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Indiana’s Implied Warranty of Fitness for Habitation: Limited Protection for Used Home Buyers

In recent years a majority of states have abolished the rule of caveat emptor and have instituted an implied warranty of fitness for habitation by builder-vendors in the sale of new homes. Since judicially adopting the warranty in 1972, Indiana has assumed a leading position in exploring the limits of its coverage. In Barnes v. Mac Brown & Co., decided in 1976, the Supreme Court of Indiana became the first court to extend protection to a second purchaser of a home for defects that are not discoverable upon reasonable inspection and that do not become manifest until after purchase. Barnes has been cited frequently in other jurisdictions; nonetheless, it has not been widely followed and has raised more questions than it has answered regarding the future of a used home warranty in Indiana.

After briefly surveying development of the implied warranty of habitability in the sale of homes, this note will examine three issues raised by Indiana’s extension of coverage to used home purchasers: first, the desirability of the remedy and the rationale upon which it should be based; second, the limitations period for the warranty; and third, the advisability of requiring notice to a defendant and opportunity to repair as a prerequisite to recovery. The first issue arises directly from the Barnes decision, while the second and third have been addressed by the Indiana Court of Appeals in Wagner Construction Co. v. Noonan.

DEVELOPMENT AND SCOPE OF THE WARRANTY IN THE UNITED STATES

Since 1957, a warranty of habitability in the sale of new homes has been adopted by a majority of states, either judicially or by statute. With

4 403 N.E.2d 1144 (1980).
a few exceptions, the elements of the warranty and attendant issues have been subject to growing consensus. The first warranty decisions required homes purchased before completion to be built in a workmanlike manner. Although a substantial number of courts still state the test in terms of "workmanlike construction" or similar language, virtually all these jurisdictions grant recovery for a defective home regardless of the amount of care taken by a builder. Today, analogizing freely from the Uniform Commercial Code and its warranties of merchantability and fitness for a particular purpose, most courts simply require a completed home to pass a test of "habitability" or "fitness for habitation."


The implied warranty of habitability originated in England. See Miller v. Cannon Hill Estate Ltd., 2 K.B. 113 (1931). The first United States decision was Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 119 (1957), adopting the English rule of Perry v. Sharon Dev. Co., 4 All E.R. 390 (C.A. 1937), and holding that "upon the sale of a house in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner." Id. at 341, 140 N.E.2d at 820. See also Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

See, e.g., cases cited note 5 supra.

See U.C.C. § 2-314 (implied warranty of merchantability); U.C.C. § 2-315 (implied warranty of fitness for particular purpose).

See, e.g., Barnes v. Mac Brown & Co., 264 Ind. 227, 229, 34 N.E.2d 619, 620 ("implied warranty of fitness for habitation").

See, e.g., id. at 229, 342 N.E.2d at 621.

See, e.g., id.

See, e.g., id.

While early commentators argued that any disclaimer of fitness for habitation in the sale of new construction should be unconscionable and void as against public policy, see,
common grounds for recovery have been deficiencies in electrical wiring.\textsuperscript{14}

e.g., Haskell, \textit{The Case for an Implied Warranty of Quality in Sales of Real Property}, 53 Geo. L.J. 633, 654 (1964), the courts have been reluctant to declare disclaimers invalid per se. On the other hand, few courts have freely permitted builders to disclaim liability. Most have sought a middle ground, enforcing only clear, conspicuous limitations directed at the defect that gave rise to the action.

Illinois typifies most jurisdictions in its approach to disclaimers by builder-vendors. In Conyers v. Malloy, 50 Ill. App. 3d 17, 23, 364 N.E.2d 986, 990 (1977), the Illinois Court of Appeals announced: "The public policy of Illinois does not prohibit a waiver or disclaimer of an implied warranty of habitability if such renunciation is sufficiently specific to adequately apprise the buyer of what he is waiving." In 1979, when the Illinois Supreme Court adopted the warranty in Petersen v. Hubschman Constr. Co., 76 Ill. 2d 31, 43, 389 N.E.2d 1154, 1159 (1979), it cited \textit{Conyers} in holding that any disclaimer of implied warranty must be stated in clear and specific language and such a contract provision will be "strictly construed against the builder-vendor."

Other courts have allowed recovery when disclaimers have not been clear and conspicuous. See, e.g., Pearson v. Franklin Lab, Inc., 254 N.W.2d 133, 141 (S.D. 1977) (disclaimer must mention merchantability and be conspicuous); MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App. 1977) (inconspicuous printed disclaimer in escrow sales contract unenforceable).

In addition to requiring that a disclaimer be unambiguously worded and conspicuously placed, the courts may demand that it be sufficiently specific and addressed to the particular defect for which recovery is sought. In Belt v. Spencer, 41 Colo. App. 227, 230-31, 585 P.2d 922, 925 (1978), the court held that a written waiver of liability for "cracking of concrete flatwork" does not relieve a builder-vendor from the implied warranty for vertical displacement or heaving in a basement and driveway. The Missouri Supreme Court in Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 800 (Mo. 1972), refused to enforce a disclaimer for latent defects relying on a "present condition" clause. \textit{But see} Tibbitts v. Openshaw, 18 Utah 2d 442, 453 P.2d 160 (1967) ("as is" clause held to be effective bar to recovery under implied warranty). Several courts have held that conditions or limitations of an express warranty should not be construed to limit the implied warranty. \textit{See} Hoagland v. Celebrity Homes, Inc., 40 Colo. App. 215, 572 P.2d 493 (1977); Sedlmajer v. Jones, 275 N.W.2d 631 (S.D. 1979).

For two reasons Indiana may be expected to follow other jurisdictions in allowing disclaimers but strictly construing them against builder-vendors. First, there has been almost no dissent from this approach among courts that have considered the issue. Second, this approach is consistent with other areas of contract and property law. For example, in Weaver v. American Oil Co., 257 Ind. 458, 464, 276 N.E.2d 144, 148 (1971), which has become a leading judicial exploration of contracts of adhesion, the court reasoned that the disparity in bargaining power, the lessee's lack of knowledge of the fine print clause, and the harsh consequences for the lessee rendered the disclaimer unconscionable in a gas station lease. The court observed: "We do not mean to say or infer that parties may not make contracts exculpating one of his negligence ... but it must be done knowingly and willingly." Id. at 465, 276 N.E.2d at 148 (emphasis in original). Similarly, in Vernon Fire & Cas. Ins. Co. v. Graham, 166 Ind. 509, 514, 336 N.E.2d 829, 833 (1975), also involving a lease clause exculpating the lessor from negligence, the court held that such provisions would be strictly construed and must be expressed in "clear and unequivocal" terms. In Indiana State Highway Comm'n v. Thomas, 169 Ind. App. 32, 346 N.E.2d 252, 263-64 (1976), the court quoted the dissent in Jordan v. City of New York, 3 A.D.2d 507, 514, 164 N.Y.S.2d 145, 152 (1957), aff'd, 5 N.Y.2d 723, 177 N.Y.S.2d 709, 152 N.E.2d 667 which noted that "clauses such as these ... demand laborious judicial parsing." In holding a lessee's written disclaimer of liability from the implied warranty of habitability under a lease agreement invalid, the Indiana Court of Appeals in Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. App. 1976), \textit{aff'd}, 267 Ind. 176, 369 N.E.2d 404 (1977), stated: "The lesson of \textit{Weaver} is not that lessees are excused from reading leases ... but rather that they may not be intimidated and tricked ... under circumstances making it unconscionable for them to be bound by booby trap clauses hidden away in a printed form lease prepared by the lessor." Id. at 785.

\textsuperscript{14} See, e.g., Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).
plumbing,\textsuperscript{15} or structural inadequacy.\textsuperscript{16} Courts have also applied the warranty when builder actions in selecting and preparing a site\textsuperscript{17} have caused


\textsuperscript{16} See, e.g., F & S Constr. Co. v. Berube, 322 F.2d 782 (10th Cir. 1963) (cracking walls and bending cupboards); Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (1972) (defective roof, improperly flashed chimney, defective plumbing, wiring, and heating system, defective drainfield). Whether a defect in the home is substantial may depend on circumstances such as climate or geography. See Gable v. Silver, 258 So. 2d 11 ( Fla. Dist. Ct. App. 1972) (warranty applied in case of defectively installed air-conditioning system).

\textsuperscript{17} Nearly every court that has been asked to extend the warranty to a defect in the land or an improvement thereon that has not affected the dwelling has denied warranty recovery. See, e.g., Witty v. Schramm, 62 Ill. App. 3d 185, 379 N.E.2d 333 (1978) (warranty recovery denied to purchaser of vacant lot). One apparent exception is Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972), in which, despite a properly constructed well, plaintiffs recovered under an implied warranty of habitability by showing that their water was unfit for consumption. In granting relief, however, the Pennsylvania Supreme Court stated that the reason for its holding was that without a decent water supply the house itself was rendered unfit for habitation. \textit{Id.} at 120, 288 A.2d at 777. In Gay v. Cornwall, 6 Wash. App. 595, 494 P.2d 1371 (1972), the court listed a defective driveway drainfield and gutters that drained into a purchaser's lawn as part of a list of defects upon which it granted warranty recovery. The list also included defective plumbing, electrical wiring, and heating installations, among the defects. A better indication of the judicial trend is Kios v. Glockel, 87 Wash. 2d 567, 554 P.2d 1349 (1976), in which the court denied recovery when a mudslide ruined the homeowner's patio but did not significantly damage the house itself.

The Oregon Supreme Court has provided a perceptive treatment of this issue. In Cook v. Salishan Properties, Inc., 279 Or. 333, 569 P.2d 1033 (1977), the court held that a commercial subdivider-developer who offers building lots for sale does not impliedly warrant that they are free from latent defects or are fit for the purpose for which the lots are sold. The court noted that even highly skilled land developers are not guarantors, in the absence of negligence or misrepresentation, should the land alone prove unsuitable. The court cited three related reasons. First, the necessary reliance of the buyer upon the expertise of the builder in constructing a dwelling is greater than in the purchase of land. \textit{Id.} at 337-39, 569 P.2d at 1035. Second, while plumbing, wiring, and structural elements of a house, especially if completed at the time of purchase, are largely inaccessible for buyer inspection, this is not the case with land. \textit{Id.} Third, the typical buyer does not view the builder as a guarantor of the land; he lacks the contractual expectations of the new home buyer. \textit{Id.} This reasoning is difficult to refute. A buyer is in a better position to inspect land than a completed home and the responsibility of a builder-vendor for its condition is proportionately less. Moreover, the buyer may still recover by showing builder negligence in the selection or preparation of the land, and may recover from the builder under a warranty theory if the defective land damages the dwelling.

In arriving at its conclusions, the Oregon court considered both statutory and case law developments in other jurisdictions. The only statute that seemingly supported the extension of an implied warranty to land in the absence of home damage was the broad statement of section 2-309 of the \textit{Uniform Land Transactions Act} that a seller in the real estate business warrants that "real estate" is "suitable for the ordinary uses of real estate of its type." In reading the accompanying comments, however, the court found that the focus of the provision was quality of construction of a building, not condition of unimproved land. \textit{Id.} at 340, 569 P.2d at 1036.

Likewise, the court discovered only one decision purporting to apply the warranty to land alone. In Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975), a developer-vendor sold plaintiff a lot subject to a restrictive covenant allowing only a single-family dwelling to be built thereon. Draining problems, however, caused the land to be unfit for sewage disposal and therefore unsuitable for its only intended purpose. While observing that the seller could not have known of the difficulty, the court nonetheless found an implied habitability warranty arising out of the restrictive covenant. \textit{Id.} at 436, 215 S.E.2d at 111. The Oregon court might have distinguished \textit{Hinson} because in \textit{Hinson} the dwelling itself was
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such problems as improper drainage or sewage disposal.¹⁸

Once a jurisdiction has adopted the habitability warranty, it must
establish its duration. Commentators have advocated fixed statutory
periods arguing that both builders and buyers would be more justly served
by predictable and uniformly applied limitations upon the warranty's
duration.¹⁹ Suggestions have ranged from one to five years, the latter
being the most popular.²⁰ Statutory solutions, however, have offered
anything but predictability and uniformity.²¹ At least six courts have ap-
plied their state's limitations statute for contract actions.²² One state has

rendered unfit. In any case, Hinson remains the only state appellate decision extending
the warranty to land alone.

¹⁸ Indiana courts have been willing to allow recovery to a purchaser for improperly in-
stalled sewage systems that damaged the home itself. See Wagner Constr. Co. v. Noonan,
⁸ Ind. App. ⁸, 403 N.E.2d 1144 (1980); Theis v. Heuer, 264 Ind. 1, 280 N.E.2d 300
(1972), affg 149 Ind. App. 52, 270 N.E.2d 764 (1971). In Wagner the court found "substantial
impairment" of the home despite repair costs of only $632.66. Id. at ⁸, 403 N.E.2d at
1149. Neither court noted that the defect itself lay outside the dwelling.

In Waggoner v. Midwestern Dev. Inc., 83 S.D. 57, 154 N.W.2d 803 (1967), a developer
filled a spring-fed pond in order to build a subdivision. During heavy rains the water table
would rise causing leaks and cracks in home foundations. Id. at 59-60, 154 N.W.2d at 804-05.
The court held that this defect in preparation of the land, because it rendered the homes
unfit for habitation, was sufficient to invoke the warranty. Id. at 68, 154 N.W.2d at 809.

In Yepsen v. Burgess, 289 Or. 635, 525 P.2d 1019 (1974), the Oregon Supreme Court found
that a builder had improperly constructed a septic tank and drainfield. The court noted
that while the defects were not in the house itself, they were a product of the builder’s
work on the land in conjunction with the house and the system was essential for use of
the house. Id. at 641-42, 525 P.2d at 1022-23. See also Tavares v. Horstman, 542 P.2d 1275
(Wyo. 1975).

Courts have been more reluctant to permit recovery for damage to a home caused by
the defective condition of the land because a builder has less reason to know of, and therefore
should be less accountable for, such conditions. If the buyer could be expected to rely on
the builder's expertise regarding the presence of a particular condition or if damage to
the house is substantial, however, most courts invoke the warranty. See, e.g., F & S Constr.
Co. v. Berube, 322 F.2d 782 (10th Cir. 1963) (settling caused cracks in walls); Mulhern v.
Hederich, 153 Colo. 275, 430 P.2d 469 (1967) (land's instability caused defects in house).

²⁲ See, e.g., Maciorowksi, Landlord and Tenant—Implied Warranty of Habitability—Demise of
the Traditional Doctrine of Caveat Emptor, 20 DEPAUL L. REV. 955, 968 (1971).
²³ E.g., Bearman, "Caveat Emptor" in Sales of Realty—Recent Assaults upon the Rule, 14
VAND. L. REV. 541, 576 (1961) (one year); Haskell, supra note 13, at 651-52 (five years).
²⁴ See, e.g., MINN. STAT. ANN. §§ 327A.01-08 (West 1981) (limitation period depends on type
of defect); N.J. STAT. ANN. §§ 46:3B-1 to -12 (West Supp. 1982-83); WASH. REV. CODE § 4.16.310
(Supp. 1981) (six-year limitation period). Maryland requires such an action to be brought
within two years after the defect was or should have been discovered, or within two years
after the warranty expires, whichever occurs first. MD. REAL PROP. CODE ANN. § 10-204 (1981).

This approach is similar to that of Oregon, OR. REV. STAT. § 12.135 (1981), and, until 1980,
under the fourteenth amendment and article IV, section 25 of the Colorado Constitution
because the statute was drawn so as to grant preferential protection for a portion of the
construction industry), but in Maryland the outside limitation is provided by the warranty
plus two years, whereas completion of the improvement plus ten years is the outside limita-
tion in Oregon and Colorado. The Colorado and Oregon two-tier approach allows for ac-
tions to be brought within a reasonable time after a latent defect is discovered, yet pro-
vides some certainty to builder-vendors by putting all claims to rest after expiration of the
outside limitation.
declared by statute that the limitations period for construction contracts, and not general contract actions, should govern. At least two courts have applied their state’s limitations period for tort actions.

Most courts have not imposed a blanket duration period in the absence of a specific statutory provision, preferring a test of “reasonable duration” upon the facts of each case. In the leading case of *Waggoner v. Midwestern Development, Inc.*, decided by the South Dakota Supreme Court, homeowners recovered damages when they discovered cracking and leaking five years after a developer built a subdivision over filled-in natural springs.

In deciding when the limitations period begins to run, most courts have adopted the discovery rule—the statute is tolled until a latent defect appears. Most statutes, however, provide that their limitations period begins to run at the time home construction is completed. The discovery rule and other duration issues have assumed particular importance in Indiana warranty decisions.

Another important issue is who may be a defendant in a warranty action. Originally, the courts applied the warranty only to builder-vendors. As the privity requirement has come under increasing attack and courts have begun considering the bargaining position of a buyer and seller and weighing the relative opportunities of each to oversee and inspect construction, courts no longer hesitate to extend liability to developers for defects caused by their contractors. Other parties who have received...
held liable a developer who was the builder's agent, while in Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 689 (1966), the court allowed the buyer to sue both the developer and the contractor. The leading recent case extending liability to developers is Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 380, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974), in which the court put aside issues of privity and agency and flatly asserted that "builders and sellers of new construction should be held to what is impliedly represented." See also House v. Thornton, 76 Wash. 2d 428, 436, 457 P.2d 199, 204 (1969). Opinions like that in Pollard are grounded on the presumption that a developer ought to be in a position to hire a competent builder, to inspect his work, to demand repair, and, if necessary, to bear the cost of repair. In Bolkum v. Staab, 133 Vt. 467, 470, 346 A.2d 210, 211 (1975), for example, the court held a developer-vendor not engaged in actual construction nonetheless liable because he was responsible for arranging construction as part of his development of a large housing tract. The one limitation that has appeared upon the liability of a developer-vendor under the warranty is that a developer is not liable for the mere sale of a building lot. See note 17 supra. In other words, the Pollard rationale does not come into play unless the developer hires the contractor, has the opportunity to supervise or inspect for defects and to demand repair, or is otherwise in a better position than the buyer to prevent or repair defects in construction.

In 1988 the California Supreme Court in Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), launched a storm of controversy in extending the implied warranty to a new, well-heeled class of defendants—the lenders. The court found that a defendant savings and loan association had notice that construction was inadequate. Considering the unequal bargaining position of individual purchasers, their inability to inspect new homes adequately, and the importance of a new home investment, the court ruled that a lender had breached its contractual duty to purchasers to prevent them from buying seriously defective homes. In recognizing this "duty on the part of tract financiers to home buyers" to encourage reasonable workmanship, the court reasoned: "If existing sanctions are inadequate, imposition of a duty at the point of effective financial control... will insure responsible building practices." Id. at 668, 447 P.2d at 618, 73 Cal. Rptr. at 378.

One commentator has suggested that other jurisdictions are unlikely to follow Connor. Jaeger, An Emerging Concept: Consumer Protection in Statutory Regulation, Products Liability and the Sale of New Homes, 11 Val. U.L. Rev. 335, 344 (1977). Moreover the state legislature in the year after the Connor decision barred recovery from a lender under an implied warranty if the lender acted merely as a lender. Cal. Civ. Code § 3434 (West 1970). But see Jeminson v. Montgomery Real Estate & Co., 396 Mich. 106, 240 N.W.2d 205 (1976). Jeminson does not explicitly adopt the Connor precedent as a matter of procedure, as the case was remanded to consider liability of the lender. However, in reversing a prior holding of summary judgment for the lender, the Michigan court impliedly followed Connor. Still, whether fearing legislation similar to that of California, or, like the Connor dissent, 69 Cal. 2d at 872, 447 P.2d at 621, 73 Cal. Rptr. at 381 (Mosk, J., dissenting), finding the lender too remote a defendant, other jurisdictions will probably look elsewhere in assessing liability.

In Cooper v. Jevne, 56 Cal. App. 3d 600, 128 Cal. Rptr. 724 (1976), the court suggested that a real estate broker might be liable under an implied warranty of habitability for defects of which he has reason to be aware. One commentator has recently argued that the trend in California and elsewhere may be toward expanding broker liability in this area, contending that by analogy brokers, like developers, may come to be equated with "merchants" and be held liable for the "merchantability" of their products. Jacobson, Broker's Liability for Sale of Defective Homes: The Decline of Caveat Emptor, 52 L.A. B.J. 846 (1977). The broker possesses expertise which his client lacks; he has a greater opportunity to inspect the home; and he may be the only available deep pocket. Often the buyer relies exclusively on the broker's skill and knowledge in purchasing a home, even in the absence of express assertions. Should a trend toward broker liability emerge, one may anticipate greater judicial willingness to extend this liability to used homes. Unlike builders and developers, brokers deal directly with second and subsequent purchasers, and, unlike other sellers of used homes, they would qualify as merchants for warranty purposes. If such
nonbuilder-vendors of used homes.\(^{34}\)

Nearly every jurisdiction has imposed or may be expected to impose the warranty upon the sale of completed as well as unfinished homes.\(^{35}\) Protection for condominium purchasers also appears within the scope of the warranty.\(^{36}\) Those courts which have considered the question have not hesitated to extend warranty coverage to condominiums.\(^{37}\) Most jurisdictions have refused to protect commercial buyers, contending that they are in a position to inspect or hire another to inspect, bargain for express warranties, and otherwise deal at arm's length with builder-vendors.\(^{38}\) Denial of recovery from builder-vendors to lessees of a trend appears, a whole new area of recovery will be opened to home buyers under the implied warranty.

\(^{34}\) In Vetor v. Shockey, ___ Ind. App. __, 414 N.E.2d 575 (1980), the court declined to extend the warranty to a nonbuilder-vendor who sells a used home pointing out that "[t]hose jurisdictions which have been confronted with such factual situations have universally rejected such expansion", apparently because such a vendor could be presumed to have no greater expertise in the sale of used housing than the purchaser. Id. at __, 414 N.E.2d at 577. Acknowledging that Haskell, supra note 13, and dicta in Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975), suggest the contrary, and that Indiana had extended the warranty to used homes originally sold by builder-vendors, Judge Sullivan concluded that "[w]hile the public interest may well be served by placing repair or replacement costs of a new home on the responsible vendor-builder who created the defect and is in a better economic position to bear the cost than the purchaser, these policy considerations are inapplicable where the house is an older one and the seller is not its builder." __, Ind. App. at __, 414 N.E.2d at 577.

\(^{35}\) The distinction between completed and not yet completed homes for warranty purposes was summarily dismissed in the leading case of Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964). The court reasoned:

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new home seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.


\(^{36}\) A condominium resembles personal property more than does a free standing dwelling further reinforcing the analogy to the Uniform Commercial Code that underlies the adoption of the warranty in Indiana and other states. While not many courts have been presented with the issue, those which have decided it have adopted this reasoning. See, e.g., cases cited note 37 infra.

\(^{37}\) See, e.g., Gable v. Silver, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972) (extending protection to condominium in its first application of the implied warranty). In Deal v. 999 Lakeshore Ass'n, 579 P.2d 775 (Nev. 1978), a group of condominium owners in a class action recovered from a developer and a contractor for breach of the implied warranty. In Strathmore Riverside Villas Condominium Ass'n Inc. v. Paver Dev. Corp., 369 So. 2d 971 (Fla. Dist. Ct. App. 1979), the court denied warranty recovery to a second purchaser because he lacked privity, but the court noted that coverage would extend to original owners. It appears, therefore, that condominium owners will receive the same warranty protection available to house owners.

purchasers is also a trend that may be expected to continue.\(^9\)

The Indiana Supreme Court was the first appellate court in any state to extend the implied warranty of habitability to a second purchaser in *Barnes v. Mac Brown & Co.*\(^{40}\) *Barnes* has had a mixed reception in other jurisdictions. Of the small number of states that have reached the issue, Mississippi,\(^4\) Connecticut,\(^42\) Colorado,\(^4\) Rhode Island,\(^43\) and South Dakota\(^45\) have explicitly denied warranty recovery to second purchasers.\(^46\) Maryland has limited recovery to first purchasers by statute.\(^47\) Only three states have joined Indiana in extending the warranty to second and subsequent buyers. Recent statutory provisions adopted in Minnesota\(^48\) and New Jersey\(^49\) include subsequent purchasers, and in 1979 the Wyoming Supreme Court has extended the warranty to a lessee of a used home from the initial purchaser. In the widely cited, but not necessarily followed, opinion of *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 95-96, 207 A.2d 314, 328 (1965), the court held that lack of privity did not bar a lessee from a warranty action against the builder 18 months after the purchase of the home by the vendee-lessee. For two reasons courts generally do not allow warranty recovery by a lessee from the builder-vendor. The first reason, not present in Indiana, *see* *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976), is that most courts require privity of contract between plaintiff and defendant. The second reason is that in many states there is recourse available to injured lessees, most notably the implied warranty of habitability extending from lessor to lessee.

\(^{21}\) One state has permitted the lessee of a home from the initial purchaser to recover from the builder-vendor. In the widely cited, but not necessarily followed, opinion of *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 95-96, 207 A.2d 314, 328 (1965), the court held that lack of privity did not bar a lessee from a warranty action against the builder 18 months after purchase of the home by the vendee-lessee. For two reasons courts generally do not allow warranty recovery by a lessee from the builder-vendor. The first reason, not present in Indiana, *see* *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976), is that most courts require privity of contract between plaintiff and defendant. The second reason is that in many states there is recourse available to injured lessees, most notably the implied warranty of habitability extending from lessor to lessee.

\(^{22}\) Oliver v. City Builders, Inc., 303 So. 2d 466 (Miss. 1974). The court in *Oliver* noted that the original purchaser may have bargained for the home in its defective condition. *Id.* at 468. The court affirmed its position in *Brown v. Elton Chalk, Inc.*, 358 So. 2d 721, 722 (Miss. 1978), holding that while there is an implied warranty extending from a builder-vendor to a new home to a first purchaser, a demurrer is proper if a claim does not allege or imply that a house is new or that a plaintiff is the first purchaser.


\(^{25}\) In *Brown v. Fowler*, 279 N.W.2d 907 (S.D. 1979), the court denied recovery to a second purchaser because of a lack of privity but remanded on the issue of negligence.

\(^{26}\) A few courts, while professing to deny recovery for used homes, have indicated some flexibility. In *Casavant v. Campopiano*, 114 R.I. 24, 327 A.2d 831 (1974), the court was asked to decide a case in which a purchaser brought an action for damages caused by a sagging roof against a builder-vendor who had previously rented the home to a lessee who had planned to purchase but later abandoned the home. While refusing to extend the warranty to used homes, the court found this to be a new home and allowed recovery. City of Philadelphia v. Page, 382 F. Supp. 148 (E.D. Pa. 1973), held that the warranty applies to the sale of renovated homes. Other decisions, including *Gable v. Silver*, 258 So. 2d 11 (Fla. Dist. Cl. App. 1972); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); and *Tavares v. Horstman*, 545 P.2d 1275, 1282 (Wyo. 1975), tend to indicate that some courts may extend the warranty to subsequent purchasers in an appropriate situation.

\(^{27}\) Md. REAL PROP. CODE ANN. §§ 10-201 to -205 (1981).

\(^{28}\) MINN. STAT. ANN. §§ 327A.01-08 (West 1981).

\(^{29}\) N.J. STAT. ANN. §§ 46:3B-1 to -12 (West Supp. 1982-83). The statute extends protection to any buyer during the warranty period who gives reasonable notice and opportunity to repair to the builder-vendor.
Court in *Moxley v. Laramie Builders, Inc.* became the second court to extend the warranty to subsequent buyers.

**The Implied Warranty of Habitability in Indiana**

The implied warranty of habitability came to Indiana in 1972 when the Indiana Supreme Court adopted the opinion of Judge Sharp for the Indiana Court of Appeals in *Theis v. Heuer*. When sewer lines and drain tiles improperly laid by a builder-vendor caused water and sewage to back into the plaintiff's house during heavy rains, plaintiff brought an action under the implied warranty theory. The trial court granted defendant's motion to dismiss for failure to state a claim upon which relief could be granted and plaintiff appealed. After considering leading cases from other jurisdictions, and noting that buying a new home has increasingly come to resemble a personal property transaction, Judge Sharp held that the first purchaser of a new home who is unaware of a defect at the time of sale, but who later finds that the home has been sold in a defective condition that substantially impairs its intended use, may recover damages from a builder-vendor under an implied warranty of fitness for habitation.

**The Warranty for Subsequent Purchasers: Barnes v. Mac Brown & Co.**

*Barnes v. Mac Brown & Co.* extended the warranty umbrella to a new class of plaintiffs—used home buyers. In 1967 or 1968, Mac Brown, a professional builder, sold a residence to the Shipmans, who conveyed it to the Barneses in October 1971. Shortly thereafter, Mr. and Mrs. Barnes discovered leaks in the basement from a large crack around three walls, and brought an implied warranty action against the builder to recover $3500 for repairs.

Justice Arterburn's majority opinion reaffirmed the court's position in *Theis* that a first purchaser may recover from a builder-vendor for a la-

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50 600 P.2d 733 (Wyo. 1979). The defendant built a house for the original owner in 1975; the plaintiffs purchased it two years later. *Id.* at 734. After discovering defective electrical wiring, they brought a warranty action. *Id.* Following its holding in Tavares v. Horstman, 542 P.2d 1375 (Wyo. 1975), the court determined that the warranty should be of reasonable duration—two years was not unreasonable for wiring—and should be limited to latent defects that become manifest after purchase. In concluding that the warranty should extend to the plaintiff as a second purchaser, the *Moxley* court cited *Barnes* as "a reasonably workable rule." 600 P.2d at 735.


53 *Id.* at 9, 280 N.E.2d at 304.

54 *Id.* at 12, 280 N.E.2d at 306.


56 Id. at 228, 342 N.E.2d at 620.

57 Id.
tent defect that substantially impairs a home’s habitability. Enlarging
upon the court’s earlier ruling, Barnes held that the plaintiff must show
that a defect is both hidden and traceable to the original builder-vendor. Whether a breach of the implied warranty has occurred is a matter of
“reasonableness in light of surrounding circumstances,” including the age
of the house, its maintenance, and the use to which it has been put. The
opinion applied the same standard of reasonableness to the duration of
the warranty, and found four years to be acceptable for cracks and leaks
in a basement. Justice Arterburn saw no rational basis for distinguishing
between recovery for property damage and personal injury and comment-
ed that a plaintiff should not be punished for detecting and repairing
a defect before a personal injury occurs. Damages, he concluded, should
be based on the cost of repair.

In considering whether to extend the warranty to subsequent pur-
chasers, Justice Arterburn ignored decisions of other state courts and
turned instead to J.I. Case Co. v. Sandefur, an Indiana products liability
decision. Analogizing to the balance the court had earlier struck between
protection of manufacturers and consumers of personal property, he
acknowledged that “the manufacturer of a home must be accorded
reasonable freedom and protection.” He concluded, however, that lack
of privity between a home vendor and a subsequent purchaser should
no longer be an absolute bar to a warranty claim. In the sale of used
homes, the court limited liability to “latent defects, not discoverable by
a subsequent purchaser’s reasonable inspection, manifesting themselves
after the purchase.”

Justice Arterburn’s reliance on a personal property decision is not sur-
prising. The language and analysis that have shaped the warranty’s
development have been rooted in personal property law, particularly the
Uniform Commercial Code. In extending the warranty to subsequent
purchasers, however, his opinion went beyond this analogy and drew a
sharp dissent from Justice DeBruler, joined by Justice Prentice. Calling
attention to the majority’s failure to delimit the potentially sweeping ap-
plication of the warranty, Justice DeBruler saw no clear indication of the
type of defects to be covered, the limitations period for bringing such
an action, or the time at which a cause of action accrues. But the heart
of his criticism was an attack on the court’s reliance upon personal prop-

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58 Id.
59 Id. at 230, 342 N.E.2d at 621.
60 Id. at 229, 342 N.E.2d at 621.
61 Id.
62 Id.
63 Id.
64 245 Ind. 213, 197 N.E.2d 519 (1964).
65 264 Ind. at 227, 342 N.E.2d at 621.
66 Id.
67 See U.C.C. § 2-314.
68 264 Ind. at 230, 342 N.E.2d at 621-22 (DeBruler, J., dissenting).
69 Id. at 232, 342 N.E.2d at 622 (DeBruler, J., dissenting).
erty law and the Uniform Commercial Code to defeat the privity requirement between vendors and subsequent purchasers. He argued that in treating the dwelling as if it were personal property the majority ignored the fact that the Uniform Commercial Code does not attach any warranty to the purchase of used goods. While an absence of privity between manufacturer and original purchaser might no longer preclude recovery for a defective product, the Uniform Commercial Code does not permit recovery from either the manufacturer or the vendor by a subsequent purchaser of the product.

Reasoning similar to that employed by Justice DeBruler has been followed in jurisdictions that have rejected extension of the warranty to used homes. Unlike a retail vendor, who does not use goods and in fact has a duty to see that customers find them in the same condition as he receives them from the manufacturer, an original purchaser-user acquires a product with the obvious intention of obtaining its fullest benefits. Decline in value through reduction in quantity or quality is an expected incident to its use. While an initial buyer expects a product to conform to a manufacturer's claims, a subsequent purchaser has no such expectation that arises from the contract between the first and second purchasers in which the builder-vendor has no part, and upon which, therefore, builder-vendor liability cannot be based.

To agree with Justice DeBruler that recovery by subsequent buyers of personal property is not contemplated by the Uniform Commercial Code's warranties does not, however, compel the conclusion that recovery should be denied to used home purchasers. For most consumers, including subsequent buyers, a house is the most expensive and durable product they will ever purchase. Its outstanding quality may be its permanence. Generally, its fundamental components such as plumbing, septic system, wiring, and structural elements are expected to be free of substantial defects for at least ten years. This crucial distinction between real and personal property provides a better rationale for warranting used homes. Unlike a subsequent buyer of personal property, the second owner of a three-year-old home has essentially the same expectations from the builder-vendor as the original owner. Such expectations are evidenced by the possibility that the second owner will have paid more for the home than his seller. Moreover a substantial defect in a home may not become manifest for several years, as in the case of cracking or leaking. In short, a balancing of vendor freedom and protection with interests of a subsequent buyer supports extension of the implied warranty to home purchasers notwithstanding analogy to the Uniform Commercial Code, provided sufficient limitations and vendor safeguards are incorporated.

\[\text{Id. (DeBruler, J., dissenting).}\]

\[\text{See, e.g., notes 44-45 & accompanying text supra.}\]
Having made the warranty available to subsequent purchasers, the Indiana Supreme Court has left it to the Indiana Court of Appeals to supply checks and limitations called for by Justice DeBruler. In Wagner Construction Co. v. Noonan,71 decided in 1980, the court of appeals established two prerequisites for recovery by a subsequent buyer from the builder-vendor: first, filing an action within the appropriate limitations period, and second, providing sufficient notice of any defect to the defendant builder.72 The first prerequisite is essential to bar stale claims by remote subsequent purchasers. The second, however, may undesirably impede warranty recovery.

Wagner, like Barnes, involved latent water-related defects. In 1973, Wagner, the defendant, built a house for the Hills, who sold it in June 1978 to the plaintiff Noonan.73 A few days later the septic system caused sewage to back up and accumulate on the basement floor. Plaintiff called a plumbing contractor who temporarily alleviated the condition by rerouting the pipe to the tank. The contractor repeated the procedure twice in January 1979 when the condition recurred. When the problem again appeared in April, the contractor excavated, opened the tank, and found it to have been defectively constructed. Upon plaintiff's small claims action under the implied warranty of habitability for the cost of repair, Wagner admitted the defective construction but argued, *inter alia*, that he should not be liable because he had been given no notice or opportunity to repair the defect himself.74 After judgment for Noonan, the defendant appealed.

**Duration of the Warranty**

The first major issue the court of appeals addressed was duration of the warranty.75 A few states have adopted fixed periods (which have varied

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71 Id. Ind. App. ___ 403 N.E.2d 1144 (1980).
72 Id. at ___, 403 N.E.2d at 1147, 1149.
73 Id. at ___, 403 N.E.2d at 1145.
74 Id.
75 The court considered four issues on appeal: first, whether the warranty extended to a second purchaser; second, whether the defect was serious enough to invoke the warranty; third, whether five years was an excessive time to extend the warranty; and fourth, whether the warranty applied to the builder when he was not notified of the defect and therefore had no opportunity to cure the problem. Id. at ___, 403 N.E.2d at 1145-46. The court raised a fifth issue, whether the judgment was for an excessive amount, and whether the judgment was supported by sufficient evidence, but found it unnecessary to address the question. Id. at ___, 403 N.E.2d at 1145. In answering the first question affirmatively, the court simply restated the Barnes holding, briefly discussing its reasoning and impact upon other jurisdictions. See id. at ___, 403 N.E.2d at 1146-48. In treating the second issue, the court determined what constitutes a breach of warranty of fitness observing that "[t]he
widely) in the interest of predictability and uniformity,\(^7^6\) while most, including Indiana under *Barnes*,\(^7^7\) have preferred to adopt a standard of "reasonable duration" upon the facts of each case.\(^7^8\) In applying the *Barnes* test in *Wagner*, Judge Ratliff, writing for the court, shed little light on an already nebulous standard. Observing that duration is a factual issue in each case, he noted that many factors may be considered and quoted *Barnes*:

> The standard to be applied in determining whether or not there has been a breach of warranty is one of reasonableness in light of surrounding circumstances. The age of a home, its maintenance, the use to which it has been put, are but a few factors entering into this factual determination at trial.\(^7^9\)

Unfortunately, these factors go primarily to the question of whether there is a breach, and, to the extent they may be applied to the issue of duration, are vague guidelines at best. Judge Ratliff did not suggest additional factors, but merely concluded: "We cannot say, as a matter of law, in this case, that five years is too long a period of time to extend the warranty of fitness for habitation as applied to a latent defect in a septic system which manifested itself after the purchase of the house."\(^8^0\)

A test of "reasonable duration" provides judicial flexibility unavailable in states applying only fixed limitations periods. As the facts of *Barnes* and *Wagner* indicate, a latent defect may not become manifest for years. In *Tavares v. Horstman*,\(^8^1\) the Wyoming Supreme Court listed factors to consider in determining reasonable duration, including geographic conditions, buyer expectations, local custom, cost of construction, type of building, and different durational expectancies for various elements of construction.\(^8^2\) With reliance only upon case-by-case adjudication, however, there can be no certainty about how much time a buyer may have to bring an action.\(^8^3\) Lack of certainty works an injustice on the purchaser who undertakes the time and expense of litigation, perhaps giving up alternative courses of action, only to learn that his claim is not "reasonably" timely. An even greater hardship is imposed on the builder-

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\(^7^6\) See note 21 & accompanying text supra.


\(^7^8\) Id. at 1282.

\(^7^9\) *See note 21 supra* (discussion of Colorado and Oregon statutes).
vendor, who remains liable indefinitely. The fairest solution—one that
would satisfy the need for both flexibility and certainty—would be to
combine this test with a statutory outside limit on the time for bringing
an action. The courts would apply the "reasonable duration" test on the
facts of each case. If, as in Barnes, a buyer cannot discover a latent defect
until years after the initial sale, he is protected. At the same time, as
Justice DeBruler suggested, an outside limitation would protect the
builder.

Interestingly, Judge Ratliff qualified his discussion of the duration issue
with the following footnote:

The builder-vendor need not fear the extension of the implied war-
 ranty of fitness for habitation into the distant future, since, in our
opinion, all such claims would be put to rest finally at the expiration
of 10 years from the date of substantial completion of the dwelling
pursuant to IC 34-4-20-2.14

In suggesting the applicability of Indiana Code section 34-4-20-2, the court
lent support to one of the three existing statutory alternatives available
to Indiana courts. The cited statute provides for a ten-year limitations
period for those who design, plan, supervise, or construct an improve-
ment upon real property.15 As a second alternative, Indiana might join
states that have imposed their general statute of limitations for written
contract actions. The Indiana Code provides for ten years.16 Finally the
court may adopt the ten-year limitation on all actions not otherwise
barred.17 The limit is fifteen years on causes of actions arising before
September 1, 1982.18

Although in some states courts have been compelled to choose, with
inconsistent results, between differing periods for construction and general
contract actions,19 the relevant Indiana statutes contain identical ten-year
limitations periods. Moreover, at least one Indiana decision in addition
to Wagner has suggested that the construction limitations statute should

14 ___ Ind. App. at ___, 403 N.E.2d at 1148 n.3.
15 IND. CODE § 34-4-20-2 (Supp. 1981). The statute states:
No action to recover damages whether based upon contract, tort, nuisance,
or otherwise, (a) for any deficiency, or alleged deficiency, in the design, plan-
ning, supervision, construction, or observation of construction, of an improve-
ment to real property, or (b) for an injury to property, either real or personal,
arising out of any such deficiency, shall be brought against any person perform-
ing or furnishing the design, planning, supervision, or observation of construc-
tion, of an improvement to real property, unless such action is commenced
within ten (10) years from the date of substantial completion of such
improvement.
Definitions are provided in Indiana Code section 34-4-20-1 (1976).
18 ___ id.
19 See, e.g., Broussard v. Pierret, 215 So. 2d 136 (La. Ct. App. 1968); Duncan v. Schuster-
prevail. In *Luxurious Swimming Pools, Inc. v. Tepe*, the leading case in applying section 34-4-20-2, the court of appeals held that the statute reaches contractors who participate in formulation of a strategy for construction, not merely architects and engineers. In choosing not to apply the six-year limitations period for negligent property damage, the court observed that the ten-year period governs damage to real property caused by defective design or construction, whether the claim is grounded in tort or contract. In 1977, after the *Tepe* action arose, the legislature made the statute's application to builders clearer by extending it to cases involving “construction” as well as “design,” “planning,” “supervision,” or “observation of construction.”

The maximum limitations period under section 34-4-20-2, requiring an action to be brought within ten years from the date of substantial completion of an improvement, and the judicial test of “reasonable duration” under the facts of each case provide a fair and workable solution to the duration issue. The former will afford a reasonable measure of certainty. The latter will continue to allow case-by-case adjustments in an area subject to variation in conditions and circumstances.

**Notice of Defect and Right to Cure**

After resolving the issues of breach and timeliness of the suit in favor of the plaintiff in *Wagner*, Judge Ratliff considered whether notice and opportunity to repair should be a condition precedent to recovery. He began by noting that the court in both *Theis* and *Barnes* had found no logical distinction between the purchase of a residence and sale of personal property to which Uniform Commercial Code warranties applied. He cited Indiana Code section 26-1-2-607(3)(a), as construed by the court of appeals in *Thompson Farms, Inc. v. Corno Feed Products*, for authority that “[i]n the personal property cases, notice of the breach has been held to be a condition precedent to recovery.” Finally, Judge Ratliff adopted the reasoning of *Pollard v. Saxe & Yolles Development Co.*, a 1974 decision by the California Supreme Court that had ruled on “this precise issue.” Judge Ratliff quoted the following:

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91 Id. at ___, 379 N.E.2d at 995 n.2.
93 For the text of the section, see note 85 supra.
94 In Indiana, the reasonable duration test of *Barnes* adequately takes into account the latency of the defect and therefore satisfies the rationale behind the discovery rule.
95 ___ Ind. App. at ___, 403 N.E.2d at 1146-47.
98 ___ Ind. App. at ___, 403 N.E.2d at 1149.
100 ___ Ind. App. at ___, 403 N.E.2d at 1149.
The requirement of notice of breach is based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements. The notice requirement also protects against stale claims. These considerations are as applicable to builders and sellers of new construction as to manufacturers and dealers of chattel.

He found "no evidence that Noonan ever gave any notice of the alleged breach of warranty." Judge Ratliff concluded:

Before a purchaser of a residence may seek damages from the builder-vendor for an alleged breach of implied warranty of fitness for habitation, wherein the damages sought are based upon the cost of repair or diminution in value of the residence, the purchaser must, as a condition precedent to recovery, give notice of the defect and alleged breach of warranty to the builder-vendor thus affording the builder-vendor an opportunity to remedy the defect. No particular form of notice is required, but the purchaser must at least inform the builder-vendor of the problem and give him a reasonable opportunity to cure or repair.

The issue of whether a buyer must give notice and opportunity to repair to a builder-vendor before pursuing his remedy has received little attention from the courts, presumably because most have declined to read the notice requirement derived from the Uniform Commercial Code into home warranty actions. The North Carolina Supreme Court in Hartley v. Ballou has indicated that a purchaser might even lose his right to warranty recovery by initially opting for repair. The court reasoned that by notifying the builder-vendor of water leakage, and continuing to reside in the building after the builder-vendor's efforts to remedy the problem, the plaintiff-buyer had accepted the property, including the defect which by that time was no longer latent, and was not entitled to warranty recovery.

Apparently, the only other state supreme court decision to consider the issue is Pollard, the California opinion cited by Judge Ratliff. In Pollard the defendants had constructed five apartment buildings that were sold to plaintiffs, who immediately became aware of certain defects. Although it was later determined that the defects arose from installation of inadequate support beams by the defendants, plaintiffs did not notify defendants until four years later, and brought the warranty action within a few days thereafter. The court, upholding the warranty but denying

101 Id. at ___, 403 N.E.2d at 1150 (quoting 12 Cal. 3d at 380, 525 P.2d at 92, 115 Cal. Rptr. at 652).
102 Id.
103 Id.
104 See U.C.C. § 2-607(3)(a).
106 Id. at 65, 209 S.E.2d at 785.
107 12 Cal. 9d at 377, 525 P.2d at 89, 115 Cal. Rptr. at 649.
recovery, required that, as with the sale of goods under the Uniform Commercial Code, the plaintiffs should have given timely notice of a breach.

That only two courts have imposed the Uniform Commercial Code's notice requirement on home sales suggests that analogy to personal property sales may be weak. As the warranty is applied in Indiana, at least two problems arise. First, the Code's notice requirement was not designed to encompass the situation in which a consumer discovers a defect that may have remained latent for several years after purchase. Second, the drafters of the Uniform Commercial Code did not intend its provisions to be applied to subsequent users.

Indiana Code section 26-1-2-607(3)(a) states in pertinent part: "Where a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ." This section is one of a cluster of provisions whose purpose is to insure that parties to a sales contract act reasonably and in good faith during the time shortly after sale, including providing the seller reasonable opportunity to substitute or cure his tender of goods. Commentators have interpreted one purpose of Uniform Commercial Code section 2-607 as preventing "commercial bad faith" in a buyer. The commercial buyer, they point out, is prevented from delaying notice in order to increase his damages. Similarly in Pollard the court held that a commercial buyer had forfeited warranty recovery by failing to notify the seller of defects of which he was aware at the time of the sale.

Official comment 4 to Uniform Commercial Code section 2-607 notes that "[a] reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is [not designed] to deprive a good faith consumer of his remedy." Even commentators who recognize the same policies behind the notice requirement as stated by the Pollard court have observed:

Not only the draftsman but also the writers and the courts seem to disfavor the lack of notice defense when invoked against an injured

103 (1976). The section, which is identical to U.C.C. § 2-607 except the Indiana Code uses the word "recovery" whereas the Uniform Commercial Code uses the word "remedy," has not been amended since Judge Ratliff's discussion in Wagner, see text accompanying notes 71-103 supra.

107 See, e.g., U.C.C. § 2-507 (effect of seller's tender; delivery on condition); U.C.C. § 2-508 (cure by seller of improper tender of delivery; replacement); U.C.C. § 2-513 (buyer's right to inspection of goods); U.C.C. § 2-601 (manner and effect of rightful rejection); U.C.C. § 2-605 (waiver of buyer's objections by failure to particularize); U.C.C. § 2-606 (what constitutes acceptance of goods); U.C.C. § 2-607 (effect of acceptance; notice of breach; burden of establishing breach after acceptance); U.C.C. § 2-608 (revocation of acceptance in whole or in part).


109 Id.

112 See text accompanying notes 101-03 supra.
The defendant's lawyer whose client is sued not by a merchant-buyer but by a consumer, especially by a consumer who suffered personal injury or property damage, should not rely heavily on a lack of notice defense. Here the notice policies collide with a countervailing policy that unsophisticated consumers who suffer real and perhaps grievous injury at the hands of the defendant-seller ought to have an easy road to recovery.\footnote{15}

The Uniform Commercial Code's notice requirement is intended primarily as a mechanism to discourage bad faith by a commercial buyer in the days or weeks immediately after purchase of nonconforming goods. It should not be used to cut off the rights of a consumer home buyer who discovers a defect that substantially impairs the habitability of his dwelling several months or years after his purchase. All Indiana home warranty decisions thus far, however, have involved consumer purchasers. Under Barnes, moreover, the warranty applies only to latent defects.\footnote{14}

Almost by definition, a home buyer may not seek warranty recovery until months or years after the period to which the Uniform Commercial Code's tender, acceptance, revocation, notice, and cure provisions are directed. Especially under circumstances such as those of Wagner, in which the small claims action followed a series of repair efforts that revealed that there was in fact a major construction defect, one may ask how plaintiff's actions were unreasonable.

Application of the Uniform Commercial Code's notice requirement seems particularly inappropriate in the case of subsequent users, to whom the code was never intended to extend. Even under the Code, courts divide over the issue of whether a consumer has a duty to give the manufacturer notice, with most finding such notice unnecessary to recovery.\footnote{15}

It is difficult to argue that a second purchaser, five years after completion of a dwelling, must turn to the initial builder for repairs, even when the defect is clearly a breach of warranty. Borrowing the Uniform Commercial Code provision works an injustice on a buyer when applied to situations for which it is not intended. Indiana courts should reexamine the rationale behind the used home warranty and should reconsider the appropriateness of this prerequisite to recovery.

**CONCLUSION**

The implied warranty of fitness for habitation is firmly established as a home buyer's remedy in Indiana and a substantial majority of states. While most issues surrounding its application have produced a consensus among courts and commentators, the Indiana courts have yet to answer

\footnote{13} J. White & R. Summers, supra note 110, at 345.
\footnote{14} 264 Ind. at 230, 342 N.E.2d at 621.
\footnote{15} See cases cited in J. White & R. Summers, supra note 110, at 347 & n.63.
all questions raised by *Barnes v. Mac Brown & Co.* in extending warranty protection to buyers of used homes. Because of the expense and the expectation of permanency in the purchase of both new and used houses, protection of subsequent purchasers is justified, provided adequate limitations and vendor safeguards are imposed. The most important safeguard—a workable warranty period—is provided by the “reasonable duration” test used in *Barnes*, and the outside limitation of ten years for construction contracts provided in Indiana Code section 34-4-20-2, as suggested in *Wagner Construction v. Noonan*. The requirement of notice to the defendant imposed by *Wagner*, however, is unrealistic within the context of used home purchases and should be abandoned. Intended under the Uniform Commercial Code to prevent “bad faith” in a commercial buyer during the period immediately following sale, the notice provision was not meant to apply to good faith consumers and therefore should not deprive an injured home buyer of remedy, especially for a defect becoming manifest several years after the home purchase.

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