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The $300,000 Question: Remedies for the New Home Buyer

by Barbara Gathright

The purchase of a new home is generally regarded as the single largest purchase a consumer makes. Figures from the National Association of Homebuilders show that in 1978 the average new home retailed for $55,700. Today that figure is up to $68,200, an increase of $12,500 or about twenty-two percent. Of course, the average retail prices does not reflect the cost of financing. Assuming a twenty percent down payment, and using current interest rates (15 1/4%), a thirty year mortgage would mean that a $68,000 house would actually cost $300,000, or almost five times the original price.

As basic purchase prices and bank financing rates have combined to escalate the cost of a new home, sales in the new home market have fallen dramatically. While national figures for March of 1981 show 518,000 new units were sold, figures for March of 1982 show only 334,000 units sold. These figures represent a 36% decline in a one year period and a 62% decline over the October of 1978 peak figure of 872,000 units sold.

The reason behind the trend is clear; inflation has made such a large purchase a very serious decision. But once the buyer has purchased the new home, what kind of protection against defects does he have? What can the buyer do when the roof leaks or the well runs dry? Is there any consumer protection available? Can the buyer seek a remedy in the courts?

The protection afforded the buyer of a used home is even less than that afforded the new home buyer and this article does not discuss the issues relating to used home sales. Furthermore, the parties against whom the buyer may seek a remedy are limited in this article to the seller and the builder, although the potential liability of the real estate brokers and the builder’s financing agent are possible remedies which should not be overlooked. Thus, this article focuses on some of the remedies available against the builder and seller when a new home buyer discovers his dream house is a nightmare.

Implied Warranties

One of the most frequently used remedies available to the new home buyer is based on an implied warranty of habitability. This warranty was first recognized in 1931 by the English courts and applied to the sale of a partially-finished home. Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113, 1 All E.R. 93 (1931).

American courts were slow to follow the lead of their English counterparts; it was over a quarter of a century later that an American jurisdiction adopted the English approach. In Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957), the court held an implied warranty attached to the sale of a partially-finished home. Seven years later, the Supreme Court of Colorado held an implied warranty would apply to the sale of a completed home as well, since they could find no reasonable basis for the distinction between partially and fully constructed houses. Carpenter v. Donohoe, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964). Today the implied warranty of habitability is recognized in almost every jurisdiction. See Shedd, The Implied Warranty of Habitability: New Applications, New Implications, 8 R.E.L.J. 291, 303 (1980).

Unlike the Colorado and Ohio courts, the Maryland courts refused to recognize the implied warranty of habitability absent legislative intervention. Allen v. Wilkinson, 250 Md. 395, 398, 243 A.2d 515, 517 (1968). In 1970, however, the General Assembly enacted a law creating implied warranties for improvements on real property, 1970 Md. Laws 420. The statute states in part:

(a) Warranties which are implied.—Except as provided in subsection (b) or unless excluded or modified pursuant to subsection (d), in every sale, warranties are implied that, at the time of the delivery of the deed to a completed improvement or at the time of completion of an improvement not completed when the deed is delivered, the improvement is:

1. Free from faulty materials;
2. Constructed according to sound engineering standards;
3. Constructed in a workmanlike manner; and
4. Fit for habitation.


Maryland courts have rarely had occasion to discuss this provision; in the twelve years since its enactment, only two cases discussing the substance of the statute have reached the appellate level. The Court of Special Appeals first applied the warranty in Krol v. York Terrace Bldg., Inc., 35 Md. App. 321, 370 A.2d 589 (1979). In that case, the court determined "that an adequate supply of potable water is one prerequisite of fitness for habitation." Id. at 333, 370 A.2d at 596. In 1979, the Maryland Court of Appeals reaffirmed the Krol decision in another dry well case, stressing the reasonableness of expecting an adequate water supply in a new home. Loch Hill Const. Co. v. Fricks, 284 Md. 708, 716, 399 A.2d 883, 889 (1979). According to the courts, the legislative intent of the statute is to protect the innocent purchaser in light of the vendor’s superior knowledge. Id. at 718–19, 399 A.2d at 890.

Much of the judicial debate on implied warranties has centered on
the expiration of the warranty and the limitations on an action for breach. The statute states: 

(b) Expiration of warranty.— Unless an express warranty specifies a longer period of time, the warranties provided for in this subtitle expire:
(1) In the case of a dwelling completed at the time of the delivery of the deed to the purchaser, one year after the delivery or after the taking of possession by the purchaser, whichever occurs first; and
(2) In the case of a dwelling not completed at the time of delivery of the deed to the purchaser, one year after the date of the completion or taking of possession by the purchaser, whichever occurs first.
(c) Limitation of actions.—Any action arising under this subtitle shall be commenced within two years after the defect was discovered or should have been discovered or within two years after the expiration of the warranty, whichever occurs first.


Thus under the Maryland statute this warranty may begin to run at two different times in two different situations. If the house is completed when the deed is delivered, the warranty begins to run at the time the deed is delivered or at the time the buyer takes possession, whichever comes first. If the deed is delivered before the house is completed, then the warranty begins to run upon the completion of the house or the taking of possession, whichever comes first. The warranty then expires one year from the date upon which it takes effect. The limitation on an action for breach of the warranty is two years after the expiration date or two years after the discovery of the breach, whichever comes first.

An action for breach of implied warranty, then, is barred when it is filed almost three years after the breach. Gensler v. Korb Roofers, 37 Md. App. 538, 378 A.2d 180 (1977). An amended declaration filed four years after the alleged breach of implied warranty is barred by a Statute of Limitations defense as well. Bay State Ins. Co. v. Hill, 34 Md. App. 593, 368 A.2d 1084 (1977). However, the most recent case discussing the real property implied warranties circumvents the limitations prescribed in the Maryland Code by holding that a letter from the seller agreeing to correct defects in the new home removed the statutory bar and extended the limitations period. Potterton v. Ryland Group, Inc., 289 Md. 371, 378, 424 A.2d 761, 765 (1981).

The Potterton decision illustrates that the Maryland courts may be inclined to be liberal in their application of the implied warranties. Liberality would be justified in light of the limited period of time for which the statute offers protection. In comparison, other jurisdictions offer longer periods for recovery. In Alaska, the legislature has enacted a six year limitations period, Alaska Stat. § 09.10.35 (1962 & Supp. 1981), and in South Dakota, the courts have held a warranty runs for a “reasonable” period of time as determined by the fact finder. Sedlmajer v. Jones, 275 N.W.2d 907 (S.D. 1979).

The Express Warranty
An express warranty for the sale of a new home in Maryland is created in three situations. Md. Real Prop. Code Ann. § 10-202 (1981). If an affirmation of fact or promise relating to the new home is made a part of the basis of the bargain between the buyer and the seller, then the warranty is created. Id. The warranty may also arise from a written description of the home or a sample or model of the home, as long as the “basis of the bargain” test is met. Id. Just as in the U.C.C. § 2-313 (1978), the warranty may be oral, but “puffing” may be a defense. Id. See generally Comment, Maryland’s Consumer Protection Act: A Private Cause of Action for Unfair or Deceptive Practices, 38 Md. L.Rev. 733, 734 (1979).

The procedural aspects of the express warranty are the same as those for the implied warranties, discussed above. The Potterton court, which circumvented procedural limitations, did so in order to apply both implied and express warranties. Potterton, 289 Md. at 373, 424 A.2d at 763 (1981). The express warranty was created by the seller’s written statement that construction would be “in a workmanlike manner substantially in accordance with plans and specifications.” Id. Thus the contract of sale may contain a warranty protecting the buyer after the deed is delivered.

Breach Of Contract
An action for breach of contract resembles a breach of express warranty action because both may be based on written or oral statements made by the seller. The contract suit, however, is usually barred by the merger doctrine. This common law doctrine views the deed as the en-
tire agreement between the parties. See generally 6a Powell, The Law of Real Property ¶893 (1981). Inconsistencies between the contract of sale and the deed are merged into the latter since the deed expressed the true and final intent of the parties.

There are, however, recognized exceptions to the merger doctrine. One exception is the collateral agreement. Maryland has long recognized that “parties may enter into covenants collateral to the deed.” Bryant v. Wilson, 71 Md. 440 (1889). These agreements survive the execution of the deed when the additional terms are consistent with the terms of the deed. Levin v. Cook, 186 Md. 535, 539–40, 47 A.2d 505, 507 (1946).

The collateral agreement can be made orally as in Stevens v. Milestone, 190 Md. 61, 57 A.2d 292 (1948). In that case at settlement one of the sellers told the buyers “the things that were to be finished in the house will be finished, also the touching up.” Id. at 66, 57 A.2d at 294. When the finished house did not contain insulation or basement windows as indicated in the plans, the court held the seller’s statement at settlement established a collateral agreement.

Maryland also recognizes an implied in law contract by the builder that he will use care and skill in the construction of a new home. Gaybis v. Palm, 201 Md. 78, 93 A.2d 269 (1952). The measure of damages for breach of this contract is either the cost of remediating the defects or the difference in the fair market value, depending upon the circumstances of the case. Gilbert Const. Co. v. Gross, 212 Md. 402, 129 A.2d 518 (1957).

**Fraud And Deceit**

Another action which circumvents the merger doctrine is an action for fraud or deceit. Fraud essentially is an intentional, purposefully deceptive, misrepresentation of existing fact relied upon by another party who suffers damages based upon his reliance. Schnader v. Brooks, 160 Md. 52, 132 A.2d 381 (1926). Fraud is a difficult action to prove because evidence of scienter—the intent to deceive the other party—is difficult to obtain.

However, Maryland courts have recognized fraud in new home sales. A statement by the builder-vendor that the buyer and his family of eleven could rely on the adequacy of the septic tank system was calculated to mislead the buyer when the builder-vendor knew the system was designed for a family of three. Fowler v. Benton, 229 Md. 571, 185 A.2d 344 (1962). The court held this conduct was actionable fraud, although the buyer’s reliance on the septic tank’s adequacy would not have been actionable. Id.

An easier action to prove is negligent misrepresentation. The Maryland Court of Appeals recently reaffirmed its recognition of this tort, distinguishing it from an action in fraud. Marten’s Chevrolet v. Seney, 292 Md. 328, 439 A.2d 534 (1982). Negligent misrepresentation is based on a negligent assertion by the defendant of a false statement; scienter need not be proved. Id. Thus in Marten’s Chevrolet, the plaintiff did not have to show an intentional misrepresentation, only a negligent one.

The Marten’s Chevrolet case involved misrepresentations made during the sale of an automobile dealership from Seney to Marten’s Chevrolet. If the courts apply this tort to an arms-length transaction between two businesses, it seems likely they would apply it to a consumer’s purchase of a new home as well. Thus, although negligent misrepresentation has not recently been applied to the sale of a new home, it should be considered as a viable cause of action in that situation today.

**Strict Liability**

Maryland follows the strict liability theories established in Restatement (Second) of Torts § 402A (1965). Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976). However, this theory has never been applied to the sale of a new home. A nearby jurisdiction did apply the strict liability theory to a case where a small child suffered severe burns and was hospitalized for 74 days due to the lack of a mixing valve on a hot water heater. Schipper v. Levitt and Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). The court in Schipper analogized the purchase of a new home (complete with a hot water heater) to the purchase of an automobile off the assembly line. Id. at 70, 207 A.2d at 325. Today’s buyer, the court determined, acts without the assistance of an architect and relies on the superior knowledge of the seller.

Thus, if personal injury results from a defective condition unreasonably dangerous, Restatement (Second) of Torts § 402A (1965), the seller of a new home may be held strictly liable. Perhaps with a set of circumstances similar to Schipper, Maryland may choose to expand the remedies available to the new home buyer to include a strict liability action.

**The Maryland Consumer Protection Act**


The statute seeks a solution through arbitration rather than litigation, but a consumer may still pursue alternative remedies in the courts. Devine v. Att’y Gen’tl, 37 Md. App. 439, 446–47, 377 A.2d 1194, 1198 (1977); cert. dismissed, 282 Md. 482, 385 A.2d 85 (1978). There is little judicial gloss on the statute as of yet, none relating to new home sales. However, filing a complaint
with the Consumer Protection Division of the Attorney General's Office may bring about a more expeditious remedy than that available from the courts.

**Conclusion**

A new home buyer does have some protection against defects which appear after the purchase of a new house. Under the Maryland Code, express and implied warranties may attach to the sale. A Statute of Limitations defense is available against these warranties, but this defense may be waived by certain acts of the defendant. By statute, however, at most the buyer is protected for three years.

At common law, an exception to the merger doctrine may allow a breach of contract action against the seller for fraud or deceit. Another breach of contract action may be available against the builder if he has failed to use care and skill in his construction.

Since the action in fraud or deceit is often difficult to prove, an action for negligent misrepresentation may be a viable alternative. The lower courts may be willing to apply this action in situations where evidence of the scienter element is lacking. Other potential remedies may be available in strict liability or under the Maryland Consumer Protection Act.

The remedies listed above are those available to the buyer in an action against the seller or the builder. Remedies against other potential defendants should also be investigated. Large purchases sometimes bring large problems, and a wise buyer should be cognizant of all possible protection.