois', have adopted a modified form of the Uniform Commercial Code, which implies warranties such as merchantability and fitness for use into every sale.**

In many states, again including Illinois, a similar consumer protection warranty, known as a warranty of habitability, is implied by judicial decision into leases or contracts for the sale of dwellings. The implied warranty of habitability is imposed by courts ostensibly to protect unsophisticated purchasers from latent defects created by careless or cunning builders.

By interfering in the housing market in this fashion, the judiciary has altered more than the allocation of risks among sellers and buyers of housing, all without legislative hearing, much less evaluation or express approval. Because a rational supplier of housing units must consider the added expenses that inevitably flow from the potential for or the defense of future litigation asserting a breach of this judicial innovation, the implied warranty inevitably increases the costs of developing and acquiring a home.

**It is clear that the warranty is not implied in favor of a non-purchaser, such as a condominium association.**

This article discusses the history and several key aspects of the implied warranty of habitability, as it is understood currently in Illinois.

## Evolution and scope of the implied warranty of habitability

The current implied warranty of habitability has its roots in English landlord-tenant relationships. In the mid-nineteenth century, an English court held that a tenant need not pay overdue rent in the short-term lease of a furnished dwelling that suffered from bug infestation.[1] Over a hundred years ago, a Massachusetts court followed the English court's decision when it held that a lessor had breached an implied warranty due to the poor condition of the rented home.[2] The judicial remedy expanded on a case-by-case basis, and by the latter half of the twentieth century, an implied warranty of habitability was commonly extended to cover many forms of residential leases.[3]

The judicial extension of protection from leases to sales of real property was not difficult, though courts initially maintained some strict limitations. For example, some courts protected purchasers if the parties executed a contract for sale before construction was completed, but not if executed even a single day after completion.[4]

Subsequently, courts in different states inconsistently expanded the reach of the implied warranty. After one state supreme court in 1964 extended the doctrine to cover a completed house,[5] another state supreme court held that the sale of the protected home must be "fairly contemporaneous" with completion and free of any intervening occupancy.[6] States also differed about whether buyers who purchased homes for investment purposes and did not intend to live in the homes could recover under the implied warranty.[7]

## Implied warranty of habitability in Illinois

Illinois courts initially refused to imply covenants into lease agreements.[8] The Illinois Supreme Court, however, reversed course in 1972 in *Jack Spring, Inc v Little*.[9] In that case, the court rejected the traditional rule of caveat lessee and held that the implied warranty of habitability imposed an obligation on landlords to maintain and repair premises.[10]

*Jack Spring* left open many questions, such as whether the implied warranty extended to the sale of new homes. Districts of the Illinois Appellate Court

1. See *Landlord and Tenant: Implied Warranty of Habitability Derived from Contract Principles*, 1970 Duke L J 1040, 1041.
2. Id.
3. See *Builder Beware: Increased Builder Liability Under the Implied Warranty of Habitability*, 66 Wash U L Q 163, 165 (1988).
4. Id at 166.
5. See *Carpenter v Donohoe*, 154 Colo 78, 83, 388 P2d 399, 402 (1964).
6. *Klos v Gockel*, 87 Wash 2d 567, 570-71, 554 P2d 1349, 1352 (1976).
7. Compare *Hopkins v Hartman*, 101 Ill App 3d 260, 262-63, 427 NE2d 1337, 1339 (4th D 1981) (investor not covered) with *Tusch Enterprises v Coffin*, 113 Idaho 37, 46, 740 P2d 1022, 1031 (1987).
8. See *Rubens v Hill*, 115 Ill App 565, 570 (2d D 1904).
9. 50 Ill 2d 351, 280 NE2d 208 (1972).
10. Id at 366, 280 NE2d at 217.

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considered the warranty's application to new home purchases both before and after *Jack Spring*, with differing results.[11]

The Illinois Supreme Court settled that dispute in *Petersen v Hubschman Construction Co, Inc.*[12] There the court held that "implied in the contract for sale from the builder-vendor to the vendees is a warranty that the house, when completed and conveyed to the vendees, would be reasonably suited for its intended use," but cautioned that the warranty "extends only to latent defects which interfere with this legitimate expectation."[13]

**Drafters should disclaim the warranty as clearly and conspicuously as possible by capitalizing only the disclaimer in a contract, using boldfaced type, and the like.**

At the same time, the court rejected the notion that an implied warranty of habitability was satisfied simply because the residence was capable of being inhabited.[14] No longer was the "warranty of habitability...found to be violated only where a home did not keep out the elements, did not provide a reasonably safe place to live, or was not structurally sound."[15] Once *Petersen* was decided, the judiciary began to explore how far the warranty extended in Illinois.

In *Tassan v United Development Co*,[16] the first district held that a developer-seller, like a builder-vendor, could be held liable for breach of an implied warranty of habitability.[17] The court reasoned that a developer, like a builder, is in the best position to ensure a home is soundly built and that buyers depend on developers to select quality contractors.[18]

Just four months later, in *Herlihy v Dunbar Builders Corp*,[19] the first district ruled that latent defects in the common elements of condominium buildings are covered by the doctrine, so long as those defects interfere with the owners' use of their units as residences.[20] Shortly thereafter, the fourth district clarified this extension, noting that the relaxation of caveat emptor in this area was meant to protect consumers, not to protect an investor purchasing a residence solely for investment purposes.[21]

Within three years of *Petersen*, the Illinois Supreme Court vastly expanded the reach of the warranty it created, holding in *Redarowicz v Ohlendorf*[22] that not just original but also subsequent purchasers may seek recovery from a builder-vendor for breach of an implied warranty of habitability.[23] Such a result was "just," the court explained, because a "subsequent purchaser is usually not knowledgeable in construction practices and must, to a substantial degree, rely upon the expertise of the person who built the home."[24] Recovery for subsequent purchasers, however, was "limited to latent defects which manifest themselves within a reasonable time after the purchase of the house."[25]

In 1985, in *Glasoe v Trinkle*,[26] the supreme court revisited the extent of the adverse condition required to sustain a breach of the implied warranty, holding that the defect must be of "such a substantial nature as to render the premises unsafe or unsanitary, and thus unfit for occupancy."[27] Moreover, the analysis of the nature of a defect should be through "the eyes of a reasonable person" and not merely those of the claimant.[28]

Yet a claimant's perspective remains relevant, if not dispositive. In one case, the first district opined that "it could hardly find the plaintiffs' units 'uninhabitable in the eyes of a reasonable person' when plaintiffs themselves stated that they were otherwise pleased with their units and had no desire to sell them or to move from them."[29]

More recently, in 1999, the Illinois Supreme Court considered a case involving an alleged defect in a detached clubhouse in a multi-residential development. While the trial court denied relief to plaintiffs, the second district, in a split decision, reversed.

By a four to three vote, the supreme court reinstated the trial court's verdict, holding that alleged latent defects in a recreational clubhouse did not impair the habitability of homeowners' residences[30] and writing as follows: "What is critical... is not simply that there be a hidden defect in or around a residence, but that the defect interfere with the dweller's use of that unit *as a residence*."[31]

The court added that the "defect's interference with the habitability of one's residence is the key distinction between the implied warranty of habitability and other warranties."[32] And, though the homeowners' memberships in the clubhouse were compulsory for residential purchasers, the court refused to expand the "narrowly tailored" implied warranty of habitability beyond "the policy and jurisprudence of the doctrine."[33]

## Unanswered questions

Despite the near 40-year history of the implied warranty of habitability in Illinois, some key questions remain. Courts have offered guidance on some matters, but case-by-case adjudication makes it hard to generalize. What follows are four areas that await resolution.

**Disclaimers.** No sooner did courts dis-

11. See *Petersen v Hubschman Const Co, Inc*, 76 Ill 2d 31, 38, 389 NE2d 1154, 1157 (1979).
12. Id at 37–38, 389 NE2d at 1156-57.
13. Id at 42, 389 NE2d at 1159.
14. Id at 41–42, 389 NE2d at 1158.
15. *Bd of Managers of the Village Centre Condo Assn, Inc v Wilmette Partners*, 198 Ill 2d 132, 137-38, 760 NE2d 976, 979-80 (2001).
16. 88 Ill App 3d 581, 410 NE2d 902 (1st D 1980).
17. Id at 587, 410 NE2d at 908.
18. Id.
19. 92 Ill App 3d 310, 415 NE2d 1224 (1st D 1980).
20. Id at 315-16, 415 NE2d at 1228.
21. *Hopkins*, 101 Ill App 3d at 262-63, 427 NE2d at 1339.
22. 92 Ill 2d 171, 441 NE2d 324 (1982).
23. Id at 183-84, 441 NE2d at 330.
24. Id at 183, 441 NE2d at 330.
25. Id at 185, 441 NE2d at 331. Later, coverage was extended to latent defects in "a significant structural addition to an existing residence." *VonHoldt v Barba & Barba Const Inc*, 175 Ill 2d 426, 432, 677 NE2d 836, 839 (1997).
26. 107 Ill 2d 1, 479 NE2d 915 (1985).
27. Id at 13, 479 NE2d at 920 (citations omitted).
28. Id at 14, 479 NE2d at 920 (citations omitted).
29. *Abrams v Rapoport*, 163 Ill App 3d 748, 753, 516 NE2d 943, 946 (1st D 1987), quoting *Glasoe*, 107 Ill 2d at 11, 479 NE2d at 920. The court's opinion omits discussion of several factors in a consumer's decision to move out of his or her current residence. For example, design or construction flaws could pose a future problem to a dwelling's structural integrity, but the owner could be pleased currently with the price, mortgage rate, neighborhood, or floor plan, and prefer fixing the defect rather than completely uprooting.
30. *Bd of Dirs of Bloomfield Club Recreation Assn v Hoffman Group, Inc*, 186 Ill 2d 419, 712 NE2d 330 (1999).
31. Id at 426, 712 NE2d at 334 (emphasis in original); see also *Briarcliffe West Townhouse Owners Assn v Wiseman Const Co*, 118 Ill App 3d 163, 167, 454 NE2d 363, 365 (2d D 1983) (warranty may extend to latent defects in land).
32. *Bloomfield* at 426, 712 NE2d at 334.
33. Id at 424, 431, 712 NE2d at 333, 337.

cover implied warranties concerning new residential construction than builder-vendors began issuing disclaimers. The Illinois Supreme Court first recognized in *Petersen* that "a knowing disclaimer of the implied warranty [of habitability is not] against the public policy of [Illinois]."[34] The court held, however, "that any such a disclaimer must be strictly construed against the builder-vendor."[35]

Illinois courts have offered clues about how an effective disclaimer must be drafted, but have resisted a final equation. Where a disclaimer is located on the back of the standard form contract among other clauses, is the same size print as all the other clauses of the contract, and does not mention "habitability" or explain the consequences of such a disclaimer, the purported disclaimer is not valid or effective.[36]

Conversely, and while the Illinois Supreme Court has declined to adopt a model disclaimer,[37] the court has clearly suggested that both a model disclaimer published in the *Chicago Bar Record*[38] and the one at issue in *Breckenridge v Cambridge Homes, Inc*[39] were representative of valid and enforceable provisions.[40] Thus, drafters no doubt will find it wise to make a disclaimer as clear and conspicuous as possible by avoiding boilerplate clauses,[41] capitalizing only the disclaimer in a contract,[42] using boldfaced type,[43] mentioning explicitly the term "habitability,"[44] using direct, nontechnical language to describe the consequences of the disclaimer,[45] and placing the disclaimer near a place for buyers to initial or near the contract signature lines.[46]

**Statutes of limitations and repose.** The Illinois Supreme Court has recognized that a builder-vendor "cannot be a lifetime guarantor of construction, susceptible to a claim for damages...beyond the foreseeable future."[47] It has not discussed with precision how foreseeable that future must be, how long coverage lasts.

To put the matter in context, Illinois statutory law provides both a four-year statute of limitations[48] and a 10-year statute of repose[49] for cases premised on construction defects. Section 13-214(b) of the Code of Civil Procedure also provides that a plaintiff has at least four years to bring an action if discovery occurs prior to the expiration of the 10-year repose period.[50] Section 13-214(a) contains a "discovery rule," which tolls the statute of limitations until the plaintiff knows or reasonably should know it has been injured and that its injury was wrongfully caused.[51]

Together, these rules could allow up to 14 years for a defect case based on a warranty. And in *Andreoli v John Henry Homes, Inc*,[52] the second district did just that, allowing a case to proceed where the original owner of a once new residence discovered an alleged latent defect within 10 years of purchase, but sued beyond 10 years from purchase.[53]

The result in *Andreoli* certainly stretches the "narrowly tailored" remedy created for purchasers of new residences, and does so without regard to any analysis as to whether the residence, at the time of discovery of the alleged defect, could still reasonably be considered to be new.

Moreover, *Andreoli*'s mechanical application of the rules of repose and limitations potentially gives rise to anomalous results. Consider the situation of two condominium units in a single building or complex. Because the warranty of habitability is only to apply to "new" residences owned by the original purchaser or his immediate successor, if a newly built unit is sold by the original owner after two years and the successor owner sells again in another year, the third owner could not avail himself of any implied warranty, though another unit owner, who was an original unit owner and held his unit for four or more years, arguably could do so.

In addition, factual situations involving multiple plaintiffs, buildings, sales contracts, disclaimers, and construction completion dates will undoubtedly complicate an analysis involving a multi-family development. For example, when does the statute of limitations bar claims arising from the completion of a single building in a development in which the completion date for other buildings in the project is different? To what extent does it matter to a statute of limitations analysis when the alleged defects are

34. *Petersen*, 76 Ill 2d at 43, 389 NE2d at 1159.
35. Id.
36. See *Wilmette Partners*, 198 Ill 2d at 140, 760 NE2d at 981; *Tassan*, 88 Ill App 3d at 589, 410 NE2d at 909.
37. *Wilmette Partners*, 198 Ill 2d at 141, 760 NE2d at 982.
38. Thomas C. Homburger, *The Waiver and Disclaimer of the Implied Warranty of Habitability*, 65 Chi B Rec 364, App. I (May-June 1984).
39. 246 Ill App 3d 810, 813-14, 616 NE2d 615, 616-17 (2d D 1993).
40. See *Wilmette Partners*, 198 Ill 2d at 141, 760 NE2d at 982.
41. See Homburger, *The Waiver and Disclaimer*, 66 Chi B Rec at 367 (cited in note 38); and *Petersen*, 76 Ill 2d at 43, 389 NE2d at 1159.
42. See *Country Squire Homeowners Assn v Crest Hill Develop Corp*, 150 Ill App 3d 30, 32, 501 NE2d 794, 796 (3d D 1986) (overturned by *Wilmette Partners*, 198 Ill 2d 132, 760 NE2d 976, to the extent it held that a disclaimer need not contain the term "habitability").
43. See *Breckenridge*, 246 Ill App 3d at 813, 616 NE2d at 616.
44. *Wilmette Partners*, 198 Ill 2d at 140, 760 NE2d at 981.
45. See *Country Squire*, 150 Ill App 3d at 32, 501 NE2d at 796.
46. See *Breckenridge*, 246 Ill App 3d at 818, 616 NE2d at 620; *Country Squire*, 150 Ill App 3d at 32, 501 NE2d at 796.
47. *VonHoldt*, 175 Ill 2d at 434, 677 NE2d at 840; see also *Hirsch v Optima, Inc*, 2009 WL 4723279, *9-10 (1st D 2009) (affirming trial court's finding that two-year period satisfies *Redarowicz's* "reasonable time" requirement).
48. 735 ILCS 5/13-214(a).
49. Id at (b).
50. Id.
51. *Swann & Weiskopf, Ltd v Meed Associates, Inc*, 304 Ill App 3d 970, 975, 711 NE2d 395, 399 (1st D 1999).
52. 297 Ill App 3d 151, 696 NE2d 1193 (2d D 1998)
53. Id at 154, 696 NE2d at 1195, citing 735 ILCS 5/13-214(b).

found in common elements shared by dwellers when many unit owners in a single building sign purchase agreements, attend closings, or move into premises and otherwise commence ownership on different dates?

**Standing and damages.** Sometimes condominium associations assert habitability claims independently of their members, but such assertions are misplaced. As *Board of Directors of Bloomfield Club Recreation Association v Hoffman Group, Inc* [54] clearly teaches, the implied warranty is designed to "protect...*purchasers*."[55]

It is also clear that the warranty is not implied in favor of a non-purchaser, such as an association. The appellate court has said decisively in a lawsuit for breach of implied warranty of habitability, "[i]t is not the association's rights that are being asserted...but the contract rights of each individual purchaser of the condominium units."[56]

Of course, section 9.1 of the Condominium Property Act grants standing to the board of directors of a condominium association to act "in a *representative capacity*" with respect "to matters involving the common elements of more than one unit, on behalf of the unit owners, *as their interests may appear*."[57] Therefore, condominium associations may assert standing in causes of action where the individual purchasers of the condominium units have standing to sue.[58] Conversely, an association may not proceed where the unit owners have no protectable interest.[59]

Citing to *Tassan*, some plaintiffs suggest that if only one unit owner has a legitimate habitability claim, damages proportionate to all unit owners are recoverable. The argument, however, misreads *Tassan*, as well as the Illinois Condominium Act and opinions of the Illinois Supreme Court.

*Tassan* involved both implied and express warranties. The primary issue on implied warranties was the sufficiency of a disclaimer. The primary issue on express warranties was the sufficiency of notice provided by one unit owner in a condominium to the developer with respect to an alleged breach.

*Tassan* held that where one unit owner gives notice of such a breach to a developer, no further notices are required.[60] That holding neither supports nor even implies that a developer who may be liable for damages to one unit owner would necessarily be liable to all, where the habitability of the other unit owners' units had not been impaired.[61] In any event, no court has definitively ruled that plaintiffs whose implied warranties have been breached may recover on behalf of plaintiffs whose implied warranties have not been breached.

**The Residential Real Property Disclosure Act.** Within the last few years, Illinois legislators adopted a property disclosure act which seeks to protect real property purchasers from a seller's knowing omissions regarding material defects.[62] While the Residential Real Property Disclosure Act expressly excludes the transfer of newly constructed homes from its reach,[63] it may reduce, if not eliminate, claims of subsequent purchasers. Because a seller of residential real estate must now deliver to a prospective buyer a disclosure report form identifying any known material defects to the buyer, those buyers may be barred from later availing themselves of an implied warranty of habitability to recover.

In the first place, the statute seemingly eliminates any theoretical reliance a subsequent purchaser could have had on the original builder. And it may provide, instead, an action in fraud or misrepresentation against the seller. Moreover, the one-year limitation on an action for violation of the Disclosure Act[64] could conceivably be construed to limit the "reasonable time" that a subsequent purchaser has to discover a latent defect and still recover from a builder under Illinois law.[65]

## Conclusion: time for a legislative response

The evolution of common law by judicial decree has a long and often honorable history.[66] But in a system of representative democracy, at some point legislators ought to ratify or reject judicial legislation. Common law principles regarding sales of goods were ultimately incorporated into a statutory framework, the Uniform Commercial Code. While the Code is open to interpretation, its provisions were subject to discussion and debate and ultimately enacted.

The implied warranty of habitability has not been treated in the same way, although the legislature has had ample time to consider the doctrine and reject or codify it. Whether the legislature's failure has been intentional or not, the result is a residential construction and conveyance process that is infected with uncertainty.

While the supreme court has described the warranty it created as "narrowly tailored," the truth is that it has grown inexorably since first announced in Illinois. And because the rules are developed case-by-case, the duties and economic risks of sellers and buyers change accordingly.

Such a process is neither good lawmaking nor good for business. And all parties involved are assuming risks, the extent of which are neither known nor knowable. Illinois can do better. ■

54. 186 Ill 2d 419, 712 NE2d 330 (1999).
55. Id at 425, 712 NE2d at 334 (emphasis added).
56. *Tassan*, 88 Ill App 3d at 596, 410 NE2d at 915.
57. 765 ILCS 605/9.1(b) (emphasis added).
58. See *Tassan*, 88 Ill App 3d at 596, 410 NE2d at 915.
59. See *Bloomfield*, 186 Ill 2d at 432-33, 712 NE2d at 337.
60. 88 Ill App 3d at 592-93, 410 NE2d at 912.
61. See *Bloomfield*, 186 Ill 2d at 426, 712 NE2d at 334.
62. Residential Real Property Disclosure Act, 765 ILCS 77/1 et seq.
63. Id at 77/15(9).
64. Id at 77/60.
65. See *Redarowicz*, 92 Ill 2d at 185, 441 NE2d at 331.
66. See generally Oliver Wendell Holmes, Jr., *The Common Law* (1881); Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921); Karl N. Llewellyn, *The Bramble Bush* (1960); Edward H. Levi, *An Introduction to Legal Reasoning* (1961).