Notes

STRICT LIABILITY AGAINST HOMEBUILDERS FOR MATERIAL LATENT DEFECTS: IT'S TIME, ARIZONA

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I. INTRODUCTION

The purchase of a home, new or used, is very likely the most important and costly acquisition an average consumer will ever make.[1] Yet throughout the first half of this century, "the rule of law concerning the sale of all new and used dwellings in the United States was caveat emptor."[2] Thus, home buyers were left without any legal recourse against careless, or worse yet, unscrupulous builders.[3]

Since World War II, there has been a continuous "assembly line, large scale production of residential homes."[4] The traditional property law regimes were ill-equipped to deal with the problems created during this rapid expansion.[5] Inexperienced and unsophisticated home buyers struggled against builders for the recovery of damages under the existing legal doctrines of the day, including caveat emptor, merger, and lack of privity of contract.[6] The holdings in the majority of these cases effectively disregarded equality of bargaining, risk allocation, and any implied covenant of good faith and fair dealing owed by the developers to the consuming public.[7]

The courts and legislators have since changed these outmoded views of homebuilder liability by modifying, amending, and even overruling previous law, so as to meet the needs of our time.[8] "To apply the rule of caveat emptor

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1. Robert L. Cherry, Jr., *Builder Liability for Used Home Defects*, 18 REAL EST. L.J. 115 (1989), *available in* Westlaw, JLR Database. *See also* Blagg v. Fred Hunt Co., 612 S.W.2d 321, 322 (Ark. 1981); Salka v. Dean Homes, 22 Cal. Rptr.2d 902, 910 (1993); McDonald v. Mianecki, 398 A.2d 1283, 1289 (N.J. 1979); Humber v. Morton, 426 S.W.2d 554, 561 (Tex. 1968); Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975).

2. Cherry, *supra* note 1, at *1. *See also* Jeff Sovern, *Toward A Theory Of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 15–16 (1993).

3. Cherry, *supra* note 1, at *1. *See also* Sovern, *supra* note 2, at 15–16.

4. Roger V. Peel, Comment, *The Expanding Scope of Liability in the Home Construction Enterprise*, 5 LAND & WATER L. REV. 637, 637 (1970).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

to an inexperienced buyer, and in favor of a builder who is daily engaged in the business of building and selling houses is manifestly a denial of justice."[9] Thus, the doctrine of caveat emptor has deteriorated to the point where the legal system is decisively against its application in the sales of residential homes.[10]

Arizona should be particularly concerned with the rights of its home buyers. The state's population increased by approximately fifty-three percent from 1970 to 1980, and by another thirty-five percent from 1980 to 1990, bringing the total 1990 Arizona population to 3.7 million.[11] Between 1985 and 1991, the number of new building permits for privately owned housing units in Phoenix and Tucson alone averaged 31,891 per year.[12] Moreover, from 1990 to 1992, Phoenix and Tucson combined for an average of 29,556 multiple listing home sales per year, totaling a yearly average of $2.99 billion in residential real estate transactions.[13] The magnitude of these figures highlights the overwhelming need for the state of Arizona to ensure consumers adequate legal protection from the unscrupulous and substandard builders in this multi-billion dollar industry.

A variety of causes of action have emerged in Arizona and other states to replace the now defunct caveat emptor rule regarding homeowners' claims against developers for latent material defects.[14] This Note addresses each of the causes of action available to a home buyer who chooses to litigate against his builder, and indicates which claims are viable in Arizona. More specifically, this Note discusses the elements and the predominant shortcomings of each cause of action. Finally, this Note argues for the use of strict liability against builders of mass produced homes for damage to the home itself, a legal standard the Arizona courts have so far refused to apply.[15] In arguing its premise, this Note will reveal that there are serious deficiencies in the legal remedies currently available that would be corrected with the implementation and application of a strict liability regime.

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9. Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966). *See also* Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968) (wherein the court stated, "[caveat emptor] does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work").

10. Peel, *supra* note 4, at 641–42.

11. UNIVERSITY OF ARIZONA, ARIZONA STATISTICAL ABSTRACT, 1993 DATA HANDBOOK 23 (1993).

12. *Id.* at 366.

13. *Id.* at 581.

14. For definitional purposes, "material" is described as "[i]mportant; more or less necessary." BLACK'S LAW DICTIONARY 976 (6th ed. 1990). A "latent defect" is "[a] hidden or concealed defect. One which could not be discovered by reasonable and customary observation or inspection; one not apparent on face of goods, product, document, etc." *Id.* at 883. Thus, a "material latent defect" is a hidden fault that is important to the overall structure or design of the home.

15. Nastri v. Wood Bros. Homes, Inc., 142 Ariz. 439, 445, 690 P.2d 158, 164 (Ct. App. 1984).

II. POSSIBLE CAUSES OF ACTION AGAINST A DEVELOPER FOR DEFECTS FOUND IN THE HOME AFTER PURCHASE

A. Negligence

Though a viable claim in many other states, Arizona does not recognize a cause of action for negligence that merely results in defects to a residential structure.[16] The Arizona Court of Appeals, in *Nastri v. Wood Brothers Homes, Inc.*,[17] held that a home purchaser can sue in both contract and tort for injuries sustained by a builder's failure to construct the house in a workmanlike manner, but the available tort claim is limited to "damage to personal property."[18] Additionally, the court stated that for a recovery in negligence, there must be a showing of harm beyond mere disappointed expectations and the loss of a benefit.[19]

Furthermore, even if an Arizona plaintiff could sue his developer for negligence for a material defect in the home, the plaintiff would have to shoulder a heavy burden of proof to prevail. The homeowner would either have to prove that the defendant developer negligently created the unsafe condition or that he was aware of it when he first sold the home.[20] Gathering the requisite evidence required to prevail in court could be difficult, especially for subsequent purchasers who have had no direct dealings with the developer.[21] In addition, with a negligence claim, society bears the unnecessary cost of imposing on the buyer an obligation to conduct extensive tests to learn what the seller already knows.[22]

B. Mutual Mistake

Arizona recognizes that a mutual mistake of a material fact which constitutes an essential part and condition of a contract for the sale of real estate is an acceptable basis for rescission of the contract.[23] The fact that either party may have avoided the mistake by exercising reasonable care does not preclude this action.[24] Thus, the doctrine of mutual mistake may be used to void a

16. *Id.* at 444–45, 690 P.2d at 163–64.
17. 142 Ariz. 439, 690 P.2d 158 (Ct. App. 1984).
18. *Id.* at 445, 690 P.2d at 164.
19. *Id.*
20. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120 (Miss. 1966).
21. These subsequent purchasers are unlikely to be able to successfully trace the developer's negligent actions that created the material latent defects in their home, as they are typically not present during each and every phase of construction. *See* William K. Jones, *Economic Losses Caused by Construction Deficiencies: The Competing Regimes of Contract and Tort*, 59 U. CIN. L. REV. 1051, 1055–56 (1991); Karen Doty, Comment, *The Case Against Strict Liability Protection for New Home Buyers in Ohio*, 14 AKRON L. REV. 103, 118 (1980).
22. Jones, *supra* note 21, at 1056; *see infra* note 179 and accompanying text.
23. Renner v. Kehl, 150 Ariz. 94, 97, 722 P.2d 262, 265 (1986) (plaintiff buyers and defendant real estate sellers, based on the data available, were equally mistaken as to the quantity of water available to sustain a commercial jojoba production enterprise on the property).
24. Marana Unified Sch. v. Aetna Casualty & Sur., 144 Ariz. 159, 165, 696 P.2d 711, 717 (Ct. App. 1985), *discussing* RESTATEMENT (SECOND) OF CONTRACTS § 157 (1979) (action by school district against contractor who refused to perform construction contract awarded him because of $400,000 mistake in computing bid; the court rejected the reasonable care standard, finding instead that the issues of good faith and fair dealing were more germane).

contract for the sale of a home in which the buyer has discovered material latent defects after purchase.[25]

If a home buyer wishes to rescind his sales contract,[26] he must first return the property to the developer-seller.[27] In addition, the purchaser must reimburse the developer for the fair rental value of the home for the duration of his occupancy.[28] However, to avoid unjust enrichment, the builder is required to pay the home buyer the reasonable value of any improvements that have enhanced the property's worth.[29] Yet, the plaintiff purchaser's recovery is limited to only the reasonable value of the improvements; he is not entitled to the amount that was actually expended upon their procurement.[30] Further, absent additional proof of misrepresentation or fraud, the plaintiff home buyer who rescinds his sales contract based on mutual mistake can not recover any consequential damages.[31]

The applicable statute of limitations in Arizona for a claim based on mistake is three years.[32] The cause of action accrues when either party to the contract discovers the facts constituting the mistake.[33]

An action requesting rescission based upon mutual mistake may be an option for a home buyer who has purchased directly from the developer. Yet rescission may be unavailable even to the initial homeowner if the subject matter of the latent defect or the general quality of the home construction is not an express condition of the purchase sales contract.[34] In addition, subsequent purchasers cannot claim mutual mistake and seek rescission against the developer, as they enjoy no sales contract privity with him.[35] Furthermore, there is an implied freedom from fault on the part of both parties in an action

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25. The premise of such a claim would be that both the builder and the home purchaser were mutually mistaken as to a material condition or the general contracted quality of construction of the home.

26. "The right to rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party.... It necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it." BLACK'S LAW DICTIONARY 1306 (6th ed. 1990).

27. *Renner*, 150 Ariz. at 98, 722 P.2d at 266.

28. *Id.*

29. *Id.* at 99, 722 P.2d at 267.

30. *Id.*

31. *Id.* at 98, 722 P.2d at 267.

32. ARIZ. REV. STAT. ANN. § 12–543 (1992).

33. *Id.* However, in the scenario of rescission of a home sale based on mutual mistake, in all probability it will be the buyer who actually "discovers" and raises the issue of the condition(s) that ultimately are determined between the parties (buyer and builder) to constitute a mutual mistake.

34. "In Arizona a contract may be rescinded when there is a mutual mistake of material fact which constitutes '*an essential part and condition of the contract.*'" (emphasis added). *Renner*, 150 Ariz. at 97, 722 P.2d at 265, *quoting* Mortensen v. Berzell Inv. Co., 102 Ariz. 348, 350, 429 P.2d 945, 947 (1967).

35. *See* 17A AM. JUR. 2D *Contracts* § 425 (1964).

> Ordinarily, the obligations arising out of a contract are due only to those with whom it is made; a contract cannot be enforced by a person who is not a party to it or in privity with it, except under a real party in interest statute or, under certain circumstances, by a third-party beneficiary.

Id.

for mutual mistake.[36] Thus, a mutual mistake claim fails to hold the developer accountable for the material latent defects in the home.

C. Unilateral Mistake

Arizona also recognizes that a unilateral mistake of a material fact of a contract is an actionable basis for rescission.[37] As with the mutual mistake doctrine, the fact that the mistaken party could have avoided the mistake by exercising reasonable care does not preclude this action.[38] Therefore, the claim of unilateral mistake is also available to void a sales contract for a home in which the buyer has discovered material latent defects after purchase.[39]

Under a unilateral mistake claim, the sales contract is voidable by the home buyer plaintiff if the mistake renders enforcement of the contract unconscionable.[40] The other required conditions precedent to the availability of rescission for a unilateral mistake include: 1) the mistake must relate to a material feature; 2) the plaintiff's mistake cannot be due to a violation of his positive legal duty or from his own culpable negligence; and 3) the defendant builder must be returned to the status quo, to the extent he suffers no serious prejudice except the loss of his bargain.[41]

In Arizona, the applicable statute of limitations for a legal claim based on a unilateral mistake is three years.[42] The cause of action accrues when the aggrieved party to the contract discovers the facts constituting his mistake.[43]

Similar to a claim of mutual mistake, seeking rescission in an action based upon unilateral mistake may be a valid legal alternative for a home buyer who has purchased directly from the developer. Subsequent purchasers, however, who are not privy to a sales contract with the developer, are unable to use a unilateral mistake claim to seek relief.[44] Moreover, as with mutual mistake, a successful unilateral mistake claim will still fail to compensate the plaintiff purchaser for his consequential damages, unless he can also prove fraud or the developer's misrepresentation.[45]

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36. *Renner*, 150 Ariz. at 98, 722 P.2d at 267 (The court found that both parties were equally mistaken as to the availability of an adequate water supply to support a jojoba production enterprise; thus, neither party was "more" culpable than the other.).

37. Marana Unified Sch. v. Aetna Casualty & Sur., 144 Ariz. 159, 163, 696 P.2d 711, 713 (Ct. App. 1985) (contractor's employee made a $400,000 error when computing a bid to build a new school).

38. *Id.* at 165, 696 P.2d at 715.

39. The presupposition of this claim would be that the home purchaser was mistaken as to a material condition, or the general quality of construction embodied in the home sales agreement.

40. *In re* Rigden, 795 F.2d 727, 732 (9th Cir. 1986) (The purchaser wished to rescind the sales contract where he thought he was obtaining the property in fee simple, but seller only had redemption rights to give. The court found that in determining the unconscionability of holding a mistaken party to a contract it must look to the parties' conduct when entering into the contract.). *See also Marana Unified Sch.*, 144 Ariz. at 163, 696 P.2d at 713.

41. *Marana Unified Sch.* 144 Ariz. at 163, 696 P.2d at 713.

42. ARIZ. REV. STAT. ANN. § 12–543.

43. *Id.*

44. *See supra* note 35.

45. Renner v. Kehl, 150 Ariz. 94, 98, 722 P.2d 262, 266 (1986) ("[A]bsent proof of breach for fraud or misrepresentation a party who rescinds a contract may not recover consequential damages.").

D. Breach of Express Warranty

An express warranty is a promise, ancillary to the underlying sales agreement, under which the promisor assures the performance, quality and/or description of the goods upon which the sales agreement is formulated.[46]

An express warranty is a component of the sales contract.[47] As such, if a homebuilder fails to honor his express warranty, his buyer may sue him for breach of contract. If the express warranty has no specified time limit of applicability, Arizona Revised Statutes section 12–552 will govern, in which case the statute of limitations for breach of warranty expires eight years after substantial completion of the home.[48] In addition, if a latent defect[49] is discovered in the eighth year after the home is built, the statute of limitations is extended to nine years.[50]

As a general rule, upon the breach of a contract, the injured plaintiff may elect either to rescind the contract and recover the value of any performance rendered by him, or he may stand by the contract and ask for damages for the breach.[51] Although specific performance is usually an available contractual remedy, contracts for building, construction, or repair are typically not specifically enforced.[52] Specific performance generally requires subsequent court action for enforcement and thus may be too costly to employ.[53] Additionally, in many instances a breach occurs because one party to the contract could not perform; as such, a court order requiring him to do so is likely to be a futile gesture.[54] For these reasons, "Anglo-American jurisprudence has long held that specific performance is available only as an extraordinary remedy when the award of a sum of money as damages would be 'inadequate'."[55]

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46. BLACK'S LAW DICTIONARY 1587 (6th ed. 1990). The Arizona Revised Statutes describe an express warranty, in part, as:

> 1. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
> 2. Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

ARIZ. REV. STAT. ANN. § 47–2313(A)(1)–(2) (1992).

47. Kensair Corp. v. Peltier, 472 P.2d 700, 700 (Colo. Ct. App. 1970) ("a 'warranty' is a part of the contract of sale"); Barni v. Kutner, 76 A.2d 801, 804 (Del. Super. Ct. 1950) ("warranty is an integral part of a contract"); Vasco Trucking, Inc. v. Parkhill Truck Co., 286 N.E.2d 383, 386 (Ill. App. Ct. 1972) ("Black's Law Dictionary, Revised Fourth Edition, 1968, tells us that a 'warranty' is 'A statement or representation made by the seller of goods, contemporaneously with and as a part of the contract of sale."); Lucas v. Canadian Valley Area Vocational Technical Sch., 824 P.2d 1140, 1141 (Okla. Ct. App. 1992) ("A warranty is an expressed or implied statement of something undertaken as a part of a contract of sale."); BLACK'S LAW DICTIONARY 1587 (6th ed. 1990) (express warranty is "[a] promise, ancillary to an underlying sales agreement, which is included in the written or oral terms of the sales agreement").

48. ARIZ. REV. STAT. ANN. § 12–552(A) (Supp. 1994).

49. *See supra* note 14.

50. ARIZ. REV. STAT. ANN. § 12–552(B) (Supp. 1994).

51. 17A AM. JUR. 2D *Contracts* § 725 (1991).

52. 81 C.J.S. *Specific Performance* § 88 (1977).

53. ARTHUR ROSETT, CONTRACT LAW AND ITS APPLICATION 291 (4th ed. 1988). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 366 (1981); 81 C.J.S. *Specific Performance* § 88 (1977).

54. ROSETT, *supra* note 53, at 291.

55. *Id.*

Rescission of a contract also has its drawbacks. Although it may be available to a plaintiff home purchaser against his developer, absent proof of fraud or misrepresentation, consequential damages will not be awarded in a grant of rescission.[56] Thus, if a home buyer opts for rescission of the contract, he will lose much of the money he has spent in actually making the purchase and moving into his new home.[57]

Therefore, in a breach of warranty claim, the homeowner's best option is usually to seek damages. Under a successful claim for damages, the homeowner will recover the cost of remedying the material latent defects.[58] The prevailing party in a breach of warranty action may also be awarded costs and expenses incurred in pursuing the civil action,[59] as well as reasonable attorney's fees.[60]

As previously noted, an express warranty is a component of the sales contract. And, "[e]very contract contains an implied covenant of good faith and fair dealing."[61] The essence of the covenant "is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship."[62] The Arizona Supreme Court in *Rawlings v. Apodaca*[63] held that tort recovery based on a breach of duty of good faith and fair dealing may be appropriate where the plaintiff, via the contract, is seeking more than a mere commercial advantage or profit from the defendant.[64] However, in *Oldenburger v. Del E. Webb Development Co.*,[65] the Arizona Court of Appeals held that there is no fiduciary duty between a home seller and a home buyer that would warrant a cause of action for a bad faith breach of contract.[66] Thus, while it may be an appealing legal doctrine, the tort claim of bad faith and unfair dealing is not available to Arizona homeowners who bring a breach of warranty action against their builders for material latent defects[67] in their home.

A breach of an express warranty claim may be a useful legal cause of action for a home buyer who has purchased directly from the builder, and who has discovered the defect within the contractual or statutory time period. This claim, however, has several serious limitations that render it inapplicable to many home buyers.

First, a breach of express warranty claim is only applicable if there is privity of contract between the homebuilder and the buyer, under which the

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56. Renner v. Kehl, 150 Ariz. 94, 98, 722 P.2d 262, 266 (1986).
57. Such lost purchase costs include bank loan processing fees, title search fees, escrow fees, etc.
58. Continental Townhouses East Unit One Ass'n v. Brockbank, 152 Ariz. 537, 542, 733 P.2d 1120, 1125 (Ct. App. 1986). *See also* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 14.29, at 633 (3d ed. 1987).
59. ARIZ. REV. STAT. ANN. § 12–341 (1992).
60. ARIZ. REV. STAT. ANN. § 12–341.01(A) (1992).
61. Oldenburger v. Del E. Webb Dev. Co., 159 Ariz. 129, 132, 765 P.2d 531, 534 (Ct. App. 1988). *See also* Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 383, 710 P.2d 1025, 1038 (1985).
62. *Oldenburger*, 159 Ariz. at 132, 765 P.2d at 534.
63. 151 Ariz. 149, 726 P.2d 565 (1986).
64. *Id.* at 159, 726 P.2d at 575.
65. *Oldenburger*, 159 Ariz. 129, 765 P.2d 531.
66. *Id.* at 133, 765 P.2d at 535.
67. *See supra* note 14.

builder expressly warranted his workmanship to the current home purchaser.[68] Therefore, this cause of action is limited to the original buyer of the home, who procured it directly from the developer. Subsequent buyers enjoy no privity of contract with the home developer upon which they can base an express breach of warranty claim.[69]

Moreover, the statute of limitations for a breach of express warranty cause of action may be far too short for a buyer to reasonably discover any material latent defects[70] in the home. Additionally, the express warranty may fail to specifically cover the latent defects that are discovered. Thus, the protection afforded by an express warranty is likely to be inadequate for the majority of home purchasers.

E. Common Law Fraud

1. Misrepresentation as Fraud

If a builder actively misrepresents that a house is free from any substantial defects when in fact he knows that this is not the case, then he has committed fraud.[71] In such a situation, the home buyer will have a legal claim against the builder.

Actionable fraud requires all nine elements of common law fraud.[72] The nine elements are: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity, or ignorance of the truth; 5) the speaker's intent that the representation should be acted upon by and in the manner reasonably contemplated; 6) the hearer's ignorance of the representation's falsity; 7) the hearer's reliance on the representation's "truth"; 8) the hearer's right to rely thereon; and 9) the hearer's consequent and proximate injury.[73]

2. Concealment as Fraud

Concealment is a theory of fraud separate from misrepresentation, which must be pled independently.[74] To be guilty of fraudulent concealment, the defendant must have a legal or equitable duty to reveal the information concealed.[75]

In a recent California case, *Barnhouse v. City of Pinole*,[76] landowners brought a claim for fraudulent concealment against their home developer.[77]

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68. *See* 17A AM. JUR. 2D *Contracts* § 410 (1991) (a warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely).

69. *See supra* note 35.

70. *See supra* note 14.

71. *See generally* Brazee v. Morris, 68 Ariz. 224, 227, 204 P.2d 475, 477 (1949) (when a party intentionally, or by design, misrepresents a material fact or produces a false impression, there is positive fraud).

72. *See* Nielson v. Flashberg, 101 Ariz. 335, 338–39, 419 P.2d 514, 517–18 (1966). *See also* Pace v. Sagebrush Sales Co., 114 Ariz. 271, 275, 560 P.2d 789, 793 (1977).

73. *See* Wagner v. Casteel, 136 Ariz. 29, 31, 663 P.2d 1020, 1022 (Ct. App. 1983). *See also* Hisel v. Upchurch, 797 F. Supp. 1509, 1523 (D. Ariz. 1992).

74. Schock v. Jacka, 105 Ariz. 131, 133, 460 P.2d 185, 187 (1969).

75. Dunlap v. City of Phoenix, 169 Ariz. 63, 69, 817 P.2d 8, 14 (Ct. App. 1990).

76. 183 Cal. Rptr. 881 (Ct. App. 1982).

77. *Id.* at 884 (plaintiffs were advised that their home was erected on fill, but the developer fraudulently concealed from them the existence of pre-existing slides and springs which ultimately caused severe damage to the home and residential yard).

The court held that fraudulent concealment may be found where the defendant builder obfuscates a material fact that he has a duty to disclose.[78] The matter is material if a reasonable man would attach importance to its existence or nonexistence in choosing his course of action.[79] The court further noted that a disclosure duty exists when one party has sole knowledge or access to material facts regarding the transaction, and knows that this information is not known or reasonably discoverable by the other.[80] The *Barnhouse* court concluded that an action for concealment in a real estate transaction does not require privity of contract.[81]

The elements of fraud based on concealment, where there is no confidential relationship between the parties, include: 1) nondisclosure by the defendant of facts materially affecting the value or desirability of the property; 2) defendant's knowledge of such facts, which are either unknown or beyond reasonable discovery by the plaintiff; 3) defendant's intention to induce plaintiff to action; 4) inducement of the plaintiff to act by reason of the nondisclosure; and 5) resulting damages.[82]

3. Arizona's Fraud Action, Whether by Misrepresentation or Concealment

Arizona has a three-year statute of limitations for an action based on fraud.[83] The cause of action does not accrue, however, until the discovery by the aggrieved party of the facts constituting the fraud.[84]

In a claim brought in Arizona for common-law fraud, regardless of whether the fraud is by misrepresentation or concealment, a plaintiff has the option of either rescinding the contract or suing for his damages.[85] The plaintiff buyer may also recover any of his consequential damages resulting from the seller's fraudulent conduct.[86] Moreover, attorney's fees can be

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78. *Id.* at 890.

79. *Id.* at 891 n.5, *referring to* RESTATEMENT (SECOND) OF TORTS § 538, at 80 (1977).

80. *Id.* at 890.

81. *Id.* at 893.

> The maker of a fraudulent misrepresentation is subject to liability...to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct.... It is not necessary that the maker of the representation have any particular person in mind. It is enough that he intends or has reason to expect to have it repeated to a particular class of persons and that the person relying upon it is one of that class.

Id. at 893, *quoting* RESTATEMENT (SECOND) OF TORTS § 533, at 72–73 (1977).

82. *Id.* at 892 n.7.

83. ARIZ. REV. STAT. ANN. § 12–543 (1992).

84. Holmberg v. Armbrecht, 327 U.S. 392, 396–97 (1946) (termination of limitations period did not preclude plaintiff's case where defendant fraudulently concealed his identity as a liable party). *See also* Rhoads v. Harvey Publications, Inc., 145 Ariz. 142, 147, 700 P.2d 840, 845 (Ct. App. 1984) (three-year limitations period applicable to fraud actions commenced to run when plaintiff knew, or through due diligence should have known, of defendant's fraud).

85. Parks v. Macro-Dynamics, Inc., 121 Ariz. 517, 591 P.2d 1005 (Ct. App. 1979), *appeal after remand,* 134 Ariz. 495, 657 P.2d 908 (Ct. App. 1982).

86. Bechtel v. Liberty Nat'l Bank, 534 F.2d 1335 (9th Cir. 1976) (plaintiff sought damages for material and false representations regarding the production capacity of irrigation wells on property defendant sold him).

recoverable.[87] In addition, punitive damages may be awarded if the conduct at issue is wanton, shows spite or ill will, or is recklessly indifferent to the rights of others.[88]

Although its recovery options are attractive, common law fraud is generally difficult to prove.[89] Fraud is more than mere "bad faith"; it requires that the defendant have acted dishonestly, intentionally and deliberately, with a contemplated motive to cheat or deceive the plaintiff.[90] Proof of fraud must be sufficient to overcome an initial presumption of honesty; each and every element of fraud must be proven by clear and convincing evidence.[91] Unfortunately, this can present a difficult burden for most homeowners to meet.[92] Moreover, a common law fraud claim is often unsatisfactory to plaintiffs, as "[i]t provides little aid when dealing with honest but incompetent builders."[93]

F. Violation of the Consumer Fraud Act

Article 7 of the Arizona Revised Statutes, the Arizona Consumer Fraud Act ("the Act"), is codified as sections 44–1521 to 44–1534. Arizona Revised Statutes section 44–1522 declares as unlawful any deception, fraud, misrepresentation, concealment, suppression, or omission of a material fact with the intent that another rely on such deception, in connection with the sale of any merchandise, whether or not the person has in fact been misled, deceived, or damaged.[94] The statute includes the term "real estate" in its definition.[95] The Act is a broad-based statute enacted with the intent to eliminate unlawful practices in merchant-consumer transactions.[96]

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87. Treat v. Nowell, 37 Ariz. 290, 294 P.2d 273 (1930).

88. Nieto–Santos v. Fletcher Farms, 743 F.2d 638 (9th Cir. 1984) (Mexican nationals brought suit against former employer for breach of employment contract and fraudulent misrepresentations). *See also* Rhue v. Dawson, 173 Ariz. 220, 841 P.2d 215 (Ct. App. 1992) (fraud and deliberate, overt, dishonest dealings will sustain punitive damages).

89. *See* House v. Thornton, 457 P.2d 199, 200 (Wash. 1969) (home purchasers brought suit against vendor-builder to rescind sale after basement, walls, floors and foundation slipped and cracked). The court held that fraud must be proved by "clear, convincing and cogent evidence." *Id.* at 202.

90. Eckert v. Miller, 57 Ariz. 94, 111 P.2d 60 (1941) (finding that the tenant defendant purposefully failed to pay the plaintiff landlord the rent due, knowing the landlord would default on his mortgage payments and lose the property without the rent money; the tenant wanted the property for himself).

91. Rhoads v. Harvey Publications, Inc., 145 Ariz. 142, 146, 700 P.2d 840, 844 (Ct. App. 1984) (evidence publisher defendant told cartoonist plaintiff that he was an employee rather than an independent contractor was insufficient to support verdict in favor of plaintiff on theory of fraud, absent evidence publisher knew that plaintiff believed an employee could not copyright his own work).

92. Sovern, *supra* note 2, at 18.

93. *Id. See also infra* notes 106 and 120 and accompanying text.

94. ARIZ. REV. STAT. ANN. § 44–1522(A) (1994).

95. ARIZ. REV. STAT. ANN. § 44–1521(5) (1994) ("'merchandise' means any objects, wares, goods, commodities, intangibles, real estate, or services").

96. Holeman v. Neils, 803 F. Supp. 237 (D. Ariz. 1992) (real estate investor plaintiff alleged consumer fraud in formation of partnership agreement, against co-owners of property). *See also* Flagstaff Medical Ctr., Inc. v. Sullivan, 773 F. Supp. 1325 (D. Ariz. 1991), *aff'd in part, rev'd in part on other grounds*, 962 F.2d 879 (9th Cir. 1992) (Plaintiffs contended that defendant committed consumer fraud by concealing its Hill–Burton obligation; Hill-Burton is a federal statute that provides for hospital care to low income families.); Madsen v. Western Am. Mortgage Co., 143 Ariz. 614, 694 P.2d 1228 (Ct. App. 1985) (mortgage company accused of consumer fraud in processing loans that charged higher points than what was stated in the

The required elements of a claim under the Act are different from those in common law fraud.[97] A violation of the Act is significantly easier for a plaintiff to prove in a court of law.[98] In order to prevail on a claim brought under the Act, the plaintiff must merely show by a preponderance of the evidence that: 1) a false promise or representation was made in connection with the sale; and 2) that he suffered consequent and proximate damages thereby.[99]

A private plaintiff's relief under the Act is his actual damages suffered.[100] The damages may include consideration paid in the contract, as well as out-of-pocket expenses.[101] Punitive damages may also be awarded where the wrongdoer's conduct is wanton, shows spite or ill will, or where the conduct demonstrates a reckless indifference to another's interests.[102] Attorney's fees, however, are not recoverable under the Act.[103]

The statute of limitations for an Arizona statutory consumer fraud claim is one year from when the cause of action accrues.[104] The Arizona courts have thus far declined to decide whether a cause of action for statutory fraud accrues at a different time than in a common law fraud claim.[105] Consequently, an Arizona homeowner's ability to bring a statutory fraud claim against the builder may be severely limited by this short, one year, statute of limitations period. Moreover, as with a common law fraud claim, a statutory fraud cause of action will prove useless "when dealing with honest but incompetent builders."[106]

G. Violation of the Arizona Racketeering Act

The Arizona Racketeer Influenced and Corrupt Organization (RICO) Act was enacted to provide broad protection and civil remedies against racketeering injuries.[107] Racketeering is defined in the Arizona Revised Statutes as any act,

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written commitment forms); State *ex rel.* Corbin v. Hovatter, 144 Ariz. 430, 698 P.2d 225 (Ct. App. 1985) (consumer fraud action brought against defendants accused of engaging in a scheme to defraud buyers and sellers of precious metals of their money and goods).

97. Compare *infra* note 99 and accompanying text (describing the elements of statutory fraud) with *supra* note 73 and accompanying text (elements of fraudulent misrepresentation) and *supra* notes 78–82 and accompanying text (elements of fraudulent concealment).

98. Peery v. Hansen, 120 Ariz. 266, 585 P.2d 574 (Ct. App. 1978).

99. *Holeman*, 803 F. Supp. at 242 (D. Ariz. 1992). *See also* Dunlap v. Jimmy GMC, Inc., 136 Ariz. 338, 666 P.2d 83 (Ct. App. 1983); Correa v. Pecos Valley Dev. Corp., 126 Ariz. 601, 617 P.2d 767 (Ct. App. 1980).

100. *Dunlap*, 136 Ariz. at 342, 666 P.2d at 87. *See also Peery*, 120 Ariz. at 270, 585 P.2d at 578.

101. Parks v. Macro-Dynamics, Inc., 121 Ariz. 517, 521, 591 P.2d 1005, 1009 (Ct. App. 1979).

102. Sellinger v. Freeway Mobile Home Sales, Inc., 110 Ariz. 573, 577, 521 P.2d 1119, 1123 (1974). *See also Dunlap*, 136 Ariz. at 343, 666 P.2d at 87–88.

103. *Sellinger*, 110 Ariz. at 577, 521 P.2d at 1123 (attorney's fees are not recoverable unless specifically provided for in the agreement, or authorized by statute).

104. ARIZ. REV. STAT. ANN. § 12–541 (1992).

105. Richards v. Powercraft Homes, Inc., 139 Ariz. 264, 265, 678 P.2d 449, 450 (Ct. App. 1983) ("[w]e need not decide whether a cause of action for statutory fraud accrues at a different time than common law fraud...").

106. Sovern, *supra* note 2, at 18. *See also supra* note 93 and *infra* note 120 and accompanying text.

107. State *ex rel.* Corbin v. Pickrell, 136 Ariz. 589, 596, 667 P.2d 1304, 1311 (1983) (in discussing the defendant's alleged illegal securities sales, the court noted that it felt that with the RICO statute, the Legislature intended to provide civil remedies for an enormous variety of conduct).

preparatory or completed, punishable by imprisonment for more than one year,[108] that is committed for financial gain and involves: 1) false claims; 2) intentional or reckless false statements or publications concerning land for sale or lease; 3) resale of realty with the intent to defraud; or 4) any scheme or artifice to defraud.[109]

To establish a violation under the Arizona RICO Act,[110] the plaintiff must show that he suffered damage or injury as a result of racketeering[111] and that the act that caused the injury was: 1) performed for financial gain; 2) one of the illegal acts enumerated in the statute; and 3) chargeable and punishable in accordance with the requirements of the statute.[112]

The initiation of civil proceedings related to a violation of any statutorily-defined racketeering offense must be commenced within seven years after the actual discovery of the violation.[113] The standard of proof required for the plaintiff to prevail on a RICO cause of action is a preponderance of the evidence.[114]

In a successful action brought under the RICO statute, the plaintiff may be awarded compensatory damages, treble damages, and attorney's fees.[115] In addition, if the predicate act rises to the level of a "serious" criminal offense,[116] RICO offers the plaintiff the possibility of recovering punitive damages.[117] Moreover, damages under a violation of the RICO statute may also be granted for attendant emotional distress.[118]

Although a wronged plaintiff may recover substantial damages against an exceptionally corrupt homebuilder under the Arizona RICO statute, it is not a panacea for the majority of homeowners. In order to prevail, a plaintiff must prove a pattern of willful corruption.[119] Establishing both the pattern and the

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108. In Arizona, the only crimes punishable by imprisonment for more than one year are felonies and Class 1 Second Offense Misdemeanors. ARIZ. REV. STAT. ANN. §§ 13–701, 13–707 (1989). Examples of violations of Arizona statutes that would fall within this definition are:

1. ARIZ. REV. STAT. ANN. § 13–2202, Deceptive Business Practices, which is a Class 1 Misdemeanor;

2. ARIZ. REV. STAT. ANN. § 13–2203, False Advertising, which is also a Class 1 Misdemeanor; and

3. ARIZ. REV. STAT. ANN. § 13–2310, Fraudulent Schemes and Artifices, which is a Class 2 Felony.

109. ARIZ. REV. STAT. ANN. § 13–2301(D) (1989).

110. *Id.* § 13–2301.

111. *Corbin*, 136 Ariz. at 596, 667 P.2d at 1311.

112. *Id.* at 596–97, 667 P.2d at 1311–12.

113. ARIZ. REV. STAT. ANN. § 13–2314(I) (1989).

114. *Id.* § 13–2314(K).

115. *Id.* § 13–2314(D)(4). *See also* Rhue v. Dawson, 173 Ariz. 220, 841 P.2d 215 (Ct. App. 1992) (evidence partner breached his fiduciary duties of good faith, fair dealing, honesty and loyalty supported finding that partner violated state racketeering statute, and was thus liable for treble damages).

116. *Corbin*, 136 Ariz. at 596, 667 P.2d at 1311 (i.e., where the crime is punishable by more than one year in prison).

117. *Rhue*, 173 Ariz. at 232, 841 P.2d at 227 (deliberate, overt, dishonest dealings and fraud will suffice to sustain an award of punitive damages).

118. DeJonghe v. E.F. Hutton & Co., 171 Ariz. 341, 344, 830 P.2d 862, 865 (Ct. App. 1991) (The court read A.R.S. § 13–2314(A), which provides that a plaintiff is entitled to recover for all injuries to his person as well as his property, to include damages for emotional distress; here defendant brokers had churned elderly plaintiffs' investments and lost their entire retirement savings.).

119. *See generally supra* notes 107–12 and accompanying text.

subjective intent of the defendant builder to deceive can prove to be a difficult and costly undertaking. Also, as with common law and statutory fraud, the Arizona RICO Act provides no protection against the honest but deficient builder.[120]

H. Breach of Implied Warranty of Habitability and Workmanship

Arizona recognizes that a homebuilder makes an implied warranty that the construction will be completed in a workmanlike manner and the resultant structure will be habitable.[121] The Arizona courts have looked to other state courts' decisions to help define and construe the implied warranty of habitability cause of action.[122]

In *Petersen v. Hubschman Construction Co.*,[123] the Illinois Supreme Court held that "the mere fact that the house is capable of being inhabited does not satisfy the implied warranty. The use of the term 'habitability' is perhaps unfortunate."[124] In *Petersen*, the plaintiff home buyers had contracted with the defendant for the purchase of a lot and the construction of a new home thereon.[125] The plaintiffs became dissatisfied with the defendant's performance and sued to rescind the agreement and recover their earnest money.[126] While noting that it was undisputed that the house was habitable and did not pose a dangerously unsafe condition, the court nevertheless found for the plaintiffs, holding that the implied warranty of habitability was more accurately a "warranty of fitness for a particular purpose."[127] In *Nastri v. Wood Brothers Homes, Inc.*,[128] the Arizona Court of Appeals declared its complete agreement with the logic of *Petersen*,[129] finding the Illinois Supreme Court's implied warranty of habitability construction consistent with Arizona's basic public policy concerns.[130]

Subsequently, in *Dillig v. Fisher*,[131] also brought under a claim of breach of implied warranty of habitability, the Arizona Court of Appeals held that in

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120. *See supra* notes 93 and 106 and accompanying text.

121. Woodward v. Chirco Const. Co., 141 Ariz. 514, 520, 687 P.2d 1269, 1275 (1984) (cracking in the foundation). *See also* Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 678 P.2d 427 (1984) (numerous home defects, including cracking in the interior and exterior walls); Nastri v. Wood Bros. Homes, Inc., 142 Ariz. 439, 690 P.2d 158 (Ct. App. 1984) (cracking in the floors, ceiling, foundation, and drywall).

122. *See generally Nastri*, 142 Ariz. 439, 690 P.2d 158.

123. 389 N.E.2d 1154 (Ill. 1979).

124. *Id.* at 1158. *See also* Banville v. Huckins, 407 A.2d 294, 297 (Me. 1979) ("[T]he [implied] warranty should not be defined in such strict terms as to require the defect to be of such magnitude as to require that the structure be deemed unlivable.").

125. *Petersen*, 389 N.E.2d at 1155.

126. *Id.* at 1156 (The court found that the many defects in the plaintiffs' home included improperly installed siding, a defective front door and door frame, a basement floor pitched in the wrong direction, away from the drain, deterioration in the interior drywall, and a defective and ill-fitting bay window.).

127. *Id.* at 1158.

128. 142 Ariz. 439, 690 P.2d 158 (Ct. App. 1984).

129. 389 N.E.2d 1154 (Ill. 1979).

130. *Nastri*, 142 Ariz. at 443–44, 690 P.2d at 162–63. "If a new home is not structurally sound because of a substantial defect of construction, such a home is not habitable within the meaning of the implied warranty of habitability." *Id.* at 443, 690 P.2d at 162. Moreover, "[i]t would be the height of cynicism to allow a shoddy builder to escape liability because his work was not shoddy enough." *Id.* at 444, 690 P.2d at 163.

131. 142 Ariz. 47, 688 P.2d 693 (Ct. App. 1984).

determining whether a house is uninhabitable as a result of a leaky roof, the purchasers were not required to prove the house could not be lived in because of the leak.[132] It was legally sufficient for the plaintiff to prevail if the evidence established that the roof was not constructed in a workmanlike manner and the plaintiff purchaser was thereby damaged.[133]

Arizona courts have further rendered claims of breach of implied warranty accessible to subsequent purchasers by holding that contract privity between builder and purchaser is not a required element of the cause of action.[134] In justifying this view, the Arizona courts have noted that the effect of latent defects is as catastrophic to a subsequent owner as to the original buyer, and that the builder is as equally unable to exculpate his improper or substandard work with succeeding purchasers.[135] Because the builder-vendor is in a better position than a subsequent owner to prevent the occurrence of major defects, the costs of poor workmanship should be his to bear.[136]

In *Richards v. Powercraft Homes, Inc.*,[137] the court stated that the applicable standard for determining whether or not a breach of warranty has occurred is one of reasonableness, in light of all surrounding circumstances.[138] Thus, the home's age, its maintenance record, and the use to which it has been subjected, are all factors that must enter into the factual determination at trial.[139] However, the defendant builder is still provided the opportunity to prove by a preponderance of the evidence that the plaintiff's losses, if any, were the result of the plaintiff's failure to take a reasonable course of action to avoid those losses.[140]

The Arizona Revised Statutes provide that no action based in contract may be maintained against a person who develops and sells real property more than eight to nine years[141] after the substantial completion of construction.[142] This statute of limitations specifically applies to any action based on implied warranty arising out of the contract of the construction of a home, including

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132. *Id.* at 50, 688 P.2d at 696.

133. *Id.* However, it is generally acknowledged that the standard of a breach of implied warranty of habitability is an objective one, "not controlled by the idiosyncratic preferences of particular buyers." Jones, *supra* note 21, at 1062.

134. Richards v. Powercraft Homes, Inc., 139 Ariz. 242, 245, 678 P.2d 427, 430 (1984); *see also* Continental Townhouses East Unit One Ass'n v. Brockbank, 152 Ariz. 537, 539 n.1, 733 P.2d 1120, 1122 n.1 (Ct. App. 1986).

135. *Richards*, 139 Ariz. at 245, 678 P.2d at 430. This sentiment was first expressed by the Supreme Court of Illinois, when it stated:

> [l]ike the initial purchaser, the subsequent purchaser has little opportunity to inspect the construction methods used in building the home. Like the initial purchaser, the subsequent purchaser is usually not knowledgeable in construction practices and must, to a substantial degree, rely upon the expertise of the person who built the home. If construction of a new home is defective, its repair costs should be borne by the responsible builder-vendor who created the latent defect.

Redarowicz v. Ohlendorf, 441 N.E.2d 324, 330 (Ill. 1982).

136. *Richards*, 139 Ariz. at 245, 678 P.2d at 430.

137. 139 Ariz. 242, 678 P.2d 427 (1984).

138. *Id.* at 242, 678 P.2d at 427. *See also Continental Townhouses East*, 152 Ariz. at 542 n.5, 733 P.2d at 1120 n.5.

139. *Richards*, 139 Ariz. at 242, 678 P.2d at 427. *See also Continental Townhouses East*, 152 Ariz. at 542 n.5, 733 P.2d at 1120 n.5.

140. *Continental Townhouses East*, 152 Ariz. at 541, 733 P.2d at 1124.

141. *See supra* notes 48 and 50 and accompanying text.

142. ARIZ. REV. STAT. ANN. § 12-552 (1995).

implied warranties of habitability, fitness, and workmanship.[143] In *Hershey v. Rich Rosen Construction Co.*,[144] the court noted that under the policies announced in *Richards*,[145] there is no reason why the same statute of limitations should not apply to subsequent purchasers as well.[146] Typically, such a cause of action accrues when the most recent purchaser reasonably discovers the latent defect and the builder abandons all efforts to remedy the situation and disclaims any responsibility therefore.[147]

"In general, the measure of damages for a builder's failure to provide a good, workmanlike structure is the cost of repair."[148] The prevailing party in an action based on a breach of an implied warranty of habitability may also be entitled to an award of his costs and expenses incurred in pursuing the civil action,[149] and his reasonable attorney's fees.[150]

A breach of an implied warranty of habitability is a breach of contract claim. As previously discussed, a plaintiff whose cause of action is based on a breach of contract may seek specific performance, rescission of the contract, or damages.[151] However, for the reasons already indicated, both an application for specific performance and a request for rescission are less practical means of recourse for the plaintiff homeowner than simply petitioning for damages.[152]

Although breach of implied warranty causes of action may have some utility for a consumer against an unscrupulous developer, they also have serious, limiting drawbacks. Specifically, for a successful breach of warranty claim, the home buyer must prove that he, or someone at his direction, made a reasonable inspection of the home.[153] This may be a significant limitation on the many new home buyers who move to Arizona from out of state and do not have the opportunity to have such an inspection made, the knowledge that one should be done, or the skill to perform the inspection themselves.[154] Moreover, a breach of warranty is associated with contract law, and the concept of a warranty can "introduce[] quite unnecessary complications into the liability of a manufacturer to a consumer."[155] Finally, the *Nastri* court declined to decide if a knowing disclaimer of the implied warranty of habitability is void as against public policy.[156] It appears that no Arizona court has addressed whether a

143. *Id.*
144. 169 Ariz. 110, 817 P.2d 55 (Ct. App. 1991) (subsequent purchaser of residential home brought a breach of implied warranty claim against the builder for damages caused by faulty stucco application performed more than 12 years prior to commencement of the suit).
145. 139 Ariz. 242, 678 P.2d 427 (1984).
146. *Hershey*, 169 Ariz. at 115 n.1, 817 P.2d at 60 n.1.
147. *Id.*
148. *Continental Townhouses East*, 152 Ariz. at 542, 733 P.2d at 1125.
149. ARIZ. REV. STAT. ANN. § 12–341 (1995).
150. *Id.* § 12–341.01 (1995).
151. *See supra* notes 51–60 and accompanying text.
152. *See supra* notes 51–60 and accompanying text.
153. *Hershey*, 169 Ariz. at 114, 817 P.2d at 58–59.
154. *See infra* note 177 and accompanying text.
155. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 119 (Miss. 1966). Here, the court noted that, "the concept of warranty has involved so many major difficulties and disadvantages that it is very questionable whether it has not become rather a burden than a boon to the courts in what they are trying to accomplish." *Id.* at 119, *quoting* WILLIAM L. PROSSER, LAW OF TORTS 679 (3d ed. 1964).
156. Nastri v. Wood Bros. Homes, Inc., 142 Ariz. 439, 443, 690 P.2d 158, 162 (Ct. App. 1984). *But see* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1159 (Ill. 1979) (knowing disclaimer would not be against public policy).

knowing disclaimer by the original purchaser is binding on a subsequent innocent buyer.[157] Thus, an express disclaimer of an implied warranty may effectively shield unscrupulous developers from liability for their substandard workmanship.

I. Synopsis of Current, Viable Causes of Action Available in Arizona for Home Buyers Against Their Home Developer

All of the previously discussed causes of action offer the consumer some relief for damages caused by shoddy home developers. Yet, as indicated, all have limitations which may provide inadequate relief for innocent home buyers against negligent, and in some cases, even dishonest contractors. In today's society the need for legal protection for home buyers has never been greater, especially when considering Arizona's rapidly growing population. The volume of homeowner complaints to consumer affairs agencies and local municipal authorities illustrates the magnitude of the problem of substandard housing construction that currently exists in the United States.[158] However, even these numbers fail to accurately quantify the problematic state of the residential construction industry, as registered complaints typically represent only the worst cases.[159]

As previously noted, a home is often a family's largest single economic investment.[160] In a United States Department of Housing and Urban Development Study,[161] it was shown that approximately seventy-nine percent of all households report at least one problem with their home that costs in excess of $100 to repair.[162] Mechanical and structural factors account for nearly seventy percent of all major problems encountered in a residential unit.[163] After purchasing a house, the average family may have few economic resources left with which to combat a builder in court.[164] The high cost of legal advice was mentioned in almost fifty percent of the cases where a lawyer was consulted but not hired.[165] Furthermore, less than two percent of all noted

157. Section 2–312 of the Uniform Land Transactions Act (1978), regarding real estate, states that disclaimers and limitations of liability may be made, but they "must appear in the deed or other recorded document so as to give the buyer notice of such limitations." Edie Lindsay, *Strict Liability and the Building Industry*, 33 EMORY L.J. 175, 210 n.71 (1984). This section of the Uniform Land Transactions Act has apparently not been enacted in Arizona. *See supra* note 156 and accompanying text.

158. RICHARD L. KALUZNY, PH.D., U.S. DEP'T HOUS. & URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH AND THE FED. TRADE COMM'N, A SURVEY OF HOMEOWNER EXPERIENCE WITH NEW RESIDENTIAL HOUSING CONSTRUCTION 2 (1980) [hereinafter HOMEOWNER EXPERIENCE STUDY]. Seventy-nine percent of the households participating in the survey reported at least one problem with the home that was in excess of $100 to repair. *Id.* at iv. Additionally, 22% reported a serious disagreement with the builder over the repair or resolution of at least one problem with the home. *Id.* at 41. Finally, the results of the survey indicated that the probability of reporting an unresolved problem with their builder was higher for those respondents living in subdivisions, compared with those who did not reside in a development. *Id.* at v.

159. *Id.*

160. *See supra* note 1 and accompanying text.

161. HOMEOWNER EXPERIENCE STUDY, *supra* note 158.

162. *Id.* at iv.

163. 1 U.S. DEP'T HOUS. & URBAN DEV., OFFICE OF POLICY DEV. AND RESEARCH, A STUDY OF HOME INSPECTION AND WARRANTY PROGRAMS 1 (1977) [hereinafter HOME INSPECTION STUDY].

164. *Id.*

165. HOMEOWNER EXPERIENCE STUDY, *supra* note 158, at 51.

problems resulted in any legal action.[166] Thus, it can be concluded that many home buyers cannot afford litigation against their developer, especially when required to prove the existence of contracts and privity, warranties (express and implied), subjective intentions, and breaches of duties.[167] The shortcomings of the current legal solutions to a material latent defect in the home make a compelling argument for the implementation of a strict liability regime. A claim of strict liability does not require extensive proof against the developer, a legal hurdle which often discourages or defeats the wronged home buyer.[168] In an action based on strict liability, a purchaser will need only show that a defect in the home existed and that damages were sustained.[169]

To date, Arizona has expressly refused to permit the use of a strict liability claim for merely defective residential construction.[170] Arizona courts have limited the application of strict liability to those cases where a product was unreasonably dangerous and the resulting injury was to something other than the product itself.[171]

III. THE CASE FOR STRICT LIABILITY

A. Strict Liability Defined

In the most basic sense, "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[172] In response to our increasingly complex modern industrial society, strict liability has emerged as a "major basis" of liability in this century.[173] Over time, as the doctrine of strict liability has developed and the social policies implicating it have been clarified, courts have begun to apply this legal claim to a variety of "products," including real estate.[174]

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166. *Id.*

167. Strict liability represents an attractive legal alternative, as the plaintiff is not required to prove fault on the part of the developer. Robert D. King, *The Legal Implications of Residential Radon Contamination: The First Decade*, 18 WM. & MARY J. ENVTL. L. 107, 154 (1993).

168. A strict liability regime "is helpful not only in reducing a plaintiff's litigation expenses, but also in making more efficient use of court time." Escola v. Coca Cola Bottling Co., 150 P.2d 436, 442 (Cal. 1944) (defendant manufacturer strictly liable where plaintiff injured when a soft drink bottle exploded in her hand).

169. Wayne S. Hyatt, *The Community Association: An Introduction*, C367 ALI-ABA 343, 370 (1989).

170. *Nastri*, 142 Ariz. at 445, 690 P.2d at 164. *See infra* note 215 and accompanying text. *See also* Arrow Leasing Corp. v. Cummins Ariz. Diesel, Inc., 136 Ariz. 444, 666 P.2d 544 (Ct. App. 1983) (holding that damage to the defective product itself creates difficult issues with respect to whether the harm is "property damage" (appropriate for a strict liability claim) or purely an "economic loss" (better handled by contract than tort law)).

171. *Nastri*, 142 Ariz. at 445, 690 P.2d at 164. However, the distinction between harm to the product and harm to the person or other personal property of the homeowner does not appear to be rational; the Restatement (Second) of Torts § 402A specifically refers to harm to the consumer's property, without any limiting qualifications. James L. Kirschnik, *Builder-Vendor Liability for Construction Defects in Houses*, 55 MARQUETTE L. REV. 369, 378 (1972).

172. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963). *See also* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 119 (Miss. 1966).

173. Joan L. Neisser, *The Tenant as Consumer: Applying Strict Liability Principles to Landlords*, 64 ST. JOHN'S L. REV. 527, 538–39 (1990).

174. *Id.* at 539. As one commentator has described:

B. The Need for a Viable Strict Liability Cause of Action Against Mass Production Residential Home Contractors

"[T]oday, with the tremendous increase in tract developments, the buyer no longer stands on equal footing with the builder."[175] Typically, a builder has supernumerary business sophistication and knowledge over the average home buyer.[176] In addition, most home purchasers lack the requisite expertise and skill necessary to adequately inspect a home for defects.[177] Also, because many home defects can be latent, or may go undetected to even the most vigilant of purchasers, the buyer is forced to rely upon the knowledge, expertise, and skill of the builder to provide a suitable home.[178] Moreover, the builder is in a superior position to prevent the occurrence of significant defects, especially in comparison with the majority of homeowners who purchase a home only after the construction is complete.[179] As one commentator has noted, a "construction defect is an unjustified injury inflicted upon the buyer by the builder."[180] Thus, the remedies of the injured consumer should not be made to depend on the intricacies of the law of sales.[181] Rather, "[t]he law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times."[182]

> Strict liability is a cause of action in which the buyer need not show that the builder-seller breached any promise or otherwise was at fault. Because the liability is not based on warranty or on any contractual promise by the seller, strict liability is not a contract action. It is a tort action—an action to remedy a civil wrong—based on the premise that public policy demands that new houses or condominiums be developed free of dangerous defects.

Hyatt, *supra* note 169, at 343.

175. Peel, *supra* note 4, at 639.

176. McDonald v. Mianecki, 398 A.2d 1283, 1289 (N.J. 1979); Peel, *supra* note 4, at 639.

> When a vendee buys a development house from an advertised model...he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional advisor of his own,...[and] his actual examination is, in the nature of things, largely superficial....

Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325–26 (N.J. 1965).

177. Weeks v. Slavick Builders, Inc., 180 N.W.2d 503 (Mich. Ct. App. 1970), *aff'd*, 181 N.W.2d 271 (Mich. 1970). *See also* Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 753 (Ct. App. 1969); Worrell v. Barnes, 484 P.2d 573, 575 (Nev. 1971); Peel, *supra* note 4, at 639.

178. Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 91 (Cal. 1974) (ceiling buckling, sliding glass doors sticking, inadequate water runoff from patio); Salka v. Dean Homes, 22 Cal. Rptr. 2d 902, 909 (Ct. App. 1993) (flooding, standing water and ground saturation); *Eichler*, 74 Cal. Rptr. at 752 (failure of radiant heating system); *McDonald*, 398 A.2d at 1289 (non-potable water from well dug for home).

179. *McDonald*, 398 A.2d at 1289. "[I]t is socially wasteful to impose upon the buyer an obligation to conduct extensive tests to learn what the seller already knows or could easily have ascertained." Jones, *supra* note 21, at 1056. *See supra* note 22 and accompanying text.

180. Jones, *supra* note 21, at 1057.

181. Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 897 (Cal. 1963); Berman v. Watergate West, Inc., 391 A.2d 1351, 1352 (D.C. 1978); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120 (Miss. 1966).

182. *Kriegler*, 74 Cal. Rptr. at 752. *See also* Avner v. Longridge Estates, 77 Cal. Rptr. 633, 636 (Ct. App. 1969).

C. Precedent Establishes Strict Liability as a Valid Claim for Defective Home Construction

The Restatement (Second) of Torts notes that only "products" qualify for application of the doctrine of strict liability.[183] "The major impediment to the inclusion of real estate under the strict liability umbrella was the notion that the term 'product' did not apply readily to real property."[184] The first case to hold that new homes were products within the meaning of strict liability was a New Jersey case, *Schipper v. Levitt & Sons, Inc.*[185]

In *Schipper*, the plaintiffs sued the homebuilder for damages suffered when their infant son was severely scalded by excessively hot water drawn from a bathroom faucet.[186] The defendant was a well-known mass residential home developer who specialized in planned communities.[187] The court found that the defendant could have easily, and at a negligible cost, completely avoided the danger posed by the hot water system by installing a recommended mixing valve.[188] In holding the defendant strictly liable, the court stated that there was "no reason for differentiating mass sales of homes from...mass sales of automobiles."[189]

As previously noted, Arizona courts will allow a strict liability claim where the product is unreasonably dangerous and the injury is to something more than the product itself.[190] With this standard, it is likely that *Shipper* would have been decided in the same manner even in an Arizona court.

Since the landmark decision in *Schipper*, however, many courts have expanded on the strict liability doctrine, holding residential home developers strictly liable in tort for damages suffered by the owners as a proximate result of material latent defects in the construction of their residences.[191]

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183. RESTATEMENT (SECOND) OF TORTS § 402(A) (1964).

184. Neisser, *supra* note 173, at 539.

185. Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965). *See also* Charles E. Cantu, *The Illusive Meaning of the Term "Product" Under Section 402A of the Restatement (Second) of Torts*, 44 OKLA. L. REV. 635, 647 (1991) (referring to *Schipper*, 207 A.2d 314).

186. *Schipper*, 207 A.2d at 316.

187. *Id.*

188. *Id.* at 324.

189. *Id. See also* Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 752 (Ct. App. 1969) ("[I]n terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and...the pertinent overriding policy considerations are the same.").

190. *See supra* note 171 and accompanying text.

191. *See, e.g.*, Bednarski v. Hideout Homes & Realty, Inc., 711 F. Supp. 823 (M.D. Pa. 1989) (defendant builder could be held strictly liable for fire that originated in electric outlet, completely destroying the home and killing plaintiff's son who was trapped inside); Bastian v. Wausau Homes, Inc., 620 F. Supp. 947 (N.D. Ill. 1985) (claim of strict liability in tort may be sustained against builder-vendor of mass-produced homes for fire damage, caused by defective electric baseboard heater, which destroyed the home); Blagg v. Fred Hunt Co., Inc., 612 S.W.2d 321 (Ark. 1981) (for purposes of Arkansas' strict liability statute, the word "product" applies to a house, and thus builder-vendor could be held strictly liable for damages caused by odor and fumes of formaldehyde emanating from the carpet); Avner v. Longridge Estates, 77 Cal. Rptr. 633 (Ct. App. 1969) (defendant developer of tract could be held strictly liable in tort for defective subsurface conditions); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (Ct. App. 1969) (defendant homebuilder strictly liable in tort for damages resulting from defective heating system); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. 1978) (development corporation, responsible for creating and marketing housing cooperative, strictly liable for defects, including air conditioner which created such serious humidity in plaintiff's bedroom that

D. Arguments for Strict Liability

There are several compelling arguments in support of Arizona acknowledging claims of strict liability against developers for material latent defects in residential home construction. First, although section 402(A) of the Restatement (Second) of Torts does not explicitly refer to homes, "it is noteworthy that it is addressed to the liability of a seller of 'products' and not 'chattels.'"[192] Thus, if "product" is given a liberal interpretation, encompassing anything that is produced, homes are clearly within the scope of the Restatement's definition.[193] Many other state courts have felt compelled to follow this line of reasoning and deem a house a product for purposes of strict liability.[194]

Moreover, a recent Arizona case arguably stands for the proposition that Arizona courts are now more likely to find a home is a product for purposes of strict liability in tort. In *Menendez v. Paddock Pool Construction Co.*,[195] the Arizona Court of Appeals noted that neither the Arizona statutes nor case law "provide a comprehensive definition of product for characterization purposes."[196] The court went on to state that since strict liability is imposed for reasons of public policy, these same policy concerns are appropriate factors for a case-by-case determination of whether a structure is a product for purposes of the tort doctrine.[197] The court concluded that it would characterize an object as a product only if such classification would serve the policy considerations of strict liability.[198]

Three main policy reasons generally support the implication of strict liability: cost-shifting, public safety, and recovery.[199] First and foremost, strict

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she was forced to keep the door to that room closed and sleep in the living room for two years); Worrell v. Barnes, 484 P.2d 573 (Nev. 1971) (remodeling contractor held strictly liable for fire damage caused by leaky gas fitting); Patitucci v. Drelich, 379 A.2d 297 (N.J. Super. Ct. Law Div. 1977) (defendant developer strictly liable for damage caused when defective sewage system placed raw effluent upon surface of yard of residence); Gay v. Cornwall, 494 P.2d 1371 (Wash. Ct. App. 1972) (defendant builder strictly liable for defects in roof, plumbing, driveway, and external paint of residential home).

192. Kirschnik, *supra* note 171, at 377.

193. *Id.*

194. Blagg v. Fred Hunt Co., 612 S.W.2d 321, 324 (Ark. 1981) (stating that "in construing the Arkansas strict liability statute, we hold that the word 'product' is as applicable to a house as to an automobile"). *See also Bednarski*, 711 F. Supp. 823 (concluding that the Pennsylvania Supreme Court would likely hold homebuilders strictly liable under § 402A of the Restatement of Torts, which defines strict liability in terms of "[o]ne who sells any *product* in a defective condition..." RESTATEMENT (SECOND) OF TORTS § 402(A) (1964) (emphasis added)); *Bastian*, 620 F. Supp. 947 (holding that because of public policy concerns a home could be a product for purposes of strict liability in tort); *Kriegler*, 74 Cal. Rptr. at 752 (in discussing a strict liability claim for damages sustained by a home constructed by defendants, the court noted that "in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles"); *Berman*, 391 A.2d at 1351 (describing the case, involving claims for a defectively constructed apartment, as a "simple case" involving a "mass-produced *product* which allegedly reached the ultimate consumer in a defective state") (emphasis added); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 322 (N.J. 1965) (stating that "there is no visible reason for any distinction between the liability of one who supplies a chattel and one who erects a structure" (citations omitted)).

195. 172 Ariz. 258, 836 P.2d 968 (Ct. App. 1991).

196. *Id.* at 262, 836 P.2d at 972.

197. *Id.* at 264, 836 P.2d at 974.

198. *Id.*

199. *Id.* at 265, 836 P.2d at 975. *See also* Roger C. Henderson, *Strict Products Liability and Design Defects in Arizona*, 26 ARIZ. L. REV. 261, 261–62 (1984).

liability insures that the costs of injuries which result from defective products are borne by those most capable of sustaining the loss—the culpable manufacturers, rather than the injured consumers, who are often powerless to protect themselves.[200] Such costs can then be distributed by the manufacturer throughout the marketplace, via his pricing policies.[201]

Second, the imposition of strict liability will result in pressure on manufacturers to evolve product improvements.[202] The defendant in *Menendez* opposed this reasoning, arguing that "public safety is already protected by governmental regulation of the construction process through builder licensing, mandatory building codes, and project permit requirements."[203] However, this does not entirely satisfy the issue. As one commentator noted, the intense economic pressure for a contractor to maintain his construction schedule creates powerful incentives to cut corners.[204] Thus, a strict liability regime would help protect the innocent homebuilder from an unscrupulous builder who is bent on breaking the rules to save time and money. Additionally, a large percentage of construction firms retain very few full-time employees,[205] resulting in a high worker turn-over, with little quality control over any one group employed for any specific home development project. The imposition of strict liability would prompt builders to retain a known workforce, with a proven track record of quality workmanship. This, of course, would help reduce the overall incidents of defects in residential home construction.

Finally, strict liability will relieve the innocent consumer from the often insurmountable burden of proving fault or negligence, especially where the manufacturing process is not open to public view, and in many cases, is not understandable without expert interpretation.[206]

All of these policy arguments for strict liability are applicable to mass home developers. Developers can more easily spread the costs of consumer harm among their purchasers through appropriate pricing schemes. In contrast, any one home buyer is generally ill-equipped to absorb the potentially catastrophic costs incurred to repair a defect or, alternatively, to litigate against the developer in court. Furthermore, the imposition of strict liability on home developers will help ensure that new home construction is performed with the

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200. Bastian v. Wausau Homes Inc., 620 F. Supp. 947, 950 (N.D. Ill. 1985); Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 901 (Cal. 1963); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 753 (Ct. App. 1969); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120 (Miss. 1966); Worrell v. Barnes, 484 P.2d 573, 575 (Nev. 1971). *See also infra* note 239 and accompanying text.

It is interesting to note that in 1873, the argument for imposition of strict liability because the more capable loss bearer was the manufacturer was rejected. In Losee v. Buchanan, 51 N.Y. 476 (1873), the court denied the plaintiff recovery for his injuries caused by the defendant's accidental, non-negligent use of technology because the plaintiff "receives his compensation for such damage by the general good [that the new technology supplies], in which he shares." *Id.* at 485.

201. Henderson, *supra* note 199, at 261–62. *See also* Pierce v. Pacific Gas & Elec. Co., 212 Cal. Rptr. 283, 291 (Ct. App. 1985).

202. Henderson, *supra* note 199, at 261–62.

203. *Menendez*, 172 Ariz. at 267, 836 P.2d at 977.

204. Lindsay, *supra* note 157, at 197.

205. *Id.* at 210 n.76.

206. Henderson, *supra* note 199, at 261–62. *See also* Bastian v. Wausau Homes, Inc., 620 F. Supp. 947, 950 (N.D. Ill. 1985).

highest applicable standards of workmanlike effort.[207] Finally, the imposition of strict liability on developers will assign the risk to the party most capable of avoiding the problem in the first place—the developer who possesses superior sophistication and knowledge regarding the home's construction.[208]

In *Menendez*, after applying the strict liability policy rationale to the facts of the case, the court concluded that the tort doctrine was inapplicable.[209] However, in arriving at this determination, the court noted that the pool in question[210] was not a "standardized model constructed, assembled, or manufactured by a mass-production process analogous to the tract homes in *Schipper* and *Kriegler*."[211] Thus the court appears to be implying that it may now find that a mass-produced home is a product for purposes of strict liability.

Nevertheless, the facts, and, therefore, the holding in *Menendez*[212] are distinguishable from the premise of this Note in one important facet. In *Menendez*, the plaintiff became a quadriplegic after being forcibly carried to a pool and thrown head first into the shallow end by a group of drunken revelers.[213] Thus, in that case, the plaintiff sustained physical injuries to his person. In contrast, this Note confines itself to the promotion of the application of strict liability to mass-production homebuilders for the harm caused by a material latent defect to the home itself.[214] The Arizona courts have consistently held that damage to the product itself, caused by a defect in that product, is not a harm which product liability actions are designed to redress.[215] Yet, the policy reasons advanced for the application of strict liability seem every bit as relevant to an economic harm as to a personal injury. A plaintiff is just as unable to protect himself from economic disaster as from physical injury caused by a defect in the home. Moreover, the contractor is as likely to be able to sustain and spread the costs of the plaintiff's economic damages as he is the costs of the plaintiff's physical injuries.

E. Arguments Against the Imposition of Strict Liability

1. Economic Harm Is Not a Dangerous Defect

The Restatement (Second) of Torts notes that for the imposition of strict liability, the product must be sold in a defective condition that is unreasonably dangerous to the consumer.[216] One could argue that material latent defects in a residence that result only in damage to the home itself are not unreasonably

207. The builder is in a better position to avoid construction defects by exercising greater care in the selection of the site, materials, procedures, and personnel. Jones, *supra* note 21, at 1056.

208. *See supra* note 176 and accompanying text.

209. *Menendez*, 172 Ariz. at 267, 836 P.2d at 977.

210. The plaintiff was claiming strict liability against a pool design subcontractor, for damages sustained when he was thrown into the pool. *Id.* at 260, 836 P.2d at 970.

211. *Id.* at 267, 836 P.2d at 977.

212. 172 Ariz. 258, 836 P.2d 968 (Ct. App. 1991).

213. *Id.* at 260, 836 P.2d at 970.

214. Generally, this entails economic harm sustained by the plaintiff buyers due to material latent defects in their home construction.

215. Rocky Mountain Fire & Casualty Co. v. Biddulph Oldsmobile, 131 Ariz. 289, 640 P.2d 851 (1982); Arrow Leasing Corp. v. Cummins Ariz. Diesel, Inc., 136 Ariz. 444, 447–49, 666 P.2d 544, 547–49 (Ct. App. 1983); *supra* note 170 and accompanying text.

216. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

dangerous within the purview of the Restatement's definition. However, the Illinois case of *Lowrie v. City of Evanston*,[217] discussed in *Menendez*,[218] states that "[t]he phrase 'unreasonably dangerous' was intended as a definition of a defective product...but it otherwise remains without specific definition...."[219] The *Lowrie* court noted that this was likely intentional, in keeping with the application of strict products liability law to changing times and circumstances.[220] Case law should keep abreast of the changing notions of justice; thus, a defect should remain an open-ended term, to be continually reconstrued in the context of the current society's conditions.[221] Therefore, a material latent defect which causes a substantial economic burden to the homeowner can reasonably be deemed a dangerous defect for strict liability purposes. Economic disaster and its myriad ramifications can be every bit as "dangerous" to a home buyer as any physical injury sustained.

2. There Is No Need for the Imposition of Strict Liability as it Is Relatively Easy to Trace the Defect to the Builder

Another popular argument against the imposition of strict liability to home developers is that it is easier to trace a defect to the builder than to a manufacturer, as there is more opportunity to make a meaningful inspection of a structure on real property.[222] As has been previously discussed, the Arizona homeowner plaintiff is often left with inadequate legal remedies against his developer.[223] Additionally, buyers of mass-produced homes actually have little if any possibility for meaningful inspection of the home prior to purchase.[224] Usually, the buyer has no opportunity to inspect all parts of the home and no input concerning the quality of goods and labor comprising its construction.[225]

3. Society Is Already Too Litigious

Another contention for denying the imposition of strict liability against mass home developers is that society is already too litigious, and if we allow this "patent plaintiff-friendly" claim into our courts, it will only exacerbate our already overburdened legal system.[226] On first observation, this argument appears to have merit. A statistical survey made in the United States District Court system reports that products liability suits escalated from a total of 1579 in 1974 to almost 9000 in 1982.[227] Rather than attributing this increase to the

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217. 365 N.E.2d 923 (Ill. App. Ct. 1977).
218. 172 Ariz. at 265, 836 P.2d at 975.
219. 365 N.E.2d at 927.
220. *Id.*
221. *Id.* (citing Dunham v. Vaughan & Bushnell Mfg. Co., 229 N.E.2d 684, 688 (Ill. App. Ct. 1967)).
222. *See, e.g.*, Wright v. Creative Corp., 498 P.2d 1179, 1182–83 (Colo. Ct. App. 1972).
223. *See supra* part II.
224. Lindsay, *supra* note 157, at 181. *See also* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1158 (Ill. 1979) ("The vendee buys in many instances from a model home or from predrawn plans. The nature of the construction methods is such that a vendee has little or no opportunity to inspect."); Patitucci v. Drelich, 379 A.2d 297, 298 (N.J. Super. Ct. Law Div. 1977) ("[A] ready-made home is no more susceptible of inspection than an automobile.").
225. Lindsay, *supra* note 157, at 195.
226. Cantu, *supra* note 185, at 649.
227. W. Kip Viscusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321, 321 n.1 (1986).

assumption that our society is becoming more litigious, however, it has been contended that a more reasonable explanation is that, as time has gone by, consumers have acquired a greater knowledge of injury causation, allowing them to hold the responsible party liable for the damages sustained.[228] Moreover, other studies indicate that "Americans are no more litigious than they were in colonial times, no more litigious than they were at the turn of the century, no more litigious than the citizens of many other industrialized democracies, and less litigious than people in Africa."[229] Professors Henderson and Eisenberg[230] undertook a unique and comprehensive study of product liability litigation in the 1980s, wherein they discovered a twenty percent decrease in plaintiff victories in cases of a definitive judgment, as well as a substantial decline in expected recoveries and a corresponding increase in products defendants prevailing on pretrial motions in federal courts for the years 1979–1987.[231] Thus, statistical data clearly indicates that the premise of the strict liability proponents' argument is without foundation.

4. Strict Liability Would Be a Powerful Weapon for Plaintiffs with Dubious Claims

Yet another proposal offered for the denial of the imposition of strict liability against home developers is that it "would provide a powerful weapon for some plaintiffs with dubious claims."[232] However, the *Schipper* court stated that its holding regarding strict liability against the developer in no way rendered him a "virtual insurer of the safety of all who thereafter come upon the premises."[233] The court pointed out that the plaintiff still sustained the burden of proving the house was defective when constructed and sold, and that the defect was the proximate cause of the injuries.[234] Moreover, the test for defectiveness was held to be one of reasonableness, rather than perfection.[235] Thus, it is hard to imagine an unwarranted strict liability claim actually prevailing in court.

228. Marc Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (and Think We Know) About Our Alleged Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69 (1983).

229. Robert A. Prentice & Mark E. Roszkowski, *"Tort Reform" and the Liability "Revolution": Defending Strict Liability in Tort for Defective Products*, 27 GONZ. L. REV. 251, 258 (1991/92).

230. James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

231. *Id.* at 523, 530–31.

232. Blaine G. Frizzell, *Strict Liability in Tort for Builder-Vendors of Homes*, 24 TULSA L.J. 117, 118 (1988). *See* Milam v. Midland Corp., 665 S.W.2d 284 (Ark. 1984) (plaintiff alleged real estate developer strictly liable for plaintiff's motorcycle accident injury because development had a street with an excessively sharp curve). *See also* Whitmer v. Schneble, 331 N.E.2d 115 (Ill. App. Ct. 1975) (defendant owner in dog bite case filed a third-party complaint against the seller of the dog, claiming he was strictly liable for selling an inherently dangerous animal).

233. Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 326 (N.J. 1965). *See also* Avner v. Longridge Estates, 77 Cal. Rptr. 633, 636 (Ct. App. 1969); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749, 753 (Ct. App. 1969); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120 (Miss. 1966); Worrell v. Barnes, 484 P.2d 573, 575 (Nev. 1971).

234. *Schipper*, 207 A.2d at 326. *See also Worrell*, 484 P.2d at 575–76.

235. *Schipper*, 207 A.2d at 326. *See also Kriegler*, 74 Cal. Rptr. at 753.

IV. CONCLUSION

The rule of strict liability for product defects, whether negligently or non-negligently created, focuses responsibility for the defects on the product manufacturer. If the product is defective when it leaves the manufacturer's control, the manufacturer will be held strictly liable.[236] Additionally, the manufacturer of a defective product is strictly liable for the entire completed product, regardless of whether he chooses to delegate any part of the development process to a third party.[237] Thus, a manufacturer will not be allowed to escape liability by tracing the defect to a component part supplied by a subcontractor.[238] Strict liability merely places responsibility for the defect on the party best able to bear the risk—the builder.[239] Sound public policy decisions require the law "to shift the loss from the purchaser to the builder of the defectively constructed home."[240]

236. *Worrell*, 484 P.2d at 575.
237. Vandermark v. Ford Motor Co., 391 P.2d 168, 170–71 (Cal. 1964).
238. *Id.* at 170.
239. *See supra* note 200 and accompanying text.
240. Peel, *supra* note 4, at 651.