CAVEAT EMPTOR IN SALES OF REAL PROPERTY — TIME FOR A REAPPRAISAL

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Caveat emptor is one of the most infamous and omninous-sounding of the legal maxims. The expression, which literally means "let the buyer beware," summarizes the rule that a purchaser takes the risk of quality and condition unless he protects himself by an express warranty or unless there has been a false representation.[1] Therefore, there are no implied warranties of quality or fitness in a transaction to which the doctrine applies.

Historians have not traced the ancient adage to its origin.[2] The phrase cannot be found in works on ancient Roman law,[3] and, since the doctrine is wholly alien to the civil law,[4] it could not "easily have come into England by any reputable intellectual route."[5] Nor did the maxim gain recognition by way of the "law merchant," that body of customs and practices uniform throughout the mercantile community as early as the twelfth century in Europe's large centralized markets.[6] The expression first appeared in print in 1534, and the doctrine became firmly established in the common law during the seventeenth and eighteenth centuries. It apparently gained its strongest foothold among traders in England's small rural markets,[7] and the concept was accepted by American judges a century after our New Republic declared its independence.[8]

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[1] BLACK'S LAW DICTIONARY 281 (4th ed. 1951).

[2] Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1156 (1931).

[3] M. RADIN, HANDBOOK OF ROMAN LAW (1927). In his treatise, at 231, the author suggests that "[t]he evil and cynical rule of *caveat emptor* was abrogated, in practice and in law, at Rome some time before the Christian era . . . ."

[4] 2 J. THOMAS, COKE UPTON LYTTLETON 290-91 (1827).

> Note, that by the civil law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty, either in deed or in law; for *caveat emptor.*

States have not enacted statutes to abolish the doctrine of caveat emptor in realty sales, with the single exception of Louisiana, a civil law state. That jurisdiction has enacted legislation establishing that a warranty of suitability is implied in all sales, including realty. This statute provides:

> *Redhibition* is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice. LA. CIV. CODE ANN. art. 2520 (West 1952).

See also Loraso v. Custom Built Homes, Inc., 144 So. 2d 459 (La. Ct. App. 1962) (the court implied a warranty without referring to the statute).

[5] Hamilton, *supra* note 2, at 1157.

[6] *Id.* at 1158.

[7] *Id.* at 1163.

[8] Barnard v. Kellogg, 77 U.S. (10 Wall.) 383 (1870).

Initially, the doctrine of caveat emptor was applied to sales of both personalty and realty.[9] Today, due largely to enactment of the Uniform Sales Act[10] followed by the Uniform Commercial Code,[11] the rule has all but vanished from transactions involving the purchase of goods.[12] However, the majority of jurisdictions in this country have rigidly adhered to the principle that there are no implied warranties in the sale of realty.[13] Consequently, an inexperienced purchaser of a new or used home who fails to obtain an express warranty must, absent a misrepresentation by the vendor, bear the entire risk of latent defects once possession is surrendered by the vendor.[14] Thus, it has been held that if a purchaser of a home signs a contract and then discovers that the sewer line is broken,[15] the foundation is inadequate,[16] the roof leaks,[17] or the place is infested with termites,[18] it is the purchaser's misfortune. The result is somewhat paradoxical: although a person is adequately protected when buying inexpensive chattels, he receives little or no protection when making a purchase as significant as a new house.[19]

Recent Assaults Upon the Rule

Currently, thirteen states[20] have recognized the inequities of the doctrine and have either abrogated the rule or circumvented it. The courts in these states have recognized that there exists both a moral and a legal obligation on the part of the vendor of realty to disclose

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[9] Hamilton, *supra* note 2, at 1136.

[10] *See* Ariz. Rev. Stat. Ann. § 44-215 (1956). This section provides for the implication of a warranty of quality or fitness for a particular purpose in sales of goods where the goods are bought by description, or where usage of the trade requires it. However, this provision, together with the remainder of the Uniform Sales Act, was replaced by the Uniform Commercial Code in 1968.

[11] *See* Ariz. Rev. Stat. Ann. § 44-2331 (1967).

> [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . Goods to be merchantable must be at least such as:
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> . . . .
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> 3. are fit for the ordinary purposes for which such goods are used. . . .

[12] Caveat emptor, as applied to the sale of goods, is beyond the scope of this comment.

[13] Annot., 78 A.L.R.2d 446 (1961).

[14] W. Prosser, Law of Torts 408 (3rd ed. 1964); However, there are cases holding that a vendor's failure to disclose defects known to him and not to the purchaser entitles the latter to damages or rescission. *See* Annot., 80 A.L.R.2d 1453 (1961); Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 Geo. L.J. 633, 642-44 (1965). Under this rule, the risk of latent defects which are unknown to either party falls on the purchaser. *See, e.g.*, Hughes v. Stusser, 68 Wash. 2d 707, 415 P.2d 89 (1966).

[15] Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717 (1957).

[16] Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978 (1959).

[17] Tudor v. Heugel, 132 Ind. App. 579, 178 N.E.2d 442 (1961).

[18] Fegeas v. Sherrill, 218 Md. 472, 147 A.2d 223 (1958).

[19] For an excellent example of this paradox see Haskell, *supra* note 14.

[20] These states are Alabama, California, Colorado, Idaho, Illinois, Indiana, Louisiana, New Jersey, Ohio, Oklahoma, South Dakota, Texas, and Washington.

known material facts not readily ascertainable upon a reasonable inspection.[21]

The initial assault upon the rule came in the form of methods circumventing it. Hence, some courts have held that a contract of sale which is executed prior to completion of the structure constitutes a contract for construction rather than a sale of realty, and that the vendor impliedly warrants that the house will be completed in a workmanlike manner and will be reasonably fit for occupancy as a place of abode.[22] However, under some of these decisions, if the structure has been completed at the time of the sale, there is no warranty and caveat emptor applies.[23]

Other courts have found contractors liable for latent defects in a new house under the theory of strict liability in tort based upon the close analogy between a defect in a new house and a manufactured chattel.[24] These courts reason that by putting a new house on the market, a contractor, like the manufacturer of a product, assumes the responsibility of making certain that his product is reasonably fit for the purpose for which it is used — habitation.[25]

In 1964, in *Carpenter v. Donohoe*,[26] Colorado took the lead and expressly repudiated the doctrine of caveat emptor as applied to the sale of new houses.[27] There, the plaintiffs purchased a new house and within four months after they moved in the walls began to crack. The condition soon became so serious that, in order to prevent a cave-in of a wall of the basement, the builder had to shore it up with heavy lumber. In time, living in the house became hazardous to the plaintiffs'

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[21] *See, e.g.*, Hughes v. Stusser, 68 Wash. 2d 707, 415 P.2d 89 (1966).

[22] Carter v. West, 280 Ala. 603, 196 So. 2d 718 (1967); Glisan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jose-Balz Co. v. DeWitt, 93 Ind. App. 672, 176 N.E. 864 (1931); Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Loma Vista Dev. Co. v. Johnson, 177 S.W.2d 225 (Tex. Civ. App. 1943); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958).

[23] *E.g.*, Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957); Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958). *See also* Staff v. Lido Dunes, Inc., 47 Misc. 2d 322, 262 N.Y.S.2d 544 (Sup. Ct. 1965).

[24] Conner v. Conejo Valley Dev. Co., 61 Cal. Rptr. 333 (Ct. App. 1967); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). *See also* Brown, *Building Contractor's Liability After Completion and Acceptance*, 16 CLEV.-MAR. L. REV. 193 (1967).

[25] *See, e.g.*, Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[26] 154 Colo. 78, 388 P.2d 399 (1964).

[27] It is interesting to note that this same court subsequently held that in the absence of a written or express warranty, a house previously occupied was not a new house; therefore, the purchaser could not have relied upon an implied warranty of fitness for habitation. H.B. Bolas Enterprises, Inc. v. Zarlengo, 156 Colo. 530, 400 P.2d 447 (1965). It has been suggested, however, that an implied warranty should cover used houses as well as new houses, at least to the extent of imposing a duty upon the seller to disclose any known defects. *See* Lokash, *House Purchasers Protection — The Need for Reform*, 24 FACULTY OF L. REV. U. TORONTO 20 (1966); Bearman, *Caveat Emptor in Sales of Realty — Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961).

family. In extending the implied warranty doctrine to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting, the court stated:

> That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.[28]

The court went on to find that builder-vendors impliedly warrant that they have complied with the area building code and, where a home is the subject of a sale, that it was built in a workmanlike manner and is fit for habitation.[29]

In a 1966 case, *Bethlahmy v. Bechtel*,[30] the defendant had constructed a house and sold it to the plaintiff. After plaintiff took possession he claimed that the house was unfit for habitation because of water seepage. The Idaho Supreme Court held that a purchaser of a new house is entitled to rescission and restitution where major defects render the house unfit for habitation. In so holding, the court found that:

> [Application of] the rule of caveat emptor 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.[31]

In 1967, two more states judicially abrogated the doctrine. In *Waggoner v. Midwestern Development, Inc.*,[32] the plaintiffs had purchased a new residence, which had been completed prior to sale, from the defendant-builder-vendor and thereafter occupied it as their home. Apparently, heavy rains resulted in a rise in the water table sufficient to cause water to seep into the basement of the house. In an action against the builder-vendor for damages, the Supreme Court of South Dakota concluded that "where in the sale of a new house the vendor is also a builder of houses for sale there is an implied warranty of reasonable workmanship and habitability surviving the delivery of deed."[33] *Moore v. Werner*[34] involved the purchase of a new house from the builder-vendor and a subsequent suit by the purchaser to recover damages for defective workmanship and inferior materials used in construction. The Houston Court of Appeals found that when the suit is between the original parties to the contract, one of whom con-

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[28] Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399, 402 (1964).
[29] *Id.* at 78, 388 P.2d at 402.
[30] 415 P.2d 698 (Idaho 1966).
[31] *Id.* at 710.
[32] 154 N.W.2d 803 (S.D. 1967).
[33] *Id.* at 809.
[34] 418 S.W.2d 918 (Tex. Civ. App. 1967).

structed the house in question, there is no reason to distinguish between the sale of a new house and the sale of personalty. The court stated:

> It was the seller's duty to perform the work in a good and workmanlike manner and to furnish adequate materials, and failing to do so, we believe the rule of implied warranty of fitness applies.[35]

Finally, in a recent decision, *Humber v. Morton*,[36] the Supreme Court of Texas held that a builder-vendor, upon the sale of a new house, impliedly warrants that the house is constructed in a workmanlike manner and is suitable for human habitation. The purchaser had alleged that defects in the fireplace and chimney had caused the house to partially burn. The court ruled that the fact the fireplace had been constructed by an independent contractor did not preclude recovery by the purchaser from the builder-vendor. The court reasoned:

> The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It 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.[37]

APPLICATION OF THE RULE IN ARIZONA

Arizona has strictly adhered to the common law rule of caveat emptor in realty sales. In *Allen v. Reichert*,[38] a leading case frequently cited by other jurisdictions, the Supreme Court of Arizona refused to grant relief to a purchaser of real property for damages resulting from a leaking roof. The court concluded that there could be no warranty of quality or condition implied in the sale of real estate. The court upheld the doctrine again in 1959 in *Voight v. Ott*.[39] There the plaintiffs purchased a new house and shortly after they took possession, it became apparent that the heating-refrigeration system did not work properly. Plaintiffs replaced the defective unit furnished by the builder-vendor and sued for breach of implied warranty, arguing that the unit was personalty rather than realty and that implied warranties of quality attach to such sales. In holding for the vendor, the Supreme Court of Arizona rejected plaintiffs' theory on the ground that the unit was a fixture and therefore part of the realty.

As discussed earlier, caveat emptor does not apply if the quality or condition of the realty has been misrepresented to the purchaser.[40]

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[35] *Id.* at 920.
[36] 426 S.W.2d 554 (Tex. 1968).
[37] *Id.* at 562.
[38] 73 Ariz. 91, 237 P.2d 818 (1951).
[39] 86 Ariz. 128, 341 P.2d 923 (1959).
[40] Nor does the doctrine apply when the builder-vendor expressly warrants the quality or condition of the property. However, as a practical matter, such warranties

Thus, if the vendor makes false representations to the purchaser concerning the fitness of the property involved, the latter may sue the former directly for fraud. However, if the seller is represented by a real estate agent in the conduct of the transaction, other considerations arise. In Arizona, if the sale is procured through a real estate broker who is not authorized to convey the land, but who is engaged merely to find a purchaser upon terms set by the owner, the representations made by the agent cannot bind the owner unless the agent was specifically authorized to make such representations or unless the owner knows of the representations prior to the completion of the transaction.[41] As a practical matter, in order to protect himself, the purchaser would have to confer with the owner concerning the representations made by his agent.

If the agent had no express authority to make such representations, the defrauded purchaser has two courses open to him. He may either make payment, reserving the right to sue the agent for damages, or he may offer to rescind and return the vendor to the status quo. If the purchaser offers to rescind and the offer is refused, the vendor by his refusal is deemed to have ratified the conduct of the agent, and he may be sued directly for fraud.[42] However, if the purchaser elects to sue either the vendor or his agent for fraud, he is going to be faced with a difficult burden of proof in that he must show, *inter alia*, that the alleged representation was made with knowledge of its falsity or with ignorance as to its truth, and with the intent that it should be acted upon by the purchaser.[43]

Conclusion

The builder-vendor presents what appears to be a convincing argument in opposition to the imposition of an implied warranty of quality and fitness in the sale of realty. The reasons advanced in defense of caveat emptor are: (a) the purchaser should make a thorough inspection before buying; (b) the builder-vendor would be harassed with complaints about all sorts of minor shortcomings because purchasers' expectations are unrealistic; (c) the purchaser should obtain an express warranty if he wishes to be protected against defects; and (d) creation of an implied warranty would result in a flood of litigation. Examination of this reasoning, however, discloses its weaknesses.

The first contention of the builder-vendor is untenable since the

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are infrequently given with the sale of real estate. Bearman, *supra* note 27.

[41] Light v. Chandler Improvement Co., 33 Ariz. 101, 261 P. 969 (1928).

[42] *Id.* at 108-09, 261 P. at 971; *accord*, Bailey v. Kuida, 69 Ariz. 357, 213 P.2d 895 (1950).

[43] For a discussion of the nine elements required for actionable fraud in Arizona, see Apolito v. Johnson, 3 Ariz. App. 232, 413 P.2d 291, *modified*, 3 Ariz. App. 358, 414 P.2d 442 (1966).

doctrine of caveat emptor applies only to latent defects. If the purchaser has an opportunity to inspect and the defects are discoverable upon inspection, the purchaser is not protected.[44] However, since the defects are usually latent, the buyer cannot protect himself by inspecting unless he incurs the considerable expense of a thorough inspection by skilled personnel — his own architect, engineers, and specialists to examine the plans and specifications, and a supervisor-inspector to insure proper workmanship.[45] This is completely impractical in the case of the average home-buyer and would defeat the purpose of mass development, *i.e.*, the production of homes at a low cost.[46]

Next, the builder-vendor contends that creation of an implied warranty of quality or fitness would subject him to liability for a multitude of minor defects. Of course, the defect must be substantial if it is to be treated as a breach of warranty.[47] The implied warranty of fitness does not impose upon the builder an obligation to build a perfect house; all houses have some defects and those susceptible of remedy usually would not warrant rescission of the contract.[48] Surely, the danger of harassment of the seller of chattels is also present, but the commercial world, the insurance industry, and the judiciary have resolved that problem. There is no reason why this cannot be done in the area of real estate sales as well.

The argument of the builder-vendor that the purchaser should obtain an express warranty assumes that he is sophisticated enough to do so.[49] Not every buyer retains an attorney when purchasing a home. Moreover, it is unlikely that a home-buyer will be able to protect himself since builder-vendors are usually unwilling to expressly warrant the quality or condition of the property sold.[50] Furthermore, a buyer who does not know of the existence of a defect is in no position to exact a specific warranty.[51] Ostensibly, it would be more reasonable to require the builder-vendor to make an express disclaimer if he wishes to be protected from liability for defects.[52]

Finally, the builder-vendor's contention that recognition of an implied warranty of quality or fitness would result in inundation of the courts is unwarranted, since the interest in allowing just claims outweighs the value of minimizing litigation. "[I]f the claims are just, that is what the courts are for."[53]

The common law rule of caveat emptor developed at a time when

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[44] *See* Godfrey v. Navratil, 3 Ariz. App. 47, 411 P.2d 470 (1966).
[45] Note, *Implied Warranties in the Sale of Realty*, 18 MD. L. REV. 332, 335 (1958).
[46] *Id.*
[47] Haskell, *supra* note 14, at 652.
[48] Bethlahmy v. Bechtel, 415 P.2d 698, 711 (Idaho 1966).
[49] Haskell, *supra* note 14, at 642.
[50] Bearman, *supra* note 27, at 549.
[51] Bethlahmy v. Bechtel, 415 P.2d 698, 707 (Idaho 1966).
[52] Haskell, *supra* note 14, at 642. But the courts might feel that a disclaimer written into a standard form contract is unconscionable.
[53] *Id.*

buyers and sellers dealt at arm's length. The doctrine was based on the premise that the parties occupied an equal bargaining position, in that each had the same opportunity and means available to gather information concerning the subject matter of the sale. Each was expected, almost as a matter of course, to protect himself in the deed.[54] Today with our modern mass-produced housing developments, a purchaser no longer stands on an equal footing with his builder-vendor. He is inexperienced and unskilled in the intricacies of housing construction, and therefore, must rely on the builder-vendor's superior training and skill.

In light of this change in the mores of the market place, it is not surprising that a vendee expects a purchase of realty to be warranted just as a purchase of a chattel. Rather, it is logical that a consumer relies on the fact that the law will protect him with the same vigor in the purchase of a home as it does when he buys items which cross the merchant's counter.[55] Indeed, the purchase of a home is not an everyday transaction; it is usually the most important and expensive purchase of a lifetime.[56] Imposition of a warranty of quality and condition on the structural components,[57] which during the process of construction become "attached" to the land and are thereby transformed from personalty to realty, would not only conform to the reasonable expectations of the vendee, but would also eliminate a trap for unwary buyers who fail or are unable to secure an express warranty.

It is apparent that the reason for the doctrine of caveat emptor has long since passed, and "when the reason for the rule no longer exists, the rule itself should be abandoned."[58] Hopefully, when the opportunity presents itself, Arizona will judicially abrogate this antiquated doctrine which still clings tenaciously to the law of sales of realty.

In his work on *The Nature of the Judicial Process,* Justice Cardozo observed:

> That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule.[59]

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[54] Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 326 (1965).

[55] Bearman, *supra* note 27, at 541.

[56] Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966).

[57] Normally, major fixtures in today's new homes such as built-ins, heating-cooling units, etc., are expressly warranted by their manufacturers, and to this extent, the burden upon the vendor is lessened.

[58] Prudential Ins. Co. of America v. O'Grady, 97 Ariz. 9, 11-12, 396 P.2d 246, 248 (1964).

[59] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 151 (1921), *quoting from* Dwy v. Connecticut Co., 89 Conn. 74, 99, 92 A. 883, 891 (1914).