Recent Developments in Implied Warranty Actions for the Sale of New Homes

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Recommended Citation
Karen Lee Schneider, Recent Developments in Implied Warranty Actions for the Sale of New Homes, 50 Mo. L. Rev. (1985)
Available at: https://scholarship.law.missouri.edu/mlr/vol50/iss2/4
I. INTRODUCTION

The Missouri Supreme Court first adopted an implied warranty of habitability or reasonable quality for the sale of a new home in Smith v. Old Warson Development Co.\(^1\) The court rejected the traditional rule of caveat emptor and allowed the purchaser of a new home a cause of action against the builder-vendor for latent structural defects in the home.\(^2\) Since Old Warson, Missouri courts have narrowly interpreted the scope of protection given by the warranty. The trend in several other jurisdictions, however, has been to extend the warranty to subsequent purchasers,\(^3\) and allow recovery under other theories such as strict liability\(^4\) and negligent construction.\(^5\) This Comment examines

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1. 479 S.W.2d 795 (Mo. 1972) (en banc).
3. See, e.g., Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984) (implied warranty by builder-vendor that construction has been done in a workmanlike manner and that the structure is habitable extends to subsequent purchaser of a home).
these recent trends and the treatment of these issues by Missouri courts.

II. BACKGROUND OF THE IMPLIED WARRANTY IN MISSOURI

Prior to *Old Warson*, a purchaser of a new home in Missouri could not recover damages from the builder-vendor for defects in the home, absent an express warranty in the deed. In *Old Warson*, the builder-vendor sold a new house to the plaintiff purchasers. Within a few months, a concrete slab supporting two rooms began to settle and sink, causing damage to a portion of the house. The purchasers brought an action against the builder-vendor for damages.

The Missouri Supreme Court held that implied warranties of merchantable quality and fitness do exist in the purchase of a new home by the first purchaser from a builder-vendor. The court discussed the doctrines of *caveat emptor* and merger, which traditionally had been bars to recovery under an implied warranty theory. The court noted the substantial trend by courts in other jurisdictions to abandon the strict rule of *caveat emptor* in the sale of a new house under circumstances similar to the *Old Warson* situation, and it


6. In Combow v. Kansas City Ground Inv. Co., 358 Mo. 934, 218 S.W.2d 539 (1949), the Missouri Supreme Court stated: “[A]bsent an express agreement to the contrary, a seller of real estate cannot be held liable for defective condition of the premises.” Id. at 938, 218 S.W.2d at 541.

7. The defendant in *Old Warson* owned a tract of land that he subdivided into residential lots. Defendant planned to sell the lots without homes thereon. To demonstrate what type of home could be built on the lots, defendant hired an agent to construct a display home, which the plaintiffs purchased. 479 S.W.2d at 797.

8. This settling caused doors to stick, the caulked space between the bathtub wall to enlarge, cracks developed in the walls, and a space developed between the baseboard and the floor. 479 S.W.2d at 797.

9. The plaintiffs brought an action for breach of an implied warranty of fitness for use as a residence and for negligence in the construction of the house. The case was submitted to the jury only on the implied warranty theory. The jury held for the plaintiffs but the trial judge directed a verdict for the defendant. The appellate court reversed. For a discussion of *Old Warson*, see Note, Products Liability—Implied Warranty in the Sale of a New House, 38 Mo. L. Rev. 315 (1973).

10. 479 S.W.2d at 801.

11. Under the doctrine of *caveat emptor*, the purchaser bears all risk as to the quality and condition of the property being sold. *Caveat emptor* required the purchaser to examine, judge, and test for himself the property being sold. See Note, supra note 9, at 316; see also State ex rel. Jones Store Co. v. Shain, 352 Mo. 630, 634, 179 S.W.2d 19, 20 (1944) (en banc); Hargous v. Stone, 5 N.Y. 73, 82 (1851); Humphrey v. Baker, 71 Okla. 272, 176 P. 896 (1918). See generally Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133 (1931).

The doctrine of merger barred recovery under an implied warranty theory because under this doctrine, any implied or express warranties in the contract of sale merge into the deed and are extinguished upon execution of the deed, unless included expressly therein. 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926 (3d ed. 1963).

12. The court determined that the merger doctrine was inapplicable in cases
also noted the trend throughout the nation to afford home purchasers the protections already afforded purchasers of chattels.\textsuperscript{13}

In addition, the \textit{Old Warson} court discussed two policy reasons in support of its decision. First, the court focused on the nature of the transaction, noting that usually the purchase of a residence is the purchase of a manufactured product—the house, and that the transfer of the land involved is a secondary element of the transaction.\textsuperscript{14}

The second policy the court emphasized was the relative bargaining position between the purchaser and the builder-vendor, which justifies the purchaser in relying on the builder's expertise and knowledge.\textsuperscript{15} The purchaser's reliance is justified, first, because latent structural defects are nearly impossible to discover after the house is built, and second, because the builder-vendor holds the residence out to the public as fit for use as a residence and as being of reasonable quality.\textsuperscript{16}

Applying these policies to the facts before it, the court noted that the defect was latent and could not be discovered even by careful inspection.\textsuperscript{17} Furthermore, the builder-vendor held this particular home out to the public as a model home for the subdivision.\textsuperscript{18} The policy underlying the \textit{Old Warson} decision is that between the ordinary, unsophisticated purchaser and the expert builder-vendor, the latter should bear the loss caused by latent structural defects in construction.\textsuperscript{19}

Even though the \textit{Old Warson} decision established an implied warranty of

such as the one at hand because the implied warranty does not arise from the contract of sale at all. The court stated that the implied warranty was a tort concept and not a contract right, so that plaintiffs' rights arose as a matter of law from their purchase of the house. 179 S.W.2d at 800.


14. 479 S.W.2d at 799. The court stated that a purchaser of a new home under the \textit{Old Warson} circumstances should have at least as much protection as the purchaser of a new car, gas stove, sump pump, or ladder. \textit{Id.} at 799.


16. 479 S.W.2d at 799.

17. \textit{Id.}

18. \textit{Id.}

habitability in the sale of a new residence, several questions were left unanswered by the decision. These questions have been explored by the Missouri courts in subsequent cases.

One question left unanswered was how serious the defect must be before recovery is permitted under the implied warranty theory. The Old Warson court did state that under this theory the test would be one of reasonableness of quality. In Major v. Rozell, the court interpreted this language to include a situation where the defect did not make the house uninhabitable but was serious enough to breach the implied warranty. The defect in that case involved a leakage of water under the house that accumulated each time it rained. This leakage occurred in the room where the furnace and hot water heater were located and it frequently caused the hot water heater to go out. Also, the leakage made the house damp, gave it a peculiar odor, and caused things to mildew. The purchaser sought to recover against the builder-vendor for damages based on an implied warranty of habitability or quality of the house as established in Old Warson. The trial court found that since the house was still habitable, the implied warranty had not been breached and held for the builder-vendor. The appellate court reversed and stated that the purchaser's cause of action under the implied warranty was not defeated merely because the purchaser had continued living in the house. The court cited O'Dell v. Custom Builders Corp., wherein the Missouri Supreme Court analogized the Old Warson warranty to the implied warranty of merchantability found in Missouri Revised Statutes section 400.2-314. The Rozell court stated that "[t]he fact people could live in the house does not mean the warranty was not breached any more than the fact that an automobile will run, however poorly, means the warranty of merchantability is not

20. See Note, supra note 9, at 318-19.
21. 479 S.W.2d at 801. The court stated that the builder-vendor would not be required to construct a perfect house. Also, the court noted that the duration of the builder-vendor's liability would be based on a standard of reasonableness. Id.
22. 618 S.W.2d 293 (Mo. App., S.D. 1981).
23. Id. at 295-96.
24. Id. at 294-95.
25. Id.
26. Id. at 294. In Major v. Rozell, the plaintiff builder-vendor filed an action to recover upon a promissory note given to them by the defendant purchasers. The latter filed a counterclaim against the former for damages based on the implied warranty theory.

The trial court acknowledged that there was a water problem in the crawl space beneath the house and found that at one point the water was 17½ inches deep, causing the hot water heater to go out. But, the trial court also found that there was no structural damage to the house, the footing, the foundation or wood, and that the sump pump should prevent the hot water heater from going out. 618 S.W.2d at 295.
27. 618 S.W.2d at 295.
28. Id.
29. 560 S.W.2d 862 (Mo. 1978) (en banc).
breached."

The Rozell court briefly discussed the range of defects that constitute a breach of the implied warranty. It noted that the breach of the warranty is not limited to such things as cracking of foundations or rott ing of floors, which are typical structural defects. The court stated that the implied warranty of habitability can also be breached by the unanticipated substantial leaking of water into a basement and by the leakage of water into the crawl space underneath a house. The court noted, however, that the full range of defects that constitute a breach of the Old Warson implied warranty had not yet been established.

Another question left unanswered in Old Warson was whether privity of contract is required for the purchaser to recover under the implied warranty. The Missouri Supreme Court in Old Warson did not have to decide the scope of the privity requirement since the defendant was the builder and the vendor. The court, however, did refer to Morrow v. Caloric Appliance Corp., which abolished the privity requirement for implied warranties of personalty. Courts in other jurisdictions normally permit recovery against the builder where the builder and the vendor are separate entities. The rationale behind this rule is that since the purchaser is the one who is protected by the implied warranty, a builder should not be able to avoid liability by first selling the home to a commercial vendor.

30. 618 S.W.2d at 295; see Miller v. Andy Burger Motors, 370 S.W.2d 654 (Mo. App., E.D. 1963); Dubinsky v. Lindburg Cadillac Co., 250 S.W.2d 830 (Mo. App., St. L. 1952).
31. 618 S.W.2d at 296.
34. See Lieber v. Bridges, 650 S.W.2d 688 (Mo. App., S.D. 1983) (defective settling of the house); Stegan v. H.W. Freeman Constr. Co., 637 S.W.2d 794 (Mo. App., E.D. 1982) (water service pipe from the house to the water main was not installed below the frost line).
35. See Note, supra note 9, at 319-20.
36. 479 S.W.2d at 801; see Note, supra note 9, at 319.
37. 362 S.W.2d 282 (Mo. App., Spr. 1962), aff'd, 372 S.W.2d 41 (Mo. 1963) (en banc).
38. 479 S.W.2d at 798.
39. See Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); see Note, supra note 9, at 319 n.36.
40. Note, supra note 9, at 320; see also Bearman, supra note 14, at 571-72; Stern & Frantze, Recent Developments in Missouri: Property Law, 48 UMKC L. Rev. 445, 454 & nn.60-61 (1980).

Another problem raised by Old Warson is the possible exclusion or disclaimer of the implied warranty. This issue will be discussed later in this Comment, see infra text accompanying notes 150-63.
Missouri courts have vacillated on whether the implied warranty for new home construction is contractual or tortious in nature since its adoption in *Old Warson*. This characterization of the cause of action is crucial in determining the applicable defenses, the types of warranties to be implied, and various limitations on the warranty.

In *Old Warson*, the Missouri Supreme Court suggested that the implied warranty was based on a tort theory. Later, in *O'Dell v. Custom Builders Corp.*, the Missouri Supreme Court again stressed the tort nature of the warranty. The *O'Dell* court noted that in *Old Warson*, it was significant that the court had rejected the merger doctrine (as a bar to recovery on implied warranty theory) by recognizing the tort nature of the implied warranty doctrine. The *O'Dell* court, however, analogized the *Old Warson* warranty to the implied warranty of merchantability found in Missouri Revised Statutes section 400.2-314. By doing so, the court seemed to indicate that the implied warranty as to homes was a contract right that grew out of the contract of sale, just like the implied warranty of merchantability for goods under section 400.2-314.

The Missouri Supreme Court resolved the issue in *Crowder v. Vandendeale*, stating that the implied warranty established in *Old Warson* was contractual in nature. The court noted that *Old Warson* was based partially on the rationale of *Keener v. Dayton Electric Manufacturing Co.* In *Keener*, the Missouri Supreme Court had indicated that the implied warranty doctrine in Missouri was similar to the tort theory of strict liability. But, the *Crowder* court distinguished *Keener* and the cases it relied on from *Old Warson* and its progeny by focusing on the nature of recovery involved in each line of cases. The *Keener*-type cases involved recovery for personal injuries or for injuries to the property sold caused by a violent occurrence. The *Crowder* court quoted the Eastern District Court of Appeals opinion, which had in turn quoted the Missouri Supreme Court's decision in *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 364 (Mo. 1969), where the court stated that the difference between strict liability and implied warranty would not be one of substance in Missouri because the courts are clearly recognizing the tort nature of the liability imposed. 479 S.W.2d at 798.

41. The *Old Warson* court quoted the Eastern District Court of Appeals opinion, which had in turn quoted the Missouri Supreme Court's decision in *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 364 (Mo. 1969), where the court stated that the difference between strict liability and implied warranty would not be one of substance in Missouri because the courts are clearly recognizing the tort nature of the liability imposed. 479 S.W.2d at 798.

42. 560 S.W.2d 862 (Mo. 1978) (en banc).
43. 560 S.W.2d at 870; see Stern & Frantze, supra note 40, at 654-55.
44. 560 S.W.2d at 870.
45. MO. REV. STAT. § 400.2-314 (1978).
46. Stern & Frantze, supra note 40, at 655.
47. 564 S.W.2d 879 (Mo. 1978) (en banc).
48. Id. at 881. Despite the express language of the Missouri Supreme Court in *Crowder v. Vandendeale* that the implied warranty is contractual, the Eastern District Court of Appeals in Missouri recently stated that the breach of the implied warranty of habitability is a tort concept and the court cited *Old Warson* as authority for this proposition. See Steffens v. Paramount Properties, Inc., 667 S.W.2d 725, 727 (Mo. App., E.D. 1984).
49. 445 S.W.2d 362 (Mo. 1969).
50. Id. at 364.
court stated that strict liability in tort was clearly appropriate in these situations.\textsuperscript{51} But in \textit{Old Warson} and similar cases, recovery is allowed for the economic losses resulting from latent structural defects in the home, which the \textit{Crowder} court stated was a contractual type of recovery.\textsuperscript{52}

The court discussed several factors in support of its conclusion that the \textit{Old Warson} implied warranty was contractual in nature. First, the court stated that the liability imposed in \textit{Old Warson} was clearly based on the transaction of purchase rather than the conduct of the builder.\textsuperscript{53} The court noted that the focus of an implied warranty case is on "the quality of the home sold rather than the conduct in building it,"\textsuperscript{54} in contrast to a negligence theory, where the focus is on both conduct and result. Furthermore, the court in \textit{Old Warson} stated that fault on the builder's part is irrelevant in an action in implied warranty.\textsuperscript{55}

A second factor the \textit{Crowder} court noted to support its conclusion is the implicit recognition in \textit{Old Warson} of the possible use of traditional contract defenses under proper circumstances.\textsuperscript{56} In \textit{Crowder}, the court pointed out that the disclaimer in \textit{Old Warson} was ineffective under the particular facts,\textsuperscript{57} but the possibility of a valid disclaimer or modification of the warranty under different facts still remained.\textsuperscript{58} The ability of the builder-vendor to limit contractually his liability is inconsistent with a conclusion that the implied warranty is based on tort law.

The desirability of giving the builder-vendor notice of the defect and an opportunity to repair it was the third factor discussed by the \textit{Crowder} court in concluding that the implied warranty is contractual in nature.\textsuperscript{59} The court noted that notice was not at issue in \textit{Old Warson} because the builder-vendor was given notice of the breach and an opportunity to repair.\textsuperscript{60} The court emphasized that when recovery is sought on a tort theory, notice is not required.\textsuperscript{61} If recovery were permitted on a negligence theory, the homeowner would not have to allow the builder-vendor the opportunity to make the needed repairs.\textsuperscript{62}

Courts in other jurisdictions have characterized this implied warranty as a contract cause of action rather than a tort action.\textsuperscript{63} Several of these jurisdic-

\begin{itemize}
\item \textsuperscript{51} \textit{Crowder}, 564 S.W.2d at 881.
\item \textsuperscript{52} \textit{Id.; see} Stern & Frantze, \textit{supra} note 40, at 656-57.
\item \textsuperscript{53} 564 S.W.2d at 881 \& n.3.
\item \textsuperscript{54} \textit{Id.} at 882.
\item \textsuperscript{55} \textit{Id.; see Old Warson}, 479 S.W.2d at 798.
\item \textsuperscript{56} 564 S.W.2d at 881.
\item \textsuperscript{57} \textit{Old Warson}, 479 S.W.2d at 800.
\item \textsuperscript{58} \textit{Crowder}, 564 S.W.2d at 881.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} The court also noted that in O'Dell v. Custom Builders Corp., 560 S.W.2d 862, 866 (Mo. 1978) (en banc), another implied warranty case, notice was given to the builder.
\item \textsuperscript{61} 564 S.W.2d at 881.
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{See Wawak v. Stewart}, 247 Ark. 1093, 1094, 449 S.W.2d 922, 923 (1970);
\end{itemize}
tions, though, have abolished the privity requirement, allowing a subsequent purchaser to recover from a builder-vendor. It is not clear, however, whether these jurisdictions are moving toward characterizing the warranty as a tort concept or have simply abolished privity of contract as a defense.

By characterizing the Old Warson implied warranty as contractual, the Missouri Supreme Court has placed significant limitations on recovery. The Crowder court stated that the contractual nature of the warranty implicitly limits the cause of action to the first purchaser. Thus, privity of contract is still a viable defense for a builder-vendor in Missouri.

Concluding that the warranty is contractual in nature also affects the type of damages that are recoverable. The damages recoverable under contract law relate to the deterioration or loss of bargain. Missouri courts are generally in accord as to the appropriate measure of damages in implied warranty cases. The basic rule is that plaintiffs are entitled to recover the lower of the cost of repair or the diminution in value.

One court has noted the effect on damages of giving the builder-vendor notice and an opportunity to remedy the defect. In Major v. Rozell, the court stated that when such notice is given and the builder-vendor takes action which does not remedy the defect, but alleviates its consequences, that action should be considered in arriving at the damages. The court also concluded that, when sold, the value of the house should reflect the remedial action taken.

The protection the implied warranty provides the purchaser under con-


64. See, e.g., Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427, 430 (1984) (privity is not required to maintain an action for breach of the implied warranty of workmanship and habitability); Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 184-85, 441 N.E.2d 324, 330 (1982) ("... [W]hile the warranty of habitability has roots in the execution of the contract for sale, we emphasize that it exists independently. Privity of contract is not required.").

65. 564 S.W.2d at 881.


67. Steffens v. Paramount Pictures, Inc., 667 S.W.2d 725, 728 (Mo. App., E.D. 1984); see also Ribando v. Sullivan, 588 S.W.2d 120, 124 (Mo. App., W.D. 1979). In Major v. Rozell, 618 S.W.2d 293 (Mo. App., S.D. 1981), the court stated the appropriate measure of damages for breach of the implied warranty is the difference between the value, at the time of the sale, of the house as warranted and of the house as it was sold or the cost of remedying the defect, whichever is lower. Id. at 296.

68. 618 S.W.2d 293 (Mo. App., S.D. 1981).

69. Id. at 296.

70. Id.
tract theory is not as broad as that provided under tort theory. The implied warranty, however, did evolve from tort into contract and does contain important elements from both areas of law. One of these elements is the purchaser's justified reliance upon the builder-vendor's knowledge and expertise which is a concept more familiar to contract law than to tort law.

One commentator has suggested that courts should not be concerned with labeling the implied warranty of habitability as either a contract or tort action. She argues that the implied warranty of habitability is a judicial creation and that no statute requires that it be limited on technical grounds to any particular buyer or to any particular type of injury. Further, courts should be free to select the features of both contract and tort law that support the policies furthered by the implied warranty.

III. TYPES OF IMPLIED WARRANTIES

Although Old Warson recognized that a purchaser has an implied warranty cause of action against the builder-vendor, Missouri courts have inconsistently described the nature of these warranties. In Old Warson, the court described the warranty in two different ways. First, the court adopted the appellate court's language that the implied warranty was one of "merchantable quality and fitness." Later, the court defined the warranty as one of "habitability or quality."

The Missouri Supreme Court attempted to clarify this issue in O'Dell v. Custom Builders Corp. The court stated that although the discussion of the implied warranty in Old Warson used the terms "fitness," "quality," "merchantability," and "habitability" interchangeably, the warranty imposed...
in *Old Warson* was closely analogous to the "implied warranty of merchantability" found in Missouri Revised Statutes section 400.2-314.80 The court noted that both the common law warranty and the statutory codification thereof require that the product be reasonably fit for the ordinary purposes for which it is used.81 The *O'Dell* court indicated that habitability is to new homes what merchantability is to goods.82

The *O'Dell* court distinguished an implied warranty of fitness for a particular use from the implied warranty of habitability established in *Old Warson*. In *O'Dell*, the court held the builder liable for breach of an implied warranty that the house plans prepared by the builder for the plaintiffs were fit for use in the construction of a house.83 The court held that there was an implied warranty that the plans would be fit for the purposes intended, which was that a house be built on the land in question.84 The plaintiff's claim in *O'Dell* was not based on the theory that the plans were unmerchantable but rather that they were not fit for use on the lot where plaintiffs were to build.85

Missouri appellate courts have referred to the *Old Warson* implied warranty in several ways. In *Stegan v. H.W. Freeman Construction Co.*,86 the Eastern District Court of Appeals stated that the *Old Warson* implied warranty is an "implied warranty of fitness for use."87 The court found that this warranty was breached by a water line problem that caused a portion of a water pipe to freeze leaving the plaintiffs without water service for twenty days.88

Another important distinction is the difference between an implied warranty of merchantability or habitability and an implied warranty that the house will be built in a skillful and workmanlike manner. The *Old Warson* implied warranty is applicable only to the sale of a completed new house.89 Subsequent cases have emphasized that the *Old Warson* implied warranty of habitability relates to the quality of the house, not the workmanship in building it.90 For example, the court in *Eckert v. Dishon*91 emphasized that the

80. Id. at 870.
82. 560 S.W.2d at 871.
83. Id.; see Sinclair, supra note 19, at 238.
84. 560 S.W.2d at 871.
85. Id. at 871. Therefore, the court concluded that Old Warson did not apply.
86. 637 S.W.2d 794 (Mo. App., E.D. 1982).
87. Id. at 797.
88. Id.
89. O'Dell v. Custom Builders Corp., 560 S.W.2d 862 (Mo. 1978) (en banc); Ribando v. Sullivan, 588 S.W.2d 120, 123 (Mo. App., W.D. 1979); Barrett v. Jenkins, 510 S.W.2d 805 (Mo. App., St. L. 1974).
90. Lieber v. Bridges, 650 S.W.2d 688, 690 (Mo. App., S.D. 1983). The court stated that when damages are sought for the deterioration of a house and the claim involves breach of an implied warranty, the issue is whether or not the house meets a certain standard of quality.
91. 617 S.W.2d 649 (Mo. App., W.D. 1981).
implied warranty as to residential property is the warranty of habitability and merchantability and not that the residence is constructed in a skillful and workmanlike manner and is free from defects in workmanship and materials.\(^92\) An implied warranty that the contractor will perform the work in a reasonably workmanlike manner is applicable where there is a contract to build a house, and not where the transaction involves the sale of a completed new house.\(^93\)

Courts in other jurisdictions have referred to the implied warranty of habitability in the sale of a completed new home in numerous ways, including an implied warranty of reasonable workmanship and habitability,\(^94\) an implied warranty of fitness for habitation and workmanlike construction,\(^95\) an implied warranty of fitness for use intended and reasonably good and workmanlike construction,\(^96\) and an implied warranty of reasonably workmanlike construction and fitness for habitation.\(^97\)

Arguably, the scope of the implied warranty imposed by many jurisdictions is broader than the warranty imposed in Missouri. Other jurisdictions have included in their interpretation of the warranty a "workmanlike construction" prong, whereas Missouri has not done so.\(^98\)

At least one commentator has suggested that the workmanlike construction prong of the implied warranty is analogous to the question of whether the builder-vendor was negligent in the construction of the home.\(^99\) This is because the reasonableness of the builder-vendor's conduct must be examined in deter-

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92. Id. at 650. In Eckert, the court held that the modification of the mandatory jury instruction, MAI 25.03, constituted prejudicial error because it could have misled the jury on the law of implied warranty. The modified instruction required the jury to find the residence free from defects and built in a workmanlike manner. The court stated that such a finding is not required to hold the defendant liable under breach of the implied warranty. See O'Dell v. Custom Builders Corp., 560 S.W.2d 862, 870-71 (Mo. 1978) (en banc).

93. Ribando, 588 S.W.2d at 123. The common law in Missouri prior to Old Warson clearly recognized this obligation upon one who contracts to build a house. See Kennedy v. Bowling, 319 Mo. 401, 4 S.W.2d 438 (1928) (en banc); Freeman Contracting Co. v. Lefferdink, 419 S.W.2d 266 (Mo. App., St. L. 1967); Pitzer v. Hercher, 318 S.W.2d 397 (Mo. App., St. L. 1958). Legal commentators also recognize this implied warranty of good workmanship in construction contracts. See Bearman, supra note 13, at 571; Haskell, supra note 13, at 637; Roberts, supra note 13, at 838; Case Comment, supra note 13, at 88.


98. See, e.g., Columbia W. Corp. v. Vela, 122 Ariz. 28, 33, 592 P.2d 1294, 1299 (Ct. App. 1979) (builder-vendor impliedly warrants that the construction was done in a workmanlike manner and that the structure is habitable); Chandler v. Madsen, 197 Mont. 234, 239, 642 P.2d 1028, 1031 (1982) (builder-vendor of a new home impliedly warrants that the residence is constructed in a workmanlike manner and is suitable for habitation).

99. Toole & Habein, supra note 72, at 162.
mining whether the house was constructed in an unworkmanlike manner.\textsuperscript{100} In jurisdictions that have recognized both prongs of the implied warranty, it is not clear whether a breach of both must be proved to recover damages.\textsuperscript{101} The Montana Supreme Court in \textit{Chandler v. Madsen}\textsuperscript{102} recognized both the implied warranties of workmanlike construction and habitability. The court, however, appeared to base liability on the implied warranty of habitability and not on the builder-vendor's negligence.\textsuperscript{103}

IV. EXTENSION OF THE IMPLIED WARRANTY TO SUBSEQUENT PURCHASERS

Several jurisdictions have extended the implied warranty of habitability to second or subsequent purchasers of a residence.\textsuperscript{104} This situation usually arises when the first purchaser from the builder sells the home to a subsequent purchaser who later discovers a latent defect. There are strong policy arguments in support of extending the implied warranty to subsequent purchasers, despite the lack of a contractual relationship between the subsequent purchaser and the builder-vendor.

Missouri courts have refused to extend the implied warranty to subsequent purchasers. In \textit{Crowder v. Vandendeale},\textsuperscript{106} the Missouri Supreme Court held that the contractual nature of the implied warranty limits the cause of action to the first purchaser. Thus, in Missouri a subsequent purchaser has no recourse against the builder-vendor for latent structural defects unless physical injury or property damage results from some violent occurrence.\textsuperscript{106} A recent Missouri appellate court decision reaffirmed \textit{Crowder}, denying a second purchaser a cause of action based on implied warranty.\textsuperscript{107} The court emphasized that the purchaser must be in privity with the builder-vendor to have a valid implied warranty cause of action.\textsuperscript{108}

\begin{footnotesize}
\item[100] \textit{Id.}
\item[101] \textit{Id.; Case Comment, supra} note 13 at 118-19.
\item[102] 197 Mont. 234, 642 P.2d 1028 (1982).
\item[103] \textit{Id.} at 238, 241-42, 642 P.2d at 1031, 1033; see Toole & Habein, \textit{supra} note 72, at 162.
\item[105] 564 S.W.2d 879, 881 (Mo. 1978) (en banc).
\item[106] Stern & Frantze, \textit{supra} note 40, at 656.
\item[107] John H. Armbruster & Co. v. Hayden Co.-Builder-Developer, 622 S.W.2d 704, 705 (Mo. App., E.D. 1981). The court also denied the former owner an implied warranty cause of action because it no longer had an interest in the residence.
\item[108] \textit{Id.} In Missouri, the warranty arises by reason of the first purchase from the builder-vendor. Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49 (Mo. App., E.D. 1981); see \textit{supra} notes 42-56 and accompanying text.
\end{footnotesize}
Missouri courts' refusal to extend the implied warranty cause of action to subsequent purchasers is unsatisfactory since the policy reasons that persuaded courts to adopt the implied warranty as to first purchasers are arguably applicable in the subsequent purchaser context as well. From a policy standpoint, the warranty seeks basically to protect innocent purchasers and hold builders accountable for their work. The courts that have afforded subsequent purchasers the protections of the implied warranty stress that, like the first purchaser, a subsequent purchaser has little knowledge of construction methods, has no reasonable opportunity to discover latent defects upon inspection, and must rely on the expertise and knowledge of the builder. As the Texas Supreme Court stated, "[t]he effect of the latent defect on the subsequent owner is just as great as on the original buyer and the builder is no more able to justify his improper work as to a subsequent owner than to the original buyer." Extending the warranty to subsequent purchasers furthers rather than hinders the purposes that the warranty was designed to serve.

The courts that have extended the implied warranty to subsequent purchasers have done so by recognizing the mobility of today's society. These courts indicate that it is reasonably foreseeable to the builder-vendor that the house will be resold, frequently within a short period of time. Therefore, it is argued that the extension of the warranty will not place undue hardship on builder-vendors.

In addition, relaxation of the privity requirement in products liability cases has influenced the courts that have extended the implied warranty to subsequent purchasers. The privity of contract requirement between a builder-vendor and a purchaser is considered by some to be an "outmoded" concept, just as is the privity of contract requirement between the manufacturer and the user of a product. One court abolished the privity requirement between the builder-vendor and supported its action by arguing that the state legislature had already abolished the privity requirement by statute.

111. Gupta, 646 S.W.2d at 169.
113. Gupta, 646 S.W.2d at 170 (Spears, J., concurring).
115. In Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 673 (Miss. 1983), the Mississippi Supreme Court addressed the argument that the removal of the privity requirement should be a legislative rather than a judicial decision. The court believed that the Mississippi legislature had already removed the privity requirement in all cases by enacting the following statute:

In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Com-
Courts that have refused to extend the implied warranty to subsequent purchasers express concern that extension of the warranty would subject the builder-vendor to unlimited liability for an unlimited period of time.\(^{116}\) However, courts that have extended the warranty address this concern by placing limits on the subsequent purchaser's ability to recover and by allowing the builder-vendor to use certain defenses.

For example, some courts have provided that the length of time for which the builder-vendor will be liable will be governed by a "reasonableness" standard. The Indiana Supreme Court has suggested that surrounding circumstances, including the age of the home, its maintenance, and the use to which it had been put, should be considered in determining whether the warranty has been breached.\(^{117}\) Another court has suggested that the statute of limitations for actions for faulty construction governs, regardless of the number of subsequent purchasers.\(^{118}\) Another defense that the builder-vendor can assert against the subsequent purchaser is that the defect was apparent or readily discoverable prior to the purchase.\(^{119}\)

The burden is on the subsequent purchaser to show that the defect had its origin and cause in the builder-vendor.\(^{120}\) Therefore, the builder-vendor has available all the traditional contract defenses. The builder-vendor can avoid liability by showing that the defects are not attributable to him or that they are the result of ordinary wear and tear.\(^{121}\) The builder-vendor can also avoid liability by proving that a substantial alteration or change in the condition of the house has occurred since the original sale.\(^{122}\) Thus, the courts' fear of unlimited liability for builder-vendors is unfounded since reasonable limits can be placed on the builder-vendor's liability by balancing the hardship placed on each party.

\footnotesize{\(^{116}\) Miss. Code Ann. § 11-7-20 (Supp. 1982) (emphasis added). Missouri has no similar statute. But cf. Barnes, 342 N.E.2d at 622 (DeBruler, J., dissenting) (the change should come about by legislative action, if at all).}

\footnotesize{\(^{117}\) Barnes, 264 Ind. at 229, 342 N.E.2d at 621; Richards, 139 Ariz. at \_, 678 P.2d at 430; Terlinde, 275 S.C. at \_, 271 S.E.2d at 769; Blagg, 272 Ark. at 187, 612 S.W.2d at 322.}

\footnotesize{\(^{118}\) Barnes, 264 Ind. at 229, 342 N.E.2d at 621.}

\footnotesize{\(^{119}\) The Mississippi Supreme Court in Keyes v. Guy Bailey Homes, Inc., 439 So. 2d 670, 673 (Miss. 1983), stated that under the applicable statute of limitations, the homebuilder's potential liability exists for ten years.}

\footnotesize{\(^{120}\) Barnes, 264 Ind. at 229, 342 N.E.2d at 621; Gupta, 646 S.W.2d at 170 (Spears, J., concurring); Redarowicz, 92 Ill. 2d at 185, 441 N.E.2d at 331.}

\footnotesize{\(^{121}\) Richards, 139 Ariz. at \_, 678 P.2d at 430; Gupta, 646 S.W.2d at 170 (Spears, J., concurring).}

\footnotesize{\(^{122}\) Richards, 139 Ariz. at \_, 678 P.2d at 430.}

\footnotesize{\(^{123}\) Gupta, 646 S.W.2d at 170 (Spears, J., concurring).}
V. LIABILITY OF THOSE OTHER THAN THE BUILDER-VENDOR UNDER THE IMPLIED WARRANTY OF HABITABILITY: AGAINST WHOM CAN THE ACTION BE BROUGHT?

The question of who may be held liable under the Old Warson implied warranty of habitability recently arose in a Western District Missouri Court of Appeals decision which addressed whether a lending institution may be held liable for a breach of the warranty. In Allison v. Home Savings Association,123 the court held that the lender could not be held liable for damages under a theory of breach of implied warranty of habitability.124 The court reviewed the pertinent language from Old Warson which specified that only those who have the opportunity to observe and correct construction defects can be held liable for breach of the implied warranty of habitability.125 The plaintiff purchasers argued that the lending institution fell within this rule, but the court rejected their argument because there was no evidence that the lending institution had either the opportunity to observe or actual knowledge of construction defects.126 The evidence offered showed that the lending institution’s only involvement in the pre-construction phase was financing. The plaintiffs asserted that the lender should have known of the possibility of defective construction, but the court stated that this was not enough to hold the lender liable under the Old Warson implied warranty theory.127

123. 643 S.W.2d 847 (Mo. App., W.D. 1982).
124. Id. at 851.
125. Id. The Old Warson court stated that:
[T]he rationale for allowing recovery by a purchaser of a new house, on a theory of breach of an implied warranty of habitability or quality, is applicable only against that person who not only had an opportunity to observe but failed to correct a structural defect, which, in turn, became latent, i.e., the builder-vendor.

479 S.W. 2d at 801 (emphasis added).
126. 643 S.W.2d at 851. If there had been evidence that the lending institution did have an opportunity to observe and inspect each stage of construction of the houses, the result may have been different.
127. Id. The plaintiff purchasers also alleged that Home Savings, as the lender, owed a duty to them to detect and warn of defects in construction. They claimed this duty arose because Home Savings’ “extensive involvement” in the construction project either made Home Savings aware or should have made Home Savings aware of the possibility that the financially-troubled builder would cut corners in construction materials and methods. Id. However, the plaintiffs raised this argument for the first time on appeal, so the issue was not properly preserved for appellate review. Id. at 852. Even though the question was not properly preserved for review, the court discussed the matter and concluded that the record did not support the existence of such a duty as the plaintiffs sought to impose. Id. at 852-53.

The court discussed Connor v. Great W. Sav. & Loan Ass’n, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968), in which the lending institution was held to owe a duty, as a lender, to purchasers of new houses to exercise reasonable care to see that the houses were constructed free of defects. The Home Savings court distinguished Connor on the basis of the involvement of the lender in the construction process. 643 S.W.2d at 852. The activities of the lender in Connor had clearly exceeded those of a
Several other jurisdictions have addressed this question.\textsuperscript{128} The Arizona Supreme Court, in \textit{Smith v. Continental Bank},\textsuperscript{129} refused to hold the lender liable for construction defects under an implied warranty theory applying a rationale similar to that used by the \textit{Home Savings} court. The lender in \textit{Smith} was partially involved in the construction of the house because bank officials reviewed the original construction plans and specifications.\textsuperscript{130} The court, however, focused on the normal course of business of the seller/lender and concluded that since the lender did not engage in the business of building and selling homes or hold itself out as a homebuilder, it could not be held liable on an implied warranty theory.\textsuperscript{131}

Most courts are unwilling to extend liability to construction lenders under an implied warranty theory. A plausible argument, however, can be made that liability could be imposed in cases where the construction lender has greater knowledge of the construction of the house and the purchaser, lacking the knowledge or ability to discover defects, justifiably relies on the lender's expertise. As the court stated in \textit{Allison v. Home Savings Association}, at the least, liability should not be imposed on the construction lender unless there is evidence that the lender had the opportunity to observe or had actual knowledge of construction defects.\textsuperscript{132} Without this requirement, a mere seller of real estate could also be held liable for defects causing economic loss under the implied warranty theory.\textsuperscript{133}

Another issue recently confronted by a Missouri appellate court was whether the implied warranty doctrine for newly-constructed homes should be extended to include large commercial buildings. The court in \textit{Chubb Group of Insurance Cos. v. C.F. Murphy & Associates}\textsuperscript{134} held that the doctrine should

normal lender. \textit{See} \textit{Connor}, 69 Cal. 2d at 864, 447 P.2d at 616, 73 Cal Rptr. at 376.

The \textit{Home Savings} court stated that the activities of the lender in \textit{Home Savings} did not exceed those of a normal lender. The lender financed the construction of the subdivision, acquired title to the two properties after their construction, and later sold them. 643 S.W.2d at 852.

Moreover, the court stated that many states had passed statutes in response to the \textit{Connor} decision. \textit{Id.} Missouri has such a statute. \textit{See} Mo. Rev. Stat. § 369.264 (1978). This statute limits the liability of a construction lender for the sale of defective new houses to cases where the lender knowingly misrepresents the character of the real property. 643 S.W.2d at 852.


\textsuperscript{129} 130 Ariz. 320, 636 P.2d 98 (1981).

\textsuperscript{130} \textit{Id.} at 321, 636 P.2d at 99.

\textsuperscript{131} \textit{Id.} at 322, 636 P.2d at 100.

\textsuperscript{132} 643 S.W.2d at 851; \textit{see Comment, Implied Warranties in New Homes and Their Extention to Subsequent Purchasers in Arizona}, 1983 ARIZ. ST. L.J. 113, 119.

\textsuperscript{133} \textit{See generally} \textit{Ferguson, Lender's Liability for Construction Defects}, 11 \textit{REAL EST. L.J.} 310 (1983).

\textsuperscript{134} 656 S.W.2d 766, 783 (Mo. App., W.D. 1983).
not be so extended.\textsuperscript{135} In \textit{Chubb Group}, the tenants of the city arena brought suit against the defendants on several theories for damages caused by a roof collapse.\textsuperscript{136} The plaintiff tenants claimed that the defendants had breached an implied warranty that the arena was designed and constructed in a skillful and workmanlike manner and that it was free of defects in design, workmanship, and material.\textsuperscript{137}

First, the court noted that the extension of the implied warranty for newly-constructed houses to large commercial buildings was an extension few courts had adopted.\textsuperscript{138} There are several reasons why the doctrine should not be extended to commercial buildings. First, a primary reason for implying a warranty of habitability or quality in the sale of newly-constructed residences is the disparity of bargaining power between the builder-vendor and the purchaser.\textsuperscript{139} Arguably, this disparity is not present when the transaction involves commercial property. Second, sellers of commercial buildings assert that the implied warranty is inapplicable to the sale of commercial buildings because the purchaser there is concerned with the income-producing potential of the building and not with its habitability.\textsuperscript{140} The \textit{Chubb Group} court did note that one court had extended the warranty to part-residential, part-commercial buildings, but did not find its reasoning persuasive.\textsuperscript{141}

In \textit{Chubb Group}, the court stated that even if it did adopt the minority view that commercial owners are entitled to the implied warranty protections,

\begin{itemize}
  \item \textsuperscript{135} \textit{See} Shedd, \textit{The Implied Warranty of Habitability: New Implications, New Applications}, 8 \textit{Real Est. L.J.} 291, 296 (1980).
  \item \textsuperscript{136} 656 S.W.2d at 769.
  \item \textsuperscript{137} \textit{Id.} at 781. Arguably, \textit{Old Warson} was inapplicable to the plaintiff's claim. The \textit{Old Warson} implied warranty does not include an implied warranty of good workmanship, which is what it appears the plaintiffs in \textit{Chubb Group} were claiming had been breached.
  \item \textsuperscript{138} \textit{Id.} at 782. The extension of the implied warranty to builders of commercial buildings has been adopted in only three states. \textit{See} Markman v. Hoefer, 252 Iowa 118, 123, 106 N.W.2d 59, 62 (1960) (defectively built onion storage and curing building); Robertson Lumber Co. v. Stephen Farmers Coop. Elevator Co., 274 Minn. 17, 24, 143 N.W.2d 622, 625-26 (1966) (structure that builder had implicitly guaranteed would be fit for its intended purpose collapsed when 100,000 bushels of wheat were stored there); Air Heaters, Inc. v. Johnson Elec., Inc., 238 N.W.2d 649, 654 (N.D. 1977) (defective installation of electrical system in plant facility). In each of these cases, the defendant was held liable under an implied warranty that the structure would be fit for its intended purpose.
  \item \textsuperscript{139} Hodgson v. Chin, 168 N.J. Super. 549, 553, 403 A.2d 942, 944 (1979).
  \item \textsuperscript{140} \textit{Id.} at 553, 403 A.2d at 944.
  \item \textsuperscript{141} \textit{Hodgson} extended the implied warranty of fitness on the particular facts of the case. The building consisted of two small stores on the first floor and two apartments on the second floor, the seller was a relatively small builder-vendor, and the purchasers were small business persons who reasonably relied on the building being reasonably fit for the intended use. \textit{Id.} at 555, 403 A.2d at 945. The \textit{Chubb Group} court noted that the \textit{Hodgson} court impliedly disapproved of the extension of the warranty to large commercial buildings constructed pursuant to contract. 656 S.W.2d at 782.
\end{itemize}
lack of privity of contract precluded recovery in the case.\textsuperscript{142} Under the minority position, a cause of action for breach of the implied warranty exists only between plaintiffs who have contracted for building services and the builders with whom they contract, and then only when the owner places particular reliance on the builder's competence.\textsuperscript{143} The plaintiffs in \textit{Chubb Group} were the tenants of the commercial owners, not the owners themselves. The court stated that extending implied warranty protections to the tenants would certainly violate Missouri's privity of contract requirement for implied warranty.\textsuperscript{144}

The court analogized the commercial building situation to cases involving residential subsequent purchasers.\textsuperscript{145} The court noted that both commercial tenants and second purchasers are arguably within the class of persons in need of protection from structural defects, but, nevertheless, second purchasers have been specifically denied the implied warranty protections in Missouri due to lack of privity.\textsuperscript{146} Although the holding in \textit{Chubb Group} was limited to the tenants of commercial owners, the court indicated that the extension of the implied warranty for newly-constructed homes to commercial buildings was not appropriate even where the plaintiff is the commercial owner.\textsuperscript{147}

VI. \textbf{Disclaimer and Exclusion of the Implied Warranty}

Since the purchaser of a new home in Missouri cannot bring a negligence action against the builder-vendor for latent structural defects, the purchaser must rely on the \textit{Old Warson} implied warranty theory.\textsuperscript{148} Missouri courts have established that the builder-vendor may disclaim or limit the warranty, but in doing so they place a heavy burden on the homebuilder to show the effectiveness of the disclaimer.

In \textit{Old Warson}, the builder-vendor claimed that the sale contract contained a provision that expressly disclaimed all warranties. The provision provided that the "property is to be accepted in its present condition unless otherwise stated in contract."\textsuperscript{149} The Missouri Supreme Court held that this was not an effective disclaimer of the warranty.\textsuperscript{150} The court determined that a reasonable interpretation of the "present condition" provision is that it precludes the purchaser from demanding that the builder-vendor do any additional work on the house, such as painting it a different color or adding a

\begin{itemize}
  \item \textsuperscript{142} \textit{Chubb Group}, 656 S.W.2d at 783.
  \item \textsuperscript{143} \textit{Id.} at 782.
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{See supra} text accompanying notes 104-22.
  \item \textsuperscript{146} 656 S.W.2d at 782; \textit{see} Crowder v. Vandendeale, 564 S.W.2d 879, 883 (Mo. 1978) (en banc); John H. Armbuster & Co. v. Hayden Co.-Builder-Developer, Inc., 622 S.W.2d 704, 705 (Mo. App., E.D. 1981).
  \item \textsuperscript{147} 656 S.W.2d at 782.
  \item \textsuperscript{148} \textit{See infra} notes 167-73 and accompanying text.
  \item \textsuperscript{149} \textit{Old Warson}, 479 S.W.2d at 800.
  \item \textsuperscript{150} \textit{Id.}
\end{itemize}
The elements of an effective disclaimer were further detailed by the court in Crowder v. Vandendeale. Because the implied warranty is contractual in nature, the right of the parties to allocate the economic risk by disclaiming warranties involved in the transaction is preserved. The court concluded that the builder-vendor not only must show that the disclaimer was conspicuous and that it fully disclosed the consequences of the disclaimer, but also that the parties in fact agreed to the provision. The court then determined that a boilerplate clause was ineffective under this approach and emphasized that a "knowing waiver of this protection will not be readily implied." The Missouri courts have yet to confront this issue squarely since Crowder, but it is clear that it will not be an easy task for the builder-vendor to avoid liability by disclaiming the warranty.

Recently, the Texas Supreme Court in G-W-L, Inc. v. Robichaux considered the sufficiency of warranty disclaimers and issued a stern warning to new home purchasers. In essence, the contract language provided that no warranties, express or implied, existed in addition to those in the written instruments. The test the court used to determine the effectiveness of the disclaimer was whether it was "clear and free from doubt." The Texas Supreme Court held that the disclaimer met this standard noting that parties

151. Id.
152. Crowder, 564 S.W.2d at 881.
153. Id. at 881 n.4.
154. Id. It has been suggested that no other court has gone as far as the Missouri Supreme Court did in Crowder in setting forth such stringent standards for a valid disclaimer. See Note, Implied Warranties in New Home Sales—Is the Seller Defendantless?, 35 S.C.L. Rev. 469, 479 (1984).
155. In Lieber v. Bridges, 650 S.W.2d 688 (Mo. App., S.D. 1983), the court concluded that there was no evidentiary support for the defendant's contention that it disclaimed any implied warranties. The court cited Crowder and stated that the defendant had failed to prove that there was a knowing waiver of any implied warranties. The plaintiffs, though, did elicit testimony from the defendant in which he denied ever telling plaintiffs that he was limiting his responsibility for the construction. Id. at 691.
156. 643 S.W.2d 392 (Tex. 1982).
157. The contract language provided:
This note, the aforesaid Mechanic's and Materialmen's Lien Contract and the plans and specification signed for identification by the parties hereto constitute the entire agreement between the parties hereto with reference to the erection of said improvements, there being no oral agreements, representations, conditions, warranties, express or implied, in addition to said written instruments.
643 S.W.2d at 393 (emphasis added).
to a contract have an obligation to protect themselves by reading what they sign.\textsuperscript{159} Thus, in Texas a homebuilder may disclaim the implied warranty without specifically referring to the warranty.\textsuperscript{160} One commentator has suggested that this signals a return to \textit{caveat emptor} in residential real estate transactions in Texas.\textsuperscript{161}

\section*{VII. \textsc{Other Theories of Recovery: Negligent Construction and Strict Liability}}

In addition to the implied warranty of habitability or quality, subsequent purchasers have brought suits against builder-vendors on negligence and strict liability theories.\textsuperscript{162} Generally, courts that have considered the issue have allowed a subsequent purchaser to bring a negligence action against the builder-vendor for personal injury or property damage resulting from latent defects.\textsuperscript{163} However, not all courts allow a subsequent purchaser a negligence claim against the builder-vendor. Missouri does not even allow the first purchaser a claim in negligence against the builder-vendor for latent structural defects in the house.\textsuperscript{164}

In \textsc{Crowder v. Vandendeale},\textsuperscript{165} the Missouri Supreme Court set forth reasons why an action in negligence should not be allowed a purchaser when purely economic loss results. The court emphasized that a duty to use ordinary care and skill is imposed on the builder-vendor when it is determined that an interest entitled to protection will be damaged if such care is not exercised.\textsuperscript{166} The court noted that such interests include safety or freedom from physical harm (either to the person or property) but do not include mere deterioration or loss of bargain. Loss of bargain refers to a failure to meet some standard of quality that is determined by the contract between the parties. The court

\begin{footnotesize}
\begin{enumerate}
\item[159.] 643 S.W.2d at 393.
\item[160.] The dissent in \textsc{Robichaux} believed that the better rule was that the waiver must be in \textit{clear and unequivocal} language specifically naming the warranty that is being disclaimed. The dissent stated that this was necessary to effectuate the public policies underlying the implied warranty. 643 S.W.2d at 394-95 (Spears, J., dissenting). The dissent cited \textsc{Crowder v. Vandendeale} as requiring clear and express language for the waiver to be effective. \textit{Id.} at 395; see also Peterson v. Hubschman Constr. Co., 76 Ill. 2d 31, 43, 389 N.E.2d 1154, 1159 (1979) (a knowing disclaimer will not violate public policy but any such disclaimer must be strictly construed against the builder-vendor); Casavant v. Campopiano, 114 R.I. 24, 28, 327 A.2d 831, 834 (1974) (language used must refer specifically to its effect on the implied warranty).
\item[163.] \textit{Id.} at 388.
\item[164.] \textsc{Crowder v. Vandendeale}, 564 S.W.2d 879 (Mo. 1978) (en banc).
\item[165.] \textit{Id.} at 881-82. Missouri does allow a cause of action if physical injury or property damage results. \textit{Id.} at 881.
\item[166.] 564 S.W.2d at 882.
\end{enumerate}
\end{footnotesize}
believed that a negligence claim should not be allowed for this type of loss because the builder-vendor would be unable to allocate the economic risk with the purchaser. The court also noted that allowing recovery for economic loss could result in a situation where the builder-vendor is held liable in negligence to a subsequent purchaser, even if such liability was disclaimed as to the first purchaser.

The Crowder position was followed recently in Clark v. Landelco. The court in Clark stated that in Missouri there is no cause of action in tort for deterioration or loss of bargain damages resulting from a builder's alleged negligence in the construction of a residence. An action in negligence can be maintained only when the negligent acts of the builder result in personal injury.

Cases from other jurisdictions indicate a residential builder-vendor may be held liable on the basis of negligence to a subsequent purchaser. In Cosmopolitan Homes, Inc. v. Weller, the Colorado Supreme Court allowed subsequent purchasers to assert a claim for property damage to the residence allegedly caused by the homebuilder's negligence, but limited the claim to latent defects not discoverable prior to purchase. The court noted that the policy reasons for extending a negligence cause of action to subsequent purchasers are based on many of the same reasons for implying a warranty of habitability to the first purchaser. Both claims are intended to protect innocent purchasers from experienced, knowledgeable builder-vendors.

167. Id.
168. Id. at 883.
169. 657 S.W.2d 634 (Mo. App., W.D. 1983).
170. Id. at 635.
171. Id. at 636.
172. 663 P.2d 1041 (Colo. 1983).
173. Id., at 1042. The court distinguished Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 441 N.E.2d 324 (1982) and Crowder v. Vandendeale, 564 S.W.2d 879 (Mo. 1978) (en banc), where the courts refused to extend the negligence cause of action to subsequent purchasers. The Weller court stated that in Missouri and Illinois, recovery in tort for economic loss is not allowed but in Colorado such recovery is allowed. 663 P.2d at 1044.
174. Although the Colorado Supreme Court allowed a subsequent purchaser a negligence cause of action against the builder-vendor, it refused to extend the implied warranty to subsequent purchasers. The court distinguished the two on the scope of duty involved and the basis for liability. The implied warranty arises from the contractual relationship between the purchaser and the builder-vendor, and proof of a defect is sufficient to establish liability. However, proof of a defect alone is insufficient to establish a negligence claim. Negligence requires that a builder be held to a standard of reasonable care in the conduct of its duties to the foreseeable users of the property. Also, the purchaser must establish that the defect was caused by the defendant builder. 663 P.2d at 1045.
175. Id.; see Duncan v. Schuster-Graham Homes, Inc., 194 Colo. 441, 444, 578 P.2d 637, 638-39 (1978); Simmons v. Owens, 363 So. 2d 142, 143 (Fla. Dist. Ct. App. 1978). Another reason the court gave for extending a negligence claim to a subsequent purchaser is that given the mobility of homeowners today, it is foreseeable to the
Other courts have held the builder-vendor liable to a subsequent purchaser for latent structural defects on a strict liability theory. In *Blagg v. Fred Hunt Co.*, the Arkansas Supreme Court held that a subsequent purchaser can hold a builder-vendor strictly liable for property damage to the house. The court, construing the Arkansas strict liability statute, held that the word "product" is as applicable to a house as to an automobile. The Arkansas court adopted the views of Justice Francis in *Santor v. A & M Karagheusian, Inc.*, where the doctrine of strict liability was extended to cover purely economic loss resulting from a defective product. The Arkansas court then referred to *Schipper v. Levitt and Sons, Inc.*, where the same court that decided *Santor* stated that strict liability principles should be carried over into the realty field.

VIII. CONCLUSION

Although Missouri recognized that a builder-vendor of new housing may be liable to the purchaser for latent structural defects under the implied warranty doctrine in 1972, Missouri courts have been reluctant to expand the scope of the warranty. A subsequent purchaser in Missouri still has no cause of action against the builder-vendor for damages arising from latent structural defects, even though the economic loss to the subsequent purchaser can be just as great as the loss to the first purchaser. Until Missouri abolishes the privity of contract requirement in implied warranties, the protections given by the *Old Warson* implied warranty will remain limited to those who purchase newly-constructed homes from builder-vendors. Perhaps the injustice of requiring privity of contract in this situation will be reexamined by Missouri

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builder-vendor that the home will be resold and any structural defects will be just as harmful to the subsequent purchaser as to the first. 663 P.2d at 1045.


177. 272 Ark. 185, —, 612 S.W.2d 321, 324 (1981). In *Blagg*, the subsequent purchasers became the owners approximately nine months after the date of the original sale. After they purchased the home, a strong odor and fumes from formaldehyde became apparent, which they traced to the carpet and pad installed by the builder. The purchasers brought this action under implied warranty and strict liability.


179. *Blagg*, 612 S.W.2d at 324.

180. 44 N.J. 52, 207 A.2d 305 (1965) (plaintiff purchaser allowed a strict liability cause of action against the manufacturer of defective carpeting even though plaintiff’s damage was limited to loss of value of the carpeting).

181. 44 N.J. 70, 207 A.2d 314 (1965) (builder-vendor held strictly liable to child of purchaser’s lessee for injuries sustained due to a defective hot water distribution system design).

courts in the near future, as the number of jurisdictions abandoning the privity requirement increases. In addition, since Missouri courts view the implied warranty as contractual in nature, a builder-vendor can effectively disclaim the warranty although a court will carefully scrutinize any such claim of waiver.

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