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COMMENTS

CAVEAT VENDITOR IN MARYLAND CONDOMINIUM SALES: CASES AND LEGISLATION IMPOSING IMPLIED WARRANTIES IN SALES OF RESIDENTIAL CONDOMINIUMS

The real estate market in the past decade has witnessed the increasing popularity of residential condominiums. The maze of interests involved in condominium development, sales, and ownership has prompted the General Assembly to enact stringent warranties to protect individual purchasers. This comment discusses the historical basis for these warranties and examines, from the perspective of a recent Maryland case, the complexity of litigation arising from breach of warranties in condominium construction.

I. INTRODUCTION

Independent developments have occurred recently in the law of implied warranties attached to residential real estate and the law of condominium ownership. The General Assembly has determined that individual home buyers merit statutory warranty protection because the average purchaser lacks the expertise to identify construction defects. When warranty claims arise in a residential condominium, however, the varied property interests existing in a condominium complicate the determination of who deserves warranty protection.

Starfish Condominium Association v. Yorkridge Service Corporation,¹ a 1983 Court of Appeals of Maryland decision, illustrates the complexity of condominium warranty litigation. In that case, the court held that a foreclosure buyer of an incomplete condominium project is liable to unit purchasers for breach of implied warranties regardless of whether he performed the actual construction of the project. The court rejected the vendor's disclaimer that failed to comply with the requirements of the Maryland statutory warranty provisions. In holding that a council of condominium unit owners had standing to sue for defects in the common areas, the court determined that any one or more of the unit owners was entitled to recover all the damages proven to exist in those areas.

This comment will use the *Starfish* decision as a framework to examine the Maryland law of implied warranties regarding condominium sales. In addition, it will discuss recent amendments to the Maryland Condominium Act and suggest their influence on future litigation.

1. 295 Md. 693, 458 A.2d 805 (1983).

II. BACKGROUND

A. *The Retreat of Caveat Emptor*

Originally, under English and American common law, self-reliance on the part of buyers was compulsory: the doctrine of caveat emptor dominated the sale of both real and personal property. As enunciated in a seventeenth century English decision,² a seller made no warranties unless he made a separate promise at the time of contracting that his wares were, in fact, what he described them to be. A mere description gave rise to no liability, as "everyone in selling his wares will affirm that his wares are good . . . yet if he does not warrant them to be so, it is no cause of action."³

The first American decision to adopt this reasoning was *Seixas v. Woods*,⁴ an 1804 decision by the Court for the Correction of Errors of New York. The *Seixas* court held that a seller who advertised brazilletto wood but delivered peachum was not liable to the buyer in the absence of an express promise that the wood was actually brazilletto. Insensitivity toward the plight of buyers characterized American commercial law decisions until the end of the nineteenth century.⁵

The first attack on the doctrine of caveat emptor came from England in *Jones v. Just*.⁶ The *Jones* court held that in certain limited instances when a buyer had no opportunity to inspect goods for which he contracted, and relied on the judgment and skill of the manufacturer, there arose an implied warranty of fitness and merchantable quality.⁷

Six years later, the Court of Appeals of Maryland cited the *Jones* case with approval, but declined to follow it on the facts presented.⁸ Meanwhile, courts in other jurisdictions adopted *Jones* in cases where buyers clearly had no opportunity to discover defects at the time of sale.⁹

2. *Chandelor v. Lopus*, [1603] 79 Eng. Rep. 3.

3. *Id.* at 4.

4. 2 Cai. R. 48 (N.Y. 1804). For early Maryland cases in accord with *Seixas*, see *Wheat v. Cross*, 31 Md. 99 (1869); *Hyatt v. Boyle*, 5 G. & J. 110 (1833); *Johnston v. Cope*, 3 H. & J. 89 (1810).

5. *E.g.*, *Hargous v. Stone*, 1 Seld. 73 (N.Y. 1851) (exhibit of a sample of cotton sheeting not sufficient to create a warranty that the bulk of goods were of the same quality). See generally R. NORDSTROM, HANDBOOK ON THE LAW OF SALES § 54 (1970) (discussing the history of warranty liability in the sale of goods).

6. [1868] 3 Q.B. 197; see also I S. WILLISTON, THE LAW GOVERNING THE SALES OF GOODS (2d. ed 1920) (discussing the English rule as announced in *Jones v. Just*).

7. *Id.* at 202.

8. *Rice v. Forsyth*, 41 Md. 389, 402-05 (1874) (insufficient evidence that the machine purchased failed to perform as would be ordinarily expected or that purchaser made known to the seller his particular needs. *Id.* at 407-08).

9. See, *e.g.*, *White v. Miller*, 71 N.Y. 118, 131-32 (1877) (sale of cabbage seed gave rise to an implied warranty that the seed would produce that particular variety of cabbage); *Hoe v. Sanborn*, 21 N.Y. 552, 561-63 (1860) (manufacturer of circular saws may be liable for implied warranty when there is reason to impute knowledge of their defects to him by reason of his manufacturing); *Wolcott v. Mount*, 36

Buyers of goods eventually gained statutory protection by the widespread adoption of the Uniform Sales Act (Act),¹⁰ and later the Uniform Commercial Code (UCC).¹¹ Under the warranty provisions of these uniform acts,¹² sellers of goods incur warranty obligations imposed by law, absent a clear agreement between the parties to the contrary. The warranties affected only sales of goods, however, creating a dichotomy between personalty and realty sales. The traditional rule of caveat emptor remained undisturbed in real estate sales well into the twentieth century. Indeed, one eminent scholar unequivocally stated in 1920 that "[t]he doctrine of *caveat emptor* so far as the title of personal property is concerned, is very nearly abolished, but in the law of real estate it is still in full force."¹³

In *Milkton v. French*,¹⁴ the Court of Appeals of Maryland upheld the doctrine of caveat emptor in sales of realty. The court held that in the absence of fraudulent misrepresentation or evidence of custom or agreement to the contrary, the vendor of real estate fully protected himself from liability for construction defects by not entering into an express warranty of quality.¹⁵ Subsequent decisions¹⁶ followed *Milkton* because "[i]t [was] settled in Maryland, as in most other jurisdictions, that there are no implied warranties in the sale of real estate."¹⁷

As in the law governing the sale of goods, the English courts were the first to find exceptions to the rigid application of caveat emptor in real estate sales. In *Miller v. Cannon Hill Estates, Ltd.*,¹⁸ where a purchaser contracted to buy a partially completed house, the court found

N.J.L. 262 (1873) (seller impliedly warrants that turnip seed furnished is the variety requested by buyer).

10. The Uniform Sales Act, drafted by Professor Samuel Williston, was modeled on the English Sale of Goods Act, 56 & 57 Vict. c.71 (1893). Between 1907 and 1941, the Act was adopted by 34 states and the District of Columbia. NORDSTROM, *supra* note 5, § 3. The Act has been superseded by Article 2 of the UCC.
11. For a brief history of the UCC and its revisions, see UCC xxv-xvi (1978) report nos. 1-3 of the Permanent Editorial Board for the UCC (1978). The UCC has been adopted, in whole or in part, by every state, the District of Columbia, and the Virgin Islands. *Id.* at xxiii-iv.
12. The implied warranty provisions of the Uniform Sales Act were set out in UNIF. SALES ACT §§ 14-16, 1 U.L.A. 207-308 (1950). Although § 16 provided an implied warranty in a sale by sample, UCC § 2-313 considers a sale by sample as an express warranty. R. NORDSTROM, *supra* note 5, § 74, at 230 n.47. The UCC implied warranty provisions are set forth in §§ 2-314 to 2-316.
13. S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926 (1920 ed.)
14. 159 Md. 126, 150 A. 28 (1930).
15. *Id.* at 136-37, 150 A. at 33.
16. See *Fegeas v. Sherrill*, 218 Md. 472, 147 A.2d 223 (1958); *Gilbert Constr. Co. v. Gross*, 212 Md. 402, 129 A.2d 518 (1957); *Berger v. Burkoff*, 200 Md. 561, 92 A.2d 376 (1952); *cf. Gaybis v. Palm*, 201 Md. 78, 93 A.2d 269 (1952) (contractor under implied obligation to perform the work for which he contracted with skill and care). *But see Note, Implied Warranties in the Sale of Realty*, 18 MD. L. REV. 332 (1958) (urging adoption of implied warranties in the sale of mass-produced homes).
17. *Fegeas v. Sherrill*, 218 Md. 472, 476, 147 A.2d 223, 225 (1958).
18. [1931] 2 K.B. 113, 117.

an implied warranty that the structure, when complete, would be habitable. The *Miller* court based its decision on the buyer's inability to protect himself by inspection at the time of contracting and his necessary reliance on the superior knowledge and skill of the builder.¹⁹

It was not until 1957 that an American court expressly adopted the *Miller* rule, pronouncing it "salutary and based on sound legal reasoning."²⁰ In *Vanderschrier v. Aaron*,²¹ the Court of Appeals of Ohio held that the purchaser of a partially completed house was entitled to an implied warranty that the house would be completed in a workmanlike manner. Accordingly, it found that improperly connected sewer lines that caused sewage to enter the home constituted a breach of warranty.

In both *Miller* and *Vanderschrier*, the courts focused on the reliance of a purchaser necessarily placed on a builder when he contracted to buy an incomplete structure. The early cases following these decisions distinguished between the sales of homes under construction and those completed at the time of contracting.²² Later cases abandoned this distinction and extended the *Miller* rule to sales of completed residential realty.²³ These later decisions acknowledged that the considerations that supported implied warranties in the sale of partially completed houses, that is, reliance upon the seller and the inability of the buyer to protect himself, applied equally in the sale of newly completed houses.²⁴

The growth of mass development housing prompted a reexamination of the distinctions between sales of goods and sales of realty. In *Schipper v. Levitt & Sons, Inc.*,²⁵ for example, the Supreme Court of New Jersey found that the buyers of mass development homes were no better able to protect themselves from latent structural defects than purchasers of automobiles were able to protect themselves from mechanical defects.²⁶ Comparing the sale of mass-produced housing to the mass marketing of automobiles, the *Schipper* court found that the

19. *Id.* at 121.

20. *Vanderschrier v. Aaron*, 103 Ohio App. 340, 343, 140 N.E.2d 819, 821 (1957).

21. 103 Ohio App. 340, 140 N.E.2d 819 (1957).

22. This distinction led to absurd results. *Compare Rappich v. Altermatt*, 106 Ohio App. 282, 151 N.E.2d 253 (1957) (buyer who signed sales contract on or about the date that construction was completed was not entitled to recover for breach of warranty) with *Perry v. Sharon Dev. Co.*, [1937] 4 All. E.R. 390 (buyer who purchased when construction was complete except for door knobs, electrical fixtures, and driveway was entitled to warranty protection). *Rappich* was decided by the same court that decided *Vanderschrier*.

23. *E.g.*, *Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399 (1964); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

24. *See Carpenter v. Donohoe*, 154 Colo. 78, 388 P.2d 399, 400 (1964). *See generally* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961) (tracing early judicial attempts to circumvent the harsh results of caveat emptor in the post-World War II housing market).

25. 44 N.J. 70, 207 A.2d 314 (1965).

26. *Id.* at 90, 207 A.2d at 325.

pertinent, overriding policy considerations were the same.²⁷ Consequently, the court applied the doctrine it had announced in *Henningesen v. Bloomfield Motors*,²⁸ where a breach of a common law warranty of merchantability was the basis for a manufacturer's liability for injury caused by a defective automobile.²⁹ With the *Schipper* decision, the doctrine of caveat emptor was fast becoming an anachronism in the modern real estate market.

Maryland courts declined to extend a common law doctrine of implied warranties into real estate sales. Twice in the late 1960's, the court of appeals noted with approval the trend in other jurisdictions toward adopting implied warranties, but requested the legislature to act upon this matter of public policy.³⁰ The General Assembly responded in 1970 by creating four statutory warranties in the sale of new improved realty.³¹ These provisions warrant that the structure is: (1) free from faulty materials; (2) constructed according to sound engineering standards; (3) constructed in a workmanlike manner; and (4) fit for habitation.³² These warranties, which are limited in application to newly constructed private dwelling units, and fixtures and structures that are made a part thereof,³³ run from the vendors³⁴ of new improved realty to the original purchasers.³⁵

In the same year that the General Assembly enacted the Maryland warranty provisions, the National Conference of Commissioners on

27. *Id.* at 91-92, 207 A.2d at 325.

28. 32 N.J. 358, 161 A.2d 69 (1960).

29. *Schipper*, 44 N.J. at 90, 207 A.2d at 325.

30. *Allen v. Wilkinson*, 250 Md. 395, 243 A.2d 515 (1968). The *Allen* court, which cited cases from other jurisdictions that found implied warranties in the sale of realty, stated, "We think that while there is some merit in the newer view . . . such a change should be made by the legislature." *Id.* at 398, 243 A.2d at 517; see *Thomas v. Cryer*, 251 Md. 725, 248 A.2d 795 (1969) (per curiam). The court quoted its call for legislative action in *Allen*, but followed that case because the legislature had not acted. *Id.* at 727, 248 A.2d at 796.

31. 1970 Md. Laws 151 (codified as amended at MD. REAL PROP. CODE ANN. § 10-203 (1981)).

32. MD. REAL PROP. CODE ANN. § 10-203(a)(1)-(4) (1981). In the case of a dwelling completed at the time of delivery of the deed to the purchaser, the warranties expire one year after delivery of the deed or the taking of possession by a purchaser. If the dwelling was not complete at the time of delivery of the deed, the warranties expire one year after completion or possession by the purchaser. Any action arising under the warranties must be brought within two years after the defect was or should have been discovered or within two years after the expiration of the warranty. *Id.* § 10-204.

33. *Id.* § 10-201(b).

34. "Vendor" means any person engaged in the business of erecting or otherwise creating an improvement on realty, or to whom a completed improvement has been granted for resale in the course of his business. *Id.* § 10-201(e).

35. *Id.* § 10-201(c). The statute's protection is limited to "original purchasers"; thus, subsequent purchasers enjoy no statutory warranty protection. *Id.* The court of appeals found that the statutory warranties place "an imposing burden on vendors." *Loch Hill Constr. Co. v. Fricke*, 284 Md. 708, 718-19, 399 A.2d 883, 890 (1979).

Uniform State Laws began drafting the Uniform Land Transactions Act (ULTA), a model act designed to reform real estate transactions law.³⁶ The ULTA includes a warranty provision³⁷ similar to those in the Maryland statute.³⁸ The official comment to the ULTA warranty provision indicates, however, that the drafters contemplated wider application than did the Maryland legislature. The ULTA warranties are implied in the sale of used, as well as new, and commercial, as well as residential, real estate.³⁹ The commissioners noted that the implied warranty provision is "perhaps the most important example of the modernization of real estate law by this Act."⁴⁰

B. *The Development of Condominium Law*

While the law of warranties in real property sales was undergoing transition, new concepts of real property ownership were evolving in the form of condominium law. The Maryland Horizontal Property Act was originally enacted in 1963,⁴¹ and has since undergone extensive revision.⁴² Under the Maryland statute, each owner in a condominium holds a fee simple individual interest in his unit and a fee simple joint interest in the common elements as a tenant in common with the other unit owners.⁴³ The unit owner's undivided percentage interest in the common elements attaches to the unit and cannot be severed by sale, subdivision, or consolidation.⁴⁴ For most purposes, the unit owner's

36. UNIF. LAND TRANSACTIONS ACT, 13 U.L.A. 539-714 (1980).

37. ULTA § 2-309, 13 U.L.A. 609-12 (1980). The ULTA was approved by the National Conference of Commissioners on Uniform State Laws in August 1975. *Id.* at 539.

38. The ULTA implies the following warranties: (1) suitability for ordinary use; (2) freedom from defective materials; (3) construction in accordance with applicable law and sound engineering and construction standards; (4) and in a workmanlike manner. ULTA § 2-309, 13 U.L.A. 609-12 (1980). For the Maryland statutory warranties, *see supra* text accompanying notes 31-33.

39. ULTA § 2-309, 13 U.L.A. 610-11 comment 1 (1980).

40. ULTA, 13 U.L.A. 539, 541 Commissioners Prefatory note (1980). This sentiment had been expressed several years earlier in the 1963 revision of Professor Williston's treatise on contracts. In a retreat from the earlier position that implied warranties were nonexistent in real estate sales, the revised edition urged general acceptance of the "enlightened approach," releasing the sale of new homes from the doctrine of caveat emptor. 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926A (3d ed. 1963 & Supp. 1983); *cf.* S. WILLISTON, *supra* note 13, § 926 (implied warranties do not exist in real estate transactions).

41. 1963 Md. Laws 387 (originally codified at MD. ANN. CODE art. 21, §§ 117-41 (1963)). This Act was recodified at MD. REAL PROP. CODE ANN. §§ 11-101 to -127 (1974). In 1974, this Act was repealed and reenacted at *id.* §§ 11-101 to -128.

42. For an historical discussion of the Act and its revisions, see REPORT OF THE CONDOMINIUM REVISION COMMITTEE OF THE REAL PROPERTY PLANNING AND ZONING SECTION OF THE MARYLAND STATE BAR ASSOCIATION, *reprinted in* MD. REAL PROP. CODE ANN. (1974 & Supp. 1980) (beginning of title 11).

43. MD. REAL PROP. CODE ANN. § 11-107(a) (1981); *see also* 64 Op. Att'y Gen. 334, 335 (1979) (unit owners as tenants in common must unanimously agree on actions affecting the common elements absent a statutory provision to the contrary).

44. *Andrews v. City of Greenbelt*, 293 Md. 69, 80, 441 A.2d 1064, 1071 (1982).

interests in the common elements and in his particular unit constitute a single parcel of property.⁴⁵

The general management of a condominium is handled by a council of unit owners.⁴⁶ These councils or associations are legal entities and may be incorporated as a nonstock corporation, or may be unincorporated.⁴⁷ Their powers include the management and maintenance of the common elements of the condominium for the benefit of the unit owners.⁴⁸

The typical condominium thus embraces two distinct forms of ownership, one individual and one joint. The joint tenancy in the common elements is managed by a third entity, the council, for the benefit of the joint tenants. Because of these varied interests, traditional concepts of privity and standing often pose threshold questions that must be resolved by a court before it can analyze the merits of a claim. In addition, courts and legislatures tend to treat condominiums as a hybrid of real and personal property.⁴⁹ These pre-packaged units of living space bear little resemblance to the unique parcels of English and American countryside that spawned traditional concepts of caveat emptor and specific performance of sales contracts. Recent amendments to the Maryland Condominium Act⁵⁰ have provided legislative resolution to some of these issues, but judicial application will be clarified only as cases arise.

III. IMPLIED WARRANTIES IN CONDOMINIUM SALES

The Court of Appeals of Maryland analyzed the statutory warranty provisions as applied to condominium sales in *Starfish Condominium Association v. Yorkridge Service Corporation*.⁵¹ This case illus-

45. *Id.* at 77, 441 A.2d at 1069.

46. MD. REAL. PROP. CODE ANN. § 11-109(a) (1981). "The affairs of a condominium [are] governed by a council of unit owners which, even if unincorporated, constitute[s] a legal entity for all purposes. The council . . . shall be comprised of all unit owners." *Id.* The responsibilities of the council are generally delegated to a board of directors, officers, managing agent, or some other person as provided for by the condominium bylaws. *Id.*

47. *Id.* § 11-109(d).

48. *Id.* § 11-108.1. A council also has the power to exist perpetually, subject to unit owners' right to terminate the condominium regime; to adopt and amend rules, regulations, and budgets and collect assessments for common expenses; to sue and be sued in its own name on matters affecting the condominium; to transact business; to make contracts, incur liabilities and borrow money, sell, mortgage, lease or otherwise dispose of any part of its assets; to purchase property; to hire and terminate employees; to invest and lend funds in furtherance of its operations; to regulate, maintain, cause improvements to be made to, or grant easements over or rent the common elements. *Id.* at 11-109(d).

49. For examples of treatment of condominiums as personal property, see *infra* note 86 and accompanying text.

50. For a discussion of these amendments, see *infra* notes 79-84 and accompanying text.

51. 295 Md. 693, 458 A.2d 805 (1983). The *Starfish* court applied the general war-

trated the problems that commonly arise in condominium litigation with an added complexity: the liability of a non-builder real estate vendor for breach of construction warranties in a condominium that it had purchased at a foreclosure sale. The court's finding of liability on the part of this vendor is not restricted to condominium sales, but apparently affects sales of all new residential realty.

A. *The Facts of Starfish*

In *Starfish Condominium Association v. Yorkridge Service Corporation*,⁵² the Court of Appeals of Maryland was confronted with issues of a non-builder vendor's liability for breach of statutory warranties, an attempted disclaimer, and the standing of a council to sue for defects in the common elements. The original developer and builder of a thirty-six unit apartment complex defaulted on his construction loans when the project was nearly complete.⁵³ A joint venture purchased the project at public auction, with the intention of completing construction and imposing a condominium regime on the development. The joint venture, a general partnership, consisted of a local realtor and an investment corporation that was wholly owned by a corporate lender.⁵⁴ According to plan, the project was completed and established as a condominium in the spring of 1975, by which time all but one of the units had been sold.⁵⁵

The council of unit owners and seventeen individual owners sued the joint venture for breach of statutory warranties arising from construction defects in both the common elements and individual units. The trial court entered judgment against the council on its claim for defects in the common areas, but ruled in favor of the unit owners' claim for defects in their particular units.⁵⁶ On appeal, the court of appeals unanimously held that the joint venture had incurred implied warranty obligations as a vendor of residential real estate under the Maryland statute⁵⁷ and further, that its attempt to disclaim this liability was ineffective.⁵⁸ By giving effect to a 1980 amendment to the Maryland Condominium Act, the *Starfish* court found that the council had

ranty provisions of MD. REAL PROPERTY CODE ANN. § 10-203 (1981), rather than the warranties specifically applicable to sales of condominiums. The latter provision was enacted in 1980, after the sales which resulted in the *Starfish* litigation. See *infra* notes 79-80 and accompanying text.

52. 295 Md. 693, 458 A.2d 805 (1983).

53. *Id.* at 697, 458 A.2d at 807. At the time of default, the project was 70-85% complete.

54. *Id.* The council's and unit owners' claims against the realtor were voluntarily dismissed when he was adjudicated bankrupt. *Id.* at 698-99, 458 A.2d at 808.

55. *Id.* at 697-98, 458 A.2d at 807-08.

56. *Id.* at 698, 458 A.2d at 808.

57. *Id.* at 702, 458 A.2d at 810 (citing MD. REAL PROP. CODE ANN. §§ 10-201(e), 10-203 (1981)).

58. *Starfish*, 295 Md. at 702, 458 A.2d at 810. The sales contracts for the units contained the following provision: "The unit and the appliances and fixtures con-

standing to sue for defects in the common areas.⁵⁹ The court also held that any unit owner or fraction of all the unit owners was entitled to recover all of the damages for defects in the common elements by virtue of his or their undivided interest as tenant[s] in common.⁶⁰

B. *Liability of Non-Traditional Builder-Vendors*

For purposes of warranty liability, Maryland has adopted the traditional concept of "vendor" in its statutory definition: "[A]ny person engaged in the business of erecting or otherwise creating an improvement on realty, or to whom a completed improvement has been granted for resale in the course of his business."⁶¹ In *Starfish*, the joint venture challenged the applicability of this definition.⁶² As buyers at a foreclosure sale, they claimed to be the original purchasers and thus the beneficiaries rather than the warrantors under the statute.⁶³ The court found, however, that a purchaser protected by the statute is the purchaser of a completed improvement.⁶⁴ By taking the project prior to completion, completing construction, and selling the units, the joint venture was in fact a vendor.⁶⁵

In cases from other jurisdictions, sellers have used the definition of "vendor" to defend against actions for breach of implied warranty, asserting that they fail to fall within its reach.⁶⁶ As in *Starfish*, however, these jurisdictions have interpreted "vendor" broadly. Although the term implies that a person be regularly engaged in the building business, a history of building experience is not necessary.⁶⁷ A first time builder is sufficiently "in the business" to impliedly warrant his work.⁶⁸ Furthermore, courts have held that the term includes the occasional builder⁶⁹ and, under certain circumstances, the real estate agent.⁷⁰ The

tained therein are sold 'as is' and . . . the seller is under no obligation to decorate, repaint, replace or repair any item or matter contained therein." *Id.*

59. *Id.* at 703-08, 458 A.2d at 810-13.

60. *Id.* at 707-08, 458 A.2d at 812-13.

61. MD. REAL PROP. CODE ANN. § 10-210(e) (1981).

62. *Starfish*, 295 Md. at 699-701, 458 A.2d at 808.

63. *Id.* at 701, 458 A.2d at 809.

64. *Id.* (construing MD. REAL PROP. CODE ANN. § 10-201(c) (1981)).

65. *Starfish*, 295 Md. at 701, 458 A.2d at 809.

66. *See cases cited infra* notes 67-72.

67. *Mazurek v. Nielsen*, 42 Colo. App. 386, 599 P.2d 269 (1979) (first-time builder who hired architect, contractor, and subcontractor to construct house was liable for breach of implied warranty of habitability when well failed); *accord Sloat v. Matheny*, 44 Colo. App. 1, 605 P.2d 71 (1980), *aff'd*, 625 P.2d 1031 (Colo. 1981).

68. *Id.* at 390, 599 P.2d at 271.

69. *E.g.*, *McDonald v. Miannecki*, 79 N.J. 275, 398 A.2d 1283 (1979) (builder need not be in the business of mass producing homes to be liable for breach of warranty); *accord Hermes v. Staiano*, 181 N.J. Super. 424, 437 A.2d 925 (1981); *Hodgson v. Chin*, 168 N.J. Super. 549, 403 A.2d 942 (1979).

70. *Capra v. Smith*, 372 So. 2d 321 (Ala. 1979) (real estate agent was a vendor since she secured financing and the building site and was involved in drawing the plans for a house which was sold to a member of the public).

part-time builder who sells a house to a member of the public has been held a "vendor" even though he began construction with the intent of occupying the house himself.⁷¹ The question of liability for breach of implied warranty does not turn on the seller's business or profession, but on the commercial rather than casual nature of the sale.⁷²

This flexible concept of "vendor" is consistent with the language of the Maryland statute, which includes not only those "engaged in the business of erecting or otherwise creating an improvement on realty," but also one to whom "a completed improvement has been granted for resale in the course of his business."⁷³ This latter category presumably includes sellers who, although not liable by reason of their superior knowledge and skill, nonetheless are in a better position than the purchaser to detect and prevent construction defects. This extension of the original policy considerations underlying warranty liability appears to focus more on the status of the parties than on the differences in their technological acumen.

One group commonly involved in construction projects has largely escaped liability for breach of implied warranty. A construction lender does not incur warranty liability when a project it funded is found to be defective.⁷⁴ This freedom from liability, however, is less certain when the lender forecloses on a defaulting borrower-contractor and acquires the property. By arranging for the completion and sale of the project, a lender may open itself to warranty liability.⁷⁵

Under the ULTA, the holder of a security interest in realty who forecloses, acquires, and resells the property does not become a vendor for warranty purposes.⁷⁶ Whether Maryland would follow the ULTA

71. *Sloat v. Matheny*, 625 P.2d 1031 (Colo. 1981). *But see* *Klos v. Gockel*, 87 Wash. 2d 567, 554 P.2d 1349 (1976) (part-time contractor who built three houses with the intent of living in one of them and who sold it to a member of the public after living in it for one year was not liable as a commercial builder-vendor).

72. *Capra v. Smith*, 372 So. 2d 321, 323 (Ala. 1979).

73. MD. REAL PROP. CODE ANN. § 10-201(e) (1981).

74. *Walters v. First Federal Sav. & Loan Ass'n*, 131 Ariz. 321, 326, 641 P.2d 235, 239 (1982); *1000 Grandview Ass'n v. Mt. Washington Assoc.*, 290 Pa. Super. 265, 268, 434 A.2d 796, 798 (1981). *But cf.* *Connor v. Great W. Sav. & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (lender who became "active participant" in construction project was found liable in negligence when soil proved to be unsuitable for large-scale housing development). The Court of Appeals of Maryland found the *Connor* rationale inapplicable to the facts of *Starfish*. *Starfish Condominium Ass'n v. Yorkridge Serv. Corp.*, 295 Md. 673, 719-20, 458 A.2d 805, 819 (1983).

75. *Compare* *Smith v. Continental Bank*, 130 Ariz. 320, 636 P.2d 98 (1981) (foreclosing bank that was not in the business of constructing homes, did not perform the work, and did not warrant the construction, was not liable for breach of implied warranties merely because it arranged completion and sale of residential development) *with* *Chotka v. Fidelco Growth Investors*, 363 So. 2d 1169 (Fla. Dist. Ct. App. 1980) (foreclosing construction lender was liable for breaches of implied warranty arising from construction defects when it assumed title to the project, completed construction, and held itself out to the public as the developer).

76. ULTA § 2-309(f), 13 U.L.A. 611 (1980).

position is unclear after the *Starfish* decision. This issue was not squarely before the court of appeals in *Starfish*, and Maryland appellate courts have not confronted the question of a foreclosing lender's liability. The joint venture was not the original construction lender for the *Starfish* project, but rather an outside buyer at a foreclosure sale. It was, nonetheless, closer in nature to a foreclosing lender than a builder-vendor. The joint venture was not regularly engaged in the business of constructing and selling homes, but was a corporate investor who bailed out a bankrupt project. The joint venture did not perform the construction work, but instead entered into an agreement with a second contractor for its completion. It had, however, taken title to the project, arranged for its completion, and perhaps most significantly, appeared to the public as if it were the developer.

The joint venture was liable because the *Starfish* court determined it a vendor under Maryland law. The court of appeals rejected the joint venture's contention that it had not performed the actual work on the project. In holding that warranty liability is not dependent on the vendor actually having performed the warranted work, the *Starfish* court drew on the example of the general contractor who is liable for the work performed by a subcontractor.⁷⁷ To recover damages for breach of statutory implied warranties, the court stated that a purchaser need only show the existence of a warranty, its breach, and the resulting damages.⁷⁸

The *Starfish* decision leaves open the question of a foreclosing lender's liability for construction defects when it forecloses on an uncompleted project and, instead of reselling to a foreclosure buyer, arranges for the completion and sale of the project. While Maryland would probably follow the general rule that lenders are not liable for construction defects, a foreclosing lender faces some uncertainty as to how involved it may become in the completion of the project before incurring warranty liability.

Recent changes in the Maryland Condominium Act (Condominium Act) may result in expanded liability for condominium vendors. In 1981, section 11-131 was added to the Real Property Code, providing that in addition to the warranties implied in the sale of all new residential realty, other warranties specifically applicable to condominiums would be implied in the sale of all new or newly converted condominiums.⁷⁹ These warranties run from a developer of a condominium

77. *Starfish*, 295 Md. at 710, 458 A.2d at 814.

78. *Id.*

79. 1981 Md. Laws 246 (current version at MD. REAL PROP. CODE ANN. § 11-131(b) (1981)). The new warranty provision implies the following warranties in the sale of a new or newly converted dwelling, which includes both the individual unit and its appurtenant interest in the common areas:

- (1) That the developer is responsible for correcting any defects in materials or workmanship in the construction of walls, ceilings, floors, and heating and air conditioning systems in the unit, and

project to the unit owners.⁸⁰ A developer under the Condominium Act is any person who subjects his property to a condominium regime,⁸¹ that is, records a declaration, by-laws, and a condominium plat in the land records office of the county where the project is located.⁸² This provision was not pertinent to the *Starfish* decision, as the 1981 amendments were only applicable to condominiums for which a notice of intent to create a condominium was filed after July 1, 1981.⁸³

The new section apparently does not embody the traditional concept of builder-vendor, at least with regard to the disparity of skill and knowledge on which warranty liability was formerly premised. A developer of a condominium need not be in the business of constructing improvements to realty or acquiring them for resale as under the original warranty provision. So long as the developer is responsible for establishing the condominium regime, he is liable for defects that come within section 10-203 and the new section 11-131 of the Real Property Code.⁸⁴ His liability is therefore not premised on his superior knowledge and skill, but clearly on his status as a seller of condominiums. This degree of liability is more closely analogous to the standard imposed on the nonmanufacturer-merchant of goods under the UCC than to traditional concepts of builder liability.⁸⁵ Extending warranty liabil-

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- (2) That the heating and air conditioning systems have been installed in accordance with acceptable industry standards and:
- (i) That the heating system is warranted to maintain a 70°(F) temperature with the outdoor temperature [at a level specified in the Energy Conservation Building Standards Act]; and
 - (ii) That the air conditioning system is warranted to maintain a 78°(F) temperature inside with the outdoor temperature [at a level specified by the Energy Conservation Building Standards Act];

Id. Compare *id.* (specificity of condominium warranties) with *id.* § 10-203(a)(1)-(4) (language of the general warranties implied in the sale of new improved real estate).

80. In 1982, the General Assembly amended § 11-131 to provide that the warranties on the common elements run directly from the developer to the council of unit owners. MD. REAL PROP. CODE ANN. § 11-131(c) (Supp. 1982). The implied warranties on the common elements apply to the roof, foundation, external supporting walls, mechanical, electrical, and plumbing systems and other structural elements. *Id.*
81. *Id.* § 11-101(f).
82. *Id.* at § 11-102.
83. *Id.* § 11-142(f); see *Starfish*, 295 Md. at 705-06 n.1, 458 A.2d at 812 n.1. It is clear that, had the new warranty provision been in effect, the joint venture would have been liable as a developer as it imposed the condominium regime on the project. *Id.* at 697-98, 458 A.2d at 808.
84. Section 11-131 states that its warranties are in addition to the warranties in § 10-203. MD. REAL PROP. CODE ANN. § 11-131(b) (1981).
85. UCC § 2-314 (1978), applied in *Sheeskin v. Giant Food*, 20 Md. App. 611, 629-30, 318 A.2d 874, 885 (1976). In *Starfish*, the court of appeals stated that a vendor's liability under § 10-203 of the Real Property Code is analogous to a merchant's liability under UCC § 2-314. *Starfish Condominium Ass'n v. Yorkridge Serv. Corp.*, 295 Md. 693, 710, 458 A.2d 805, 814 (1983). If so, then the court unnecessarily determined that the joint venture was responsible for at least some of the

ity to condominium developers who may not fit within a restrictive definition of vendor is consistent with a tendency of courts and legislatures to treat condominiums as personal rather than real property.⁸⁶

In regard to the sale of goods, the General Assembly has been consumer-oriented, adopting a non-uniform amendment to Maryland's version of the UCC⁸⁷ as well as a comprehensive Consumer Protection Act.⁸⁸ Thus, when faced with a close question of liability in a condominium sale, the court of appeals may place a heavier burden on a developer than on a vendor of non-condominium realty.

C. *Attempted Disclaimers of Implied Warranties in Real Estate Sales*

The contracts for the sale of the condominium units in *Starfish* provided that the units themselves, the appliances, and the fixtures were sold "as is."⁸⁹ In limited circumstances, this language can effectively disclaim implied warranties in the sale of goods.⁹⁰ Vendors have frequently employed this method of disclaiming warranties in real estate transactions, with mixed results.⁹¹ After *Starfish*, however, it is

construction on the project because a nonmanufacturing-merchant is liable for breach of implied warranty so long as he is in the chain of distribution. UCC § 2-314 (1978).

86. See, e.g., *Centex Homes Corp. v. Boag*, 128 N.J. Super. 385, 390, 320 A.2d 194, 198 (1974) (vendor of condominium units not entitled to specific performance of sales contract because condominium units are not unique and "regardless of their realty label, share the same characteristics as personal property."); see also FLA. STAT. ANN. § 718.203 (West 1976) (provides for implied warranties of *merchantability* and *fitness* in the sale of condominiums; these terms are generally associated with sales of goods).
87. See MD. COM. LAW CODE ANN. § 2-316.1 (Supp. 1983) (implied warranties cannot be excluded or modified in the sale of consumer goods). See generally Freeman & Dressel, *Warranty Law in Maryland Product-Liability Cases: Strict Liability Incognito*, 5 U. BALT. L. REV. 47 (1977) (comparing warranty liability under the Maryland commercial code to strict liability in tort).
88. 1976 Md. Laws 907 (codified at MD. COM. LAW CODE ANN. §§ 13-101 to -501 (1983)).
89. *Starfish*, 295 Md. at 701-02, 458 A.2d at 810.
90. UCC § 2-316(3)(a) (1978). Although this section provides that "all implied warranties are excluded by expressions like 'as is,' 'with all faults,' or other language which in common understanding calls the buyer's attention to the exclusion," the judiciary has restricted the effectiveness of this method of disclaiming warranties. See *Fairchild Indus. v. Maritime Air Serv., Ltd.*, 274 Md. 181, 190, 333 A.2d 313, 318 (1975) (court imposed a conspicuousness requirement on disclaimers under § 2-316(3)(a), because otherwise the section would be "contrary to the spirit of the U.C.C., and to the policy disfavoring exclusion of warranties").
91. Compare *Lenawee County Bd. of Health v. Messerly*, 417 Mich. 17, 331 N.W.2d 203 (1982) (presence of "as is" clause at the end of sales contract was sufficient evidence of agreement between the parties to assign the risk of defects to the purchaser) and *Schepps v. Howe*, 665 P.2d 504 (Wyo. 1983) ("as is" clause included in listing, advertisements, and sales contract for house constituted an effective waiver of warranty rights) with *Colsant v. Goldsmith*, 97 Ill. App. 3d 53, 421 N.E.2d 1073 (1981) ("as is" clauses that were in regular size type and included in standard form multi-page real estate contracts were ineffective since they did not meet the builder's burden of showing a conspicuous disclaimer that fully disclosed

clear that in Maryland the use of "as is" will not effectively disclaim warranties that are implied in real estate sales.⁹² The court held that an effective disclaimer must strictly comply with subsection 10-203(d), which requires a written, detailed instrument signed by the purchaser.⁹³ An "as is" clause, the *Starfish* court found, failed "to advise the purchaser of the rights which the statute confers and which [he] is asked to waive."⁹⁴

Generally, while disclaimers of implied warranties have not been found to be against public policy, they have been strictly construed against builder-vendors. Vendors have the burden of showing a conspicuous provision that fully discloses the consequences of its inclusion.⁹⁵ The requirements of the Maryland disclaimer provision and its interpretation by the court of appeals attempt to ensure only knowing and intelligent waivers of warranty rights by residential purchasers. As a practical matter, vendors who attempt to comply with subsection 10-203(d) may find that the mechanics of securing the purchaser's informed waiver of warranty protection deters potential buyers. A sales contract that includes a separate, detailed disclaimer of warranties presents an unattractive and tenuous prospect to most home buyers. In any case, however, where it is not clear that a waiver of warranty rights was fully informed and consensual, or does not meet the formal requirements of subsection 10-203(d), the waiver is likely to be found ineffective.

D. *Standing to Sue for Defects in the Common Areas*

In Maryland, all actions must generally be brought in the name of the real party in interest.⁹⁶ The joint venture in *Starfish* asserted that the council of unit owners was not the real party in interest as they held no property rights in the subject matter of the suit. Therefore, the joint venture reasoned, the council lacked standing to sue for the defects in the common elements.⁹⁷

its consequences) and *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1980) (same) and *Tassan v. United Dev.*, 88 Ill. App. 3d 581, 410 N.E.2d 902 (1980) (same).

92. *Starfish*, 295 Md. at 702, 458 A.2d at 810.

93. MD. REAL PROP. CODE ANN. § 10-203(d) (1981) provides:

[A]n implied warranty may be excluded or modified wholly or partially by a written instrument, signed by the purchaser, setting forth in detail the warranty to be excluded or modified, the consent of the purchaser to the exclusion or modification, and the terms of the new agreement with respect to it.

94. *Starfish*, 295 Md. at 702, 458 A.2d at 810.

95. See *Colsant v. Goldsmith*, 97 Ill. App. 3d 53, 421 N.E.2d 1073 (1981); *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 415 N.E.2d 1224 (1980); *Tassan v. United Dev.*, 88 Ill. App. 3d 581, 410 N.E.2d 902 (1980); accord *Starfish Condominium Ass'n v. Yorkridge Serv. Corp.*, 295 Md. 693, 458 A.2d 805 (1983).

96. MD. R.P. 203. Exceptions to this rule can be found in *id.* 203(b).

97. *Starfish*, 295 Md. at 703, 458 A.2d at 810-11.

Common elements of a condominium are held by the unit owners as tenants in common.⁹⁸ Although the council is charged with the management of the common elements, it enjoys no property interest in them. As a general rule, in the absence of a statutory provision to the contrary, condominium associations lack standing to sue in a representative capacity at least with respect to property rights that are held by unit owners.⁹⁹ Condominium councils in Maryland and elsewhere generally have the capacity to bring a legal action, but this is distinguished from the standing to sue as a real party in interest.¹⁰⁰ Former section 11-109 of the Condominium Act, which conferred capacity to sue on the *Starfish* council, provided that a council had the power "to sue and be sued, complain and defend in any court."¹⁰¹

Courts in other jurisdictions have interpreted similar statutory language in conjunction with other sections of their condominium acts that impose affirmative duties on the councils to maintain the common elements. Citing strong policy reasons to allow the councils to bring suit, these courts have construed their statutes to find that the councils are the proper parties to sue on matters affecting the common elements.¹⁰² The courts declared that denial of standing to the associations would result in a multiplicity of lawsuits, inconsistent adjudication of claims, and judicial waste,¹⁰³ and that the cost of establishing a case asserting damages in the common elements would discourage individual litigants.¹⁰⁴

In Maryland, questions of standing have been resolved by a 1980 amendment to section 11-109, which gives condominium councils the statutory power to sue on behalf of themselves or two or more unit

98. MD. REAL PROP. CODE ANN. § 11-107(a) (1981).

99. *Friendly Village Community Ass'n v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973); *Reibel v. Rolling Green Condominium A, Inc.*, 311 So. 2d 156 (Fla. Dist. Ct. App. 1974); *Rubenstein v. Burleigh House Inc.*, 305 So. 2d 311 (Fla. Dist. Ct. App. 1974); *Commodore Plaza at Century 21 Condominium Ass'n v. Saul J. Morgan Enters.*, 301 So. 2d 783 (Fla. Dist. Ct. App. 1974).

100. *Whittington Condominium Apartments, Inc. v. Braemer Corp.*, 313 So. 2d 463, 466 (Fla. Dist. Ct. App. 1975); *Friendly Village Community Ass'n v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 107 Cal. Rptr. 123 (1973). *See generally* Annot., 69 A.L.R. 3d 1143 (1974) (discussing distinction between a condominium association's capacity to sue and its standing to request relief for defects in the common elements).

101. MD. REAL PROP. CODE ANN. § 11-109(d)(2) (1974) (current version at *id.* § 11-109(d)(4) (1981 & Supp. 1983)).

102. *See* *Whittington Condominium Apartments, Inc. v. Braemar Corp.*, 313 So. 2d 463 (Fla. App. 1975) (construing FLA. STAT. ANN. § 711.12(2) (West 1969) (recodified at *id.* § 718.111 (West 1976)); *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 461 A.2d 568 (1983) (construing N.J. STAT. ANN. § 46:8B-15 (WEST 1970)).

103. *Siller v. Hartz Mountain Assocs.*, 93 N.J. 370, 379, 461 A.2d 568, 572-73 (1983); *1000 Grandview Ass'n v. Mt. Washington Assocs.*, 290 Pa. Super. 365, 368, 434 A.2d 796, 798 (1981).

104. *Raven's Cove Townhomes v. Knuppe Dev.*, 115 Cal. App. 3d 783, 791, 171 Cal. Rptr. 334, 338-39 (1981).

owners on matters affecting the condominium.¹⁰⁵ Although this amendment did not become effective until after the institution of the *Starfish* litigation, the court of appeals found that it could be applied to cure the procedural defect in the council's complaint.¹⁰⁶ Questions of a council's standing to sue for matters concerning the common elements have since been clarified by further legislative action. Section 11-131, which provides for implied warranties to unit owners, was amended in 1981 to state that the warranties on the common elements run directly from the developer to the council of unit owners.¹⁰⁷ This section was again amended in 1982 to give the council the exclusive right to sue for breach of warranty in these areas.¹⁰⁸ The General Assembly apparently recognized the practicality of allowing the council to represent the unit owners' interest in suits involving those areas for which it held all other responsibilities.

E. Quantum of Damages Recoverable for Defects in the Common Areas

In *Starfish*, seventeen of the thirty-six individual unit owners joined the council to sue for breach of warranty arising from defects in the common areas. The court raised but rejected the argument that each owner was entitled only to one thirty-sixth of the total damage found to be present.¹⁰⁹ This question arose because of the nature of the individual's interest as a tenant in common holding an undivided percentage interest in the common areas. When less than all of the unit owners are parties to the suit, less than all of the ownership interests in the common elements are represented. Courts that have analyzed this issue have held, however, that any fraction of the unit owners are entitled to recover all the damages proven to exist in the common elements.

Developers have argued that awards that represent the percentage

105. 1980 Md. Laws 681 (codified as MD. REAL PROP. CODE ANN. § 11-109(d)(4) (1981)). This language is similar to that of a comparable provision of the UNIF. CONDOMINIUM ACT § 3-102(4), 7 U.L.A. 163 (Supp. 1984).

106. The court stated: "'Ordinarily a change affecting procedure only, and not substantive rights, made by statute applies to all actions whether accrued, pending or future.'" *Starfish*, 295 Md. at 705, 458 A.2d at 811 (quoting *Richardson v. Richardson*, 217 Md. 316, 320, 142 A.2d 550, 553 (1958)).

107. MD. REAL PROP. CODE ANN. § 11-131(c) (1981 & Supp. 1983).

108. 1982 Md. Laws 836, § 3 (codified at MD. REAL PROP. CODE ANN. § 11-131(c)(4) (1982)). Actions for breach of warranty on the limited common elements can be brought by the council or the unit owners for whose use the areas are reserved. *Id.* Limited common elements are those identified in the declaration or condominium plat as reserved for the exclusive use of one or more, but less than all of the unit owners. *Id.* § 11-101(b)(1).

109. *Starfish*, 295 Md. at 707, 458 A.2d at 812; see also *Stony Ridge Hill v. Auerbach*, 64 Ohio App. 2d 40, 410 N.E.2d 782 (1979) (dismissing developer's claim that the non-party owners' interests should not be reflected in the award for damages caused by defective roof; each owner by statute held an undivided percentage interest in the common areas and a right to have roof repaired; *id.* at 45, 410 N.E.2d at 786).

interests of non-party unit owners would benefit subsequent purchasers who are not entitled to warranty protection.¹¹⁰ Courts have held, however, that despite any advantage to subsequent purchasers, denying an entire award would deprive original purchasers of the benefit of their bargain.¹¹¹ Similarly, one court has held that so long as a single unit owner gives proper notice, a developer is liable for all of the defects in the common areas.¹¹²

In addition to compensatory damages, defects in the common elements may result in consequential damages to the individual condominium unit. In *Andrews v. City of Greenbelt*,¹¹³ the court of appeals held that an award for consequential damages may be justified when a portion of the common elements are taken by eminent domain. The *Andrews* court ostensibly based its decision on the language of subsection 11-112(c)¹¹⁴ of the Maryland Real Property Code. This subsection, however, does not expressly authorize this type of award. Subsection (1) provides for consequential damages to a unit owner "for the taking of all or part of *his respective unit*";¹¹⁵ subsection (3) provides that for a taking of the common elements, unit owners are entitled to a proportional award measured by their percentage interest.¹¹⁶

Despite the lack of express statutory authority, the *Andrews* decision awarding consequential damages to unit owners for damage to their respective units resulting from a taking of common elements is justified. The court reasoned that the individual interest in the unit and the joint interest in the common elements held by a unit owner constituted a single parcel of land because of the unity of ownership, use, and contiguity that exists between them.¹¹⁷ Loss of, or damage to common elements is therefore also loss or damage to the unit.

The general common elements are usually the last segment of a condominium project to be completed.¹¹⁸ Sales are based on plans,

110. *Drexel Properties v. Bay Colony Club Condominiums, Inc.*, 406 So. 2d 515 (Fla. Dist. Ct. App. 1981); *accord Juno by the Sea Condominium Apartments, Inc. v. Juno by the Sea Condominium Ass'n*, 418 So. 2d 1195 (Fla. Dist. Ct. App. 1982).

111. *Drexel Properties v. Bay Colony Club Condominiums, Inc.*, 406 So. 2d 515, 519 (Fla. Dist. Ct. App. 1981); *accord Starfish*, 295 Md. at 707-08, 458 A.2d at 812-13.

112. *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581, 592-93, 410 N.E.2d 902, 911-12 (1980); *accord Starfish*, 295 Md. at 708, 458 A.2d at 812-13 (allowing the council to cure the procedural defect in its complaint did not deprive the joint venture of a substantive right, as any unit owner could have recovered all of the damages proven to exist in the common areas).

113. 293 Md. 69, 441 A.2d 1064 (1982).

114. MD. REAL PROP. CODE ANN. § 11-112(c) (1982); *see Andrews*, 293 Md. at 80, 441 A.2d at 1071.

115. MD. REAL PROP. CODE ANN. § 11-112(c)(1) (1982) (emphasis supplied).

116. *Id.* § 11-112(c)(3).

117. *Andrews*, 293 Md. at 77-79, 441 A.2d at 1070-71.

118. *See Chotka v. Fidelco Growth Investors*, 363 So. 2d 1169 (Fla. Dist. Ct. App. 1980). *See generally Hyatt & Rhoads, Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 960-62 (1976) (size and complexity of condominium common ele-

brochures, and developer's representations of the completed project. When a swimming pool or tennis court fails to materialize or the air conditioning is inadequate, the purchaser is denied the full benefit for which he bargained. Recognizing this, the *Andrews* court stated: "We have no difficulty in finding that there exists a 'unity of use' between a condominium's common elements and an individual's particular unit. The full enjoyment of this type of proprietorship would not be possible unless the unit owner had a right to utilize the common elements."¹¹⁹

The Court of Appeals of Maryland has sanctioned an award of consequential damages to mitigate loss to the individual unit in the case of a taking of common elements by eminent domain, reasoning that this taking lessened the value of the unit to the owner. Construction defects in the common areas giving rise to breach of implied warranty similarly lessen the value of a particular unit. Consequential damages should be recoverable when a breach of warranty damages the common areas of a condominium and depreciates the value of an owner's unit.

IV. CONCLUSION

The law of warranties implied in sales of real property remains in its nascency, as does condominium law in general. In contrast, the law of warranties implied in the sale of goods is well developed and offers some guidance to real estate practitioners. Real estate law will continue to follow the lead of personal property law as mass production and marketing of housing causes the distinctions between the two to become less significant. In Maryland, vendors of residential housing, condominium and otherwise, will be held to statutory standards of performance analogous to that of a merchant under the UCC. Liability will be premised on the seller's status rather than his participation in the actual construction of the dwelling. Disclaimers of warranty liability have been disfavored and will be found ineffective if not in strict compliance with section 10-203(d) of the Real Property Code.

Recent amendments to the Maryland Condominium Act have expanded the potential liability of condominium developers beyond that of vendors of other real estate. The new condominium warranties are far more specific than the original warranty provisions of the Real Property Code, indicating a legislative protectionism for condominium purchasers. Condominium councils are now the direct beneficiaries of warranties on the common areas, increasing the likelihood that more of these suits will be brought. Developers should consider the consumer-oriented approach that the General Assembly and Maryland courts

ments, along with the common construction practice of completing these areas after beginning unit sales, require enforcement of warranty liability for defects in those areas).

119. *Andrews*, 293 Md. at 79, 441 A.2d at 1070.

have taken in regard to sale of consumer goods for it is likely that they will be held to a similar standard.

Linda Semesky Woolf