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RESIDENTIAL REAL ESTATE TRANSACTIONS: A COMPARISON OF THE UNIFORM LAND TRANSACTIONS ACT AND MARYLAND LAW

Barbara J. Britzke†

Warranties of title and quality define the scope of residential home buyers' rights against sellers and builders. Using a comparative analysis format, this article discusses existing Maryland warranty law and comparable provisions of the Uniform Land Transactions Act to reveal serious deficiencies in the Maryland warranty scheme. The author concludes that in those areas where the Maryland and Uniform Act schemes differ, the Uniform Act offers consumers more comprehensive protection than Maryland law. In those areas where the schemes are harmonious, uniformity and related benefits can be achieved without a major overhaul of all areas of warranty law.

I. INTRODUCTION

Buying a home is normally the most important purchase a consumer undertakes. In residential real estate transactions, the buyer is faced with two primary concerns. First, the buyer must determine that the seller owns the property in question. Warranties of title protect the purchaser against this concern. Second, the buyer must ascertain the condition of the home and its component parts, such as the soundness of the roof and the stability of the foundation. Warranties of quality guard against these potential problems.

This article compares existing Maryland law of warranties of title and quality with the Uniform Land Transactions Act (ULTA), a

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1. The Uniform Land Transactions Act (ULTA) definition of "residential real estate" will be used for purposes of this article. The ULTA defines residential real estate as:

[Real estate, improved or to be improved, containing not more than [3] acres, not more than 4 dwelling units, and no non-residential uses for which the protected party is a lessor. A condominium unit that is otherwise 'residential real estate' remains so even though the common elements of the condominium include more than [3] acres or the condominium contains units used for non-residential purposes.

UNIF. LAND TRANSACTIONS ACT (ULTA) § 1-203(b), 13 U.L.A. 561 (1980).

"Protected party" means "an individual who contracts to give a real estate security interest in, or to buy or to have improved, residential real estate all or a part of which he occupies or intends to occupy as a residence." Id. § 1-203(a)(1), 13 U.L.A. at 560. Thus, this article focuses on the typical purchase of real estate which will serve as a home. Commercial transactions are not considered since in the majority of those transactions the parties are more likely to be equally sophisticated. See U.C.C. § 2-104 comment 1 (1983).

model act drafted by the National Conference of Commissioners on Uniform State Laws.  

3. This comparison illustrates two themes. First, Maryland law falls short in its protection of consumer buyers; the ULTA provides more realistic and thorough guarantees. Second, in the many areas where Maryland law parallels the ULTA, the benefits of codification and uniformity can be achieved by the adoption of the model act without a significant disruption of existing law.

Organized by these two themes, the article begins with a general discussion of the ULTA, Maryland law, and warranties. The article then develops the theme of consumer protection by comparing Maryland warranties of title and quality with the corresponding ULTA provisions to illustrate how the ULTA provides more complete consumer guarantees than Maryland law. The similarities between the two schemes regarding marketable title and available remedies for breach of warranties are subsequently examined to emphasize the benefits of codification and uniformity. The article concludes by recommending that Maryland adopt the ULTA, with minor modifications.

II. BACKGROUND

A. The ULTA

The ULTA is one of three model acts which purport to reform real estate transactions law.  

4. The ULTA, which focuses on contractual transfers of real estate that regulate the relationship between the buyer
and seller, consists of three articles. Article 1 contains general definitions and provisions applicable to both sales and secured transactions. Article 2 concerns sales of real estate, including lease transactions, and outlines the rights and responsibilities of the parties with respect to contract formation, performance obligations, breach, damages, specific performance, the statute of frauds, and the statute of limitations. Article 3 sets forth rules governing the formation of security interests, the extent of the interests acquired, the rights of the debtor and secured creditor as to the real estate, and foreclosure.

Modeled on the Uniform Commercial Code (UCC), Articles 1, 2, and 3 of the ULTA respectively mirror the structure of Articles 1, 2, and 9 of the UCC. This organization reflects the drafters' belief that many of the principles appropriate to the sale of personalty are also applicable to the transfer of realty. Despite a heavy debt to the UCC, the drafters added statutory provisions to cope with issues that arise more frequently in real estate sales. For example, the title provisions of the ULTA are far more expansive than the analogous UCC section.

6. Id. For example, the definition of protected party casts the consumer as both a purchaser and mortgagor of real estate. See supra note 1. The provisions for the exercise of good faith are also applicable to both sales and financing. Id. § 1-301, 13 U.L.A. at 563. See generally Balbach, The Uniform Land Transactions Act: Articles 1 and 2, 11 REAL PROP. PROB. & TR. J. 1, 2-4 (1976) (discusses general provisions of Article 1).
7. ULTA, 13 U.L.A. 539 commissioners' prefatory note (1980); see also Balbach, supra note 6, at 4-11 (summarizes provisions of Article 2).
9. ULTA, 13 U.L.A. 540 commissioners' prefatory note (1980); Balbach, supra note 6, at 1 (distinction between real and personal property is disappearing). That no distinctions exist between the sale of personal and real property has been characterized as a "possibly questionable assumption." Kratovil, supra note 3, at 461.
The drafters designed the ULTA to promote four underlying objectives: (1) "to simplify, clarify, and modernize the law governing real estate transactions";\textsuperscript{13} (2) "to promote the interstate flow of funds for real estate transactions";\textsuperscript{14} (3) to protect the parties to real estate transactions against "practices which may cause unreasonable risk and loss to them";\textsuperscript{15} and (4) to promote uniformity among the states.\textsuperscript{16}

**B. Maryland Law**

In contrast to the ULTA's comprehensive statutory scheme, Maryland does not have an organized approach to residential real estate transactions.\textsuperscript{17} Rather, Maryland has an amalgam of decisional law and statutes. While guarantees against apparent title defects are found solely in decisional law,\textsuperscript{18} consumer protection against problems of quality are controlled by statute.\textsuperscript{19} Moreover, the rules governing law-


15. Id. § 1-102(3), 13 U.L.A. at 550.
16. Id. § 1-102(4), 13 U.L.A. at 550. The need the commissioners perceived for uniformity in real estate transactions law has been criticized. Because real estate plays a critical role in the economic and related systems in each state, rules which are responsive to local conditions, it has been argued, should be allowed to develop. Kuklin, \textit{supra} note 8, at 25-26. At least with respect to the issues addressed by this article, these fears are unwarranted. See \textit{infra} text accompanying notes 163-86. As of this writing, no state has adopted the ULTA in its entirety. Donovan \textit{v.} Bachstadt, 91 N.J. 434, 443 n.5, 453 A.2d 160, 165 n.5 (1982). The commissioners' goal of uniformity has thus yet to be realized.

17. This lack of an organized approach is not surprising. Most property concepts developed at early common law. The introduction of statutes has been sporadic and based on the perceived need for change in common law rules. For example, one Maryland statute changes the common law rights of an owner of a right of entry or possibility of reverter. MD. REAL PROP. CODE ANN. §§ 6-101 to -105 (1981). The effect of this change is to clear title of ancient interests. Similarly, Maryland's statutory warranties of quality, discussed extensively in this article, represent a modification of the common law concepts of caveat emptor. See \textit{infra} text accompanying notes 64-156.

18. See \textit{infra} text accompanying notes 163-68.
19. See \textit{infra} text accompanying notes 71-156. While this article focuses on Maryland's statutory warranty of quality, other causes of action may be available in limited situations. An exception to the doctrine of merger by deed affords some protection. If the claim made by the buyer is to a collateral matter such as an express promise of quality, the doctrine does not control to destroy this claim. Levin \textit{v.} Cook, 186 Md. 535, 47 A.2d 505 (1946). In Levin, the sellers promised in the sales contract that the heating system was in good working order, but the buyers had to replace the boiler several months later. The Levin court held that the doctrine of merger by deed was not an effective defense. Id. at 539-40, 47 A.2d at 507-08. Maryland condominium buyers are also protected against defects in quality. Starfish Condominium Ass'n \textit{v.} Yorkridge Serv. Corp., 295 Md. 693, 458 A.2d 805 (1983); MD. REAL PROP. CODE ANN. § 11-131 (1981). One commentator has argued that real estate purchasers are protected by the Consumer Protection Act. Comment, \textit{Maryland's Consumer Protection Act: A Private Cause
tent title difficulties are a mix of statutory provisions, short forms, and decisional law. Given this hodgepodge of decisional law and statutory provisions, Maryland lacks the simplicity and clarity that mark the ULTA.

C. Warranties

The warranties of title and quality compared in this article are promises that accompany real estate transfers which are designed to protect purchasing consumers. They may be expressed as part of an agreement or implied by operation of law.

1. Title

Warranties of title guarantee the purchaser ownership of the property. Questions of ownership may arise both before and after the seller has transferred legal title. In a typical residential real estate sale, two written instruments are used: a land sale contract and a deed. The contract memorializes the parties’ agreement and gives equitable title to the purchaser; the deed transfers legal title.

of Action for Unfair or Deceptive Trade Practices, 38 Md. L. Rev. 733 (1979). Finally, Maryland homeowners may be protected by a Home Owners Warranty (HOW) guarantee, which may be offered when new improvements are sold. Comment, Liability of the Builder-Vendor Under the Implied Warranty of Habita-


21. The term warranty “naturally means promise but in different kinds of contracts it is used with varying meanings.” 5 S. Williston, A Treatise on the Law of Contracts § 673, at 168 (3d ed. 1961). It was originally used in the law of real property. Id. The concept of warranty has been characterized as “a freak hybrid born of the illicit intercourse of tort and contract.” Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 800 (1966). The concept’s dual origin still causes difficulties. Note, Builder’s Liability for Latent De-


22. An example of an express warranty of title is a seller’s promise that he has “done no act to encumber the land.” Md. Real Prop. Code Ann. § 2-110 (1981). Similarly, a builder’s promise to provide a refrigerator and double oven is an express warranty of quality. By contrast, a seller’s promise of habitability or to convey marketable title are covenants implied by operation of law. See infra text accompanying notes 85-94 and 163-68.

23. A land sale contract is usually not signed for gifts of real property. The time lag between the land sale contract and actual transfer of title allows a real property purchaser to search the title and obtain financing. A donee has no need to secure financing and has less interest in possible title problems.

24. The purchaser is treated in equity as the owner of the property and debtor for the purchase money because he holds equitable title. 3 American Law of Property
By operation of law a guarantee to convey marketable title is engrafted onto all land sale contracts. Under this rule, the vendor promises to deliver title which "a reasonable purchaser, who is well informed as to the facts and their legal bearings . . . would be willing to accept in the exercise of that prudence which businessmen ordinarily use in such transactions." This implied promise effectively protects the buyer against defects which he discovers before delivery of legal title.

A deed may contain covenants of title. The six common law covenants of title are the covenants of warranty, quiet enjoyment, seisin, the right to convey, further assurances, and against encumbrances. Unlike the guarantee of marketable title, covenants of title are traditionally express rather than implied. These promises provide needed protection against latent defects.

2. Quality

Warranties of quality guarantee the buyer a home free from defects. They protect against problems with the home's structure, foundation, and component parts. At common law no warranties of

§ 11.22 (1974) [hereinafter cited as AMERICAN LAW]; see also id. §§ 11.23 to .35 (consequences of holding equitable title).

25. Id. § 12.35; see also id. §§ 12.37 to .55 (requirements for an effective deed).

26. Id. § 11.47.


28. If the deed contains no express warranties of title, none are traditionally implied by operation of law. See infra text accompanying notes 45-58.

29. The covenant of warranty guarantees that the buyer will be paid for losses caused by failure of the title which the seller promised to convey. 2A R. POWELL, THE LAW OF REAL PROPERTY ¶ 899 (1982); see also Comment, Covenant of Warranty, 14 BAYLOR L. REV. 77 (1962) (discusses problems arising under the covenant of warranty). Jurisdictions generally treat the covenant of quiet enjoyment as identical in scope and operation to a covenant of warranty. Brown v. Lober, 75 Ill. 2d 63, 389 N.E.2d 1188 (1979); R. POWELL, supra, at ¶ 900. In a majority of jurisdictions, the covenant of seisin is a guarantee that the seller has "ownership" rights to the property. Id. ¶ 896. The seller's right to convey generally affords the same rights and remedies as the covenant of seisin. Id. ¶ 897. When the seller has ownership of the property but a third party is in adverse possession, the purchaser is protected by the covenant of the right to convey rather than the covenant of seisin. Id. The covenant of further assurances, enforceable by specific performance, compels the seller to perform future acts that will help ensure the buyer's title. Id. ¶ 901. The covenant against encumbrances protects against infringements on the title of two types: (1) those against the title itself, such as an unpaid tax; and (2) those involving "physical facts concerning the premises," such as easements or building restrictions. Id. ¶ 898; see also MD. REAL PROP. CODE ANN. §§ 2-105, 2-107 to -112 (1981) (comparable Maryland warranties); AMERICAN LAW, supra note 24, at §§ 12.126 to .130 (describing covenants of title).

30. See infra text accompanying notes 45-54.

31. See infra text accompanying notes 71-100.
quality existed in real estate transactions. Today, both express and implied warranties may accompany the sale of a residence. While a broad application of warranties of quality has gained acceptance, important questions remain unanswered concerning the coverage of these warranties, the buyers protected, the duration of the warranty, and the seller's ability to disclaim or exclude the warranties.

III. CONSUMER PROTECTION: WARRANTIES OF TITLE IN DEEDS AND WARRANTIES OF QUALITY

The modernization of real estate law was an important goal of the ULTA drafters. Recognizing that real property law is bound more to ancient principles than any other area of the law, the drafters sought to harmonize traditional real estate law with the realities of current residential transactions. This harmonization dramatically increased the protection afforded consumers. This perceived need for increased consumer protection is based on several principles, the foremost of which is the need to protect the reasonable expectations of the parties in their bargain. For example, in residential transactions, a home buyer assumes that his newly acquired

32. Ohio was the first state to adopt a warranty of habitability for sales of residential property. Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957).
34. See infra text accompanying notes 101-56.
35. ULTA § 1-102(1), 13 U.L.A. 550 (1980); id. at 540 commissioners' prefatory note.
36. Id. at 540-41 commissioners' prefatory note. "[T]he body of private property law . . . more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." Jones v. United States, 362 U.S. 257, 266 (1960).
38. The drafters specially noted the ULTA's provisions of implied warranties of quality. Id. at 541 commissioners' prefatory note.
39. The ULTA also protects borrowers and sellers. Id. § 1-102(3), 13 U.L.A. at 550.
40. Several courts have noted the importance of effectuating the expectations of the parties. Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 379, 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974) (en banc); McDonald v. Mianecki, 79 N.J. 275, 289, 398 A.2d 1283, 1289 (1979). This concept can be extended to other areas. For example, the buyer's reliance on the expertise of the builder becomes part of the
title will not be challenged. With respect to quality, he anticipates that the structure will function properly.41 Another argument in favor of improved consumer protection is the inability of residential home buyers, due to a lack of expertise, to discover non-apparent defects of title and quality.42 Finally, aggressive warranties of quality advance the important public policy of discouraging shoddy workmanship.43 Only when professional vendors are held financially responsible for their products can consumers justifiably rely on the structural integrity of their homes.44

Neither Maryland's legislature nor its courts has fully embraced the principles of consumer protection. Residential home buyers are frequently placed in positions where they may be easily duped by sophisticated sellers. In contrast, the ULTA addresses many of these deficiencies by taking a more realistic view of the low level of sophistication possessed by purchasers. A comparison of the ULTA and Maryland law on warranties of title and quality illustrates this distinction.

A. Warranties of Title in Deeds

After a real estate sales contract has been consummated, i.e., the buyer has paid the purchase price and has received legal title by a deed, latent title defects may arise despite an adequately performed title search.45 Covenants of title govern the seller's accountability for these latent defects. At this juncture, the ULTA and Maryland law differ markedly because the former provides far greater protection for the purchaser than the latter.

1. Rights

In Maryland no warranties of title are implied in conveyancing instruments by operation of law.46 When the deed is silent, the buyer's expectation interest. Pollard, 12 Cal. 3d at 379, 525 P.2d at 91, 115 Cal. Rptr. at 651; McDonald, 79 N.J. at 290, 398 A.2d at 1290.

41. The buyer's expectations are obvious. The seller, however, encourages these expectations. With respect to title, the seller holds himself out, expressly or impliedly, as owner of the property he is contracting to sell. A builder-vendor holds himself out, expressly or impliedly, as having the ability to construct a home which meets reasonable quality standards.


43. See, e.g., Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968); 7 S. Williston, supra note 21, § 926A, at 818 (3d ed. 1963).

44. Problems may arise for several reasons. See McDonald v. Mianecki, 79 N.J. 275, 290, 398 A.2d 1283, 1291 (1979).


46. "[T]here is no implied covenant or warranty by the grantor as to title or possession
has no guarantee that he will not be dispossessed at a future date by the assertion of a superior title by another person. Also, because Maryland recognizes the doctrine of merger by deed, any promise with respect to title in the contract for sale ends with the buyer’s acceptance of the deed. Under the ULTA, by contrast, four warranties of title are implied: (1) “the real estate is free from all encumbrances”; (2) “the buyer will have quiet and peaceable possession of or right to enjoy the real estate conveyed”; (3) the seller “has the power and right to convey the title which he purports to convey”; and (4) the seller “will defend the title to the real estate conveyed against all persons lawfully claiming it.” By its terms this fourth warranty covers not only those who may challenge the buyer’s title under a claim of right granted by the seller or his predecessors, but also all claims against the property from any source. Since all four warranties of title run with the land, subsequent

in any grant of land or of any interest or estate in land.” MD. REAL PROP. CODE ANN. §§ 2-115 (1981).


48. In 1948, the Court of Appeals of Maryland stated in classic terms the doctrine of merger by deed: “[A] prima facie presumption arises from the acceptance of a deed that it is an execution of the entire agreement for the sale of the realty, and the rights of the parties in relation to the agreement are to be determined by the deed.” Edison Realty Co. v. Bauernschub, 191 Md. 451, 458-59, 62 A.2d 354, 357 (1948). Thus, in Maryland, acceptance of the deed determines any rights which the parties have under the contract for sale. But see Gilbert Constr. Co. v. Gross, 212 Md. 402, 409, 129 A.2d 518, 521 (1957) (when a deed is only a partial execution of a contract, collateral agreements are not merged).

49. Two provisions of the ULTA govern the four warranties of title. ULTA §§ 2-304(b)(2), 2-306, 13 U.L.A. 600, 605 (1980). The ULTA mandates that a seller in a contract promises to convey a deed which will not exclude the four warranties of title. Id. § 2-304(b)(2), 13 U.L.A. at 600. The latter section then provides for the implication of four warranties of title when a deed does not provide to the contrary. Id. § 2-306, 13 U.L.A. at 605.

50. Id. § 2-306(1), 13 U.L.A. at 605.
51. Id. § 2-306(2), 13 U.L.A. at 605.
52. Id. § 2-306(3), 13 U.L.A. at 605.
53. Id. § 2-306(4), 13 U.L.A. at 605.
54. This promise is a general warranty. 2 R. POWELL, supra note 29, ¶ 899. By contrast, special warranty deeds protect the purchaser only against third parties who challenge the buyer’s title based on a claim derived from the seller alone. Id.; E. FRANK, TITLE TO REAL AND LEASEHOLD ESTATES AND LIENS 97 (1912). The four warranties are analogous to statutory “short form” covenants found in many state statutes. ULTA § 2-306 comment 1, 13 U.L.A. 605 (1980). State legislatures have provided for short forms of common law promises to shorten and simplify deeds. Maryland’s statutory short forms are contained in MD. REAL PROP. CODE ANN. §§ 2-104 to -112 (1981).
55. ULTA § 2-312 comment 1, 13 U.L.A. 615 (1980). This provision, however, can be modified to the contrary by agreement of the parties. Id. Once a seller has paid
purchasers of the property are also protected by the original promise of the seller. The guarantees of the seller's right to convey and against encumbrances are breached only at the time of the transfer of title. Because the statute of limitations for breach of these particular warranties is six years, original and subsequent purchasers have only six years from the time of conveyance to bring suit for defects. By contrast, the promises of quiet enjoyment and general warranty are breached when an actual or constructive eviction occurs. Since evictions may occur more than six years after the time of conveyance, these promises afford greater protection to the buyer and subsequent purchasers.

2. Assessment

The ULTA imposes more substantial obligations on the seller than existing Maryland law. Under the model act, if the seller fails to contract specifically to give less than a full warranty deed, the burden of the four warranties of title will be implied. Conversely, Maryland law provides that when the deed is silent as to warranties of title, the purchaser will be protected only when a cloud on the title is discovered before the time for conveyance. Maryland thus affords no protection to the buyer who fails to negotiate for covenants of title.

This deficiency is serious and should be remedied by the General Assembly. A purchaser should not only receive that for which he has bargained, but he should retain it as well. Certainly one of the buyer's expectations of realty is that problems with his ownership of the property will not arise. This expectation may be frustrated by the inadequate protection provided under Maryland law. For example, when the seller has lost his title to an adverse possessor who was absent from the property when it was conveyed to an unsuspecting purchaser, the unprotected Maryland purchaser could be dispossessed by the adverse possessor. Not only would he forfeit the property, he would also have damages to the buyer, the seller's obligation under the warranty is extinguished and the covenant ceases to run. See infra text accompanying notes 163-68.
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no recourse against the seller. This inequity is aggravated by the purchaser’s inability to discover the existence of an adverse possessor in his seller’s chain of title. Under Maryland law, the only means by which a seller’s lack of title may be discovered is to conduct an extensive interrogation of prospective neighbors. Not only would this be a time consuming, haphazard process, it would also work an unnecessary hardship on the buyer in light of the seller’s superior access to this type of information.

The above discussion makes clear that the unsophisticated consumer receives better protection under the ULTA’s warranties of title. Specifically, the ULTA secures important title protection for those consumers who are unfamiliar with the intricacies of real estate transfers.

B. Warranties of Quality

In today’s urban technological society, the typical purchaser of residential real estate is most concerned with the improvements on the property; the land itself is normally of secondary importance. But the time-worn common law rules governing real estate transactions were based upon the antiquated belief that the land itself was more important than any of the improvements constructed on it. This heritage was most deeply ingrained in the doctrine of caveat emptor.

Originally, the doctrine of caveat emptor mirrored the expectations of the contracting parties. Trust was neither given nor relied upon. While the doctrine has been modified and very nearly abolished with respect to personal property, in real property law the an-

62. Although recordation is not required, titles held by adverse possession can be recorded. Frederickson v. Henke, 167 Minn. 356, 209 N.W. 257 (1926); American Law, supra note 24, § 15.4. A traditional title search using a grantor-grantee index would not reveal this kind of title defect. A tract index, however, would reveal the adverse possessor’s deed.

63. The purpose of this “inspection” would be to determine if, at any time, an adverse possessor had been on the property for the requisite time period. Interviews with neighbors would be the best source of this information.

64. For an excellent discussion of the history and development of caveat emptor, see Hamilton, The Ancient Maxim Caveat Emptor, 40 Yale L.J. 1133 (1931).

65. The doctrine had its genesis in medieval England. In this predominantly agrarian society, most transactions of goods occurred between neighbors. Since trading with strangers was done at fairs held in large towns, a class of merchants developed whose business morality was such that “no trust was given or expected.” Seavey, Caveat Emptor as of 1960, 38 Tex. L. Rev. 439, 441 (1960). The doctrine of caveat emptor reflected the standards of these merchants. Id. For a somewhat different historical analysis, see Roberts, The Case of the Unwary Home Buyer: The Housing Merchant Did It, 52 Cornell L.Q. 835, 836 (1967). Professor Roberts claims that mediaevalists were protected by regulations that punished sellers for selling substandard goods and that caveat emptor was created by nineteenth-century judges during a laissez-faire era.

66. The UCC provides that “[u]nless excluded or modified... a warranty that 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.” U.C.C. § 2-314(1) (1983).
cient principle has remained in force. The end of World War II, which marked the beginning of an unprecedented growth in the mass produced home industry, triggered a shift in the doctrine of caveat emptor as applied to real estate purchasers. Since that time both commentators and courts have begun to emphasize the similarity, rather than the differences, between the buying of personal property (goods) and residential real estate. This has occurred because the buyer is in effect seeking a “good,” that is, an improvement which will house his family. This similarity has resulted in a minimizing of the importance of caveat emptor in sales of real property.

Both the ULTA and Maryland have modernized the law of residential real estate transactions to incorporate the values of consumer protection by creating warranties of quality. After a comparative analysis of the ULTA and Maryland law on express and implied warranties, the duration of the warranties, their permissible exclusions and limitations, and the buyers protected, it will become apparent that the ULTA generally offers consumers a more comprehensive protective scheme than that available under Maryland law.


68. Dunham, Vendor’s Obligation As to Fitness for a Particular Purpose, 37 Minn. L. Rev. 108, 110 (1953) [hereinafter cited as Dunham, Vendor’s Obligation]. For a brief history of the change in the caveat emptor principle in real estate sales, see Lawrence, Homebuilder’s Liability for Physical Defects After the Sale, 7 Okla. City U.L. Rev. 49 (1982); Shedd, supra note 33, at 293-301.

69. Comparing the protections given the purchaser of a two-dollar fountain pen and a newly constructed home, and finding that the pen is protected by a warranty but the home is not, one commentator noted that “[t]he law is not entirely devoid of its own brand of wry humor.” The “punch line” is the doctrine of caveat emptor’s application in real property sales. Roberts, supra note 65, at 835. For similar comparisons, see Dunham, Vendor’s Obligation, supra note 68, at 108; Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, 53 Geo. L.J. 633 (1965).

70. The contrast between the rules of law applicable to the sale of personal property and those applicable to the sale of real property was so great as to be indefensible. One who bought a chattel as simple as a walking stick or a kitchen mop was entitled to get his money back if the article was not of merchantable quality. But the purchaser of a $50,000 home ordinarily had no remedy even if the foundation proved to be so defective that the structure collapsed in a heap of rubble. Wawak v. Stewart, 247 Ark. 1093, 1094-95, 449 S.W.2d 922, 923 (1970). For similar comparisons, see Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974) (en banc); McDonald v. Mianbecki, 79 N.J. 275, 398 A.2d 1283 (1979).
1. Express Warranties

a. Rights

Express warranties are the explicit contractual guarantees of the seller which vary according to the terms of the agreement.\(^7^1\) In creating these warranties, both the ULTA and the Maryland statute use the UCC as a guide, tracking its pattern and, sometimes, its exact language.\(^7^2\)

Express warranties are similar under the ULTA and Maryland law. Both statutory schemes state that any “affirmation of fact or promise . . . creates an express warranty” that the item at issue will conform to the affirmation or promise.\(^7^3\) Thus, a real estate seller’s promise that a particular fixture will be included is an express warranty under either scheme.

Frequently, samples, models, or descriptions are used when marketing new residences. Under both the ULTA and Maryland statute,\(^7^4\) these representations create explicit guarantees. For example, a prospective buyer shown a carpet sample will be able to insist on the same kind of carpeting under an express warranty theory. In addition, both statutes negate the creation of warranties for statements that are merely commendations or opinions of a parcel of real estate or its value.\(^7^5\)

Despite these similarities, important differences exist between the statutory schemes. While samples, models, or descriptions may create explicit contractual obligations under Maryland law, if “an affirmation of fact or promise” is to provide the basis for an express warranty, it must be in writing.\(^7^6\) The ULTA, by contrast, allows oral promises to become warranties.\(^7^7\) Also, Maryland limits express warranties to those which are made “part of the basis of the bargain.”\(^7^8\) The ULTA does

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71. Gilbert Constr. Co. v. Gross, 212 Md. 402, 129 A.2d 518 (1957) (builder promised to provide particular kind of heating system); Stevens v. Milestone, 190 Md. 61, 57 A.2d 292 (1948) (builder promised to provide insulation and two cellar windows).


77. ULTA § 2-308 does not qualify the kind of “affirmation of fact or promise.” ULTA § 2-308(b), 13 U.L.A. 607 (1980). The drafters’ comment to this section focuses on “conduct.” Id. comment 1, 13 U.L.A. at 607.

not impose this limitation.\textsuperscript{79}

More importantly, Maryland limits the subject matter of the warrant to the home and its “fixture[s] and structure.”\textsuperscript{80} The ULTA recognizes that a contemporary real estate purchaser is interested in more than the quality of the dwelling itself\textsuperscript{81} by permitting the creation of express warranties with respect to promises that relate “to the real estate, its use, rights appurtenant thereto, improvements that would directly benefit the real estate, or the right to use or have benefit of facilities not located on the real estate.”\textsuperscript{82} Thus, a developer's promise to install a neighborhood swimming pool may be enforceable under the ULTA but not under the Maryland statute.

\textit{b. Assessment}

The ULTA express warranty provisions appropriately afford the buyer more protection than comparable Maryland provisions. The requirement under Maryland law that a seller's promise be in writing erroneously presupposes a consumer who will demand that all representations be reduced to writing. The Maryland consumer who relies on the seller's verbal guarantees is precluded from presenting any evidence of the oral contract at trial. Maryland has thus opted for certainty at the expense of the buyer who relies on the seller's oral statements.

The ULTA solution to this problem is far more desirable. The notion that verbal promises can create warranties more accurately reflects the realities of real estate negotiations. The discussions that occur during the home sale process are inexorably linked to the resulting land sale contract.\textsuperscript{83} Allowing recourse for these verbal guarantees not only better comports with the reasonable expectations of the buyer, but fairness dictates that the vendor should be bound by his statements.\textsuperscript{84}

The ULTA increases protection by expanding the subject matter of express warranties. Although both statutory schemes acknowledge the shift in focus from land to improvements, the ULTA takes an additional step. The ULTA’s realistic appraisal of residential real estate

\begin{footnotes}
\item[79] The ULTA provides that warranties are created “if relied upon by the buyer.” ULTA § 2-308(a), 13 U.L.A. 607 (1980). The seller has the burden to show that “representations made in the bargaining process were not relied on by the buyer at the time of the contracting.” \textit{Id.} comment 1, 13 U.L.A. at 607.
\item[81] ULTA § 2-308 comment 2, 13 U.L.A. 608 (1980).
\item[82] \textit{Id.} § 2-308(a)(1), 13 U.L.A. at 607.
\item[83] It is impossible to imagine a sale of a home conducted without oral communication. As a vendor shows the property to a prospective buyer, the two parties will invariably talk to each other.
\item[84] Because conversations are inevitable in the course of purchasing a home, the buyer's expectations are affected by the seller's declarations. The ULTA's drafters stated that “[i]n actual practice representations made by a seller about the real estate during the bargaining process are regarded as a part of [sic] description.” \textit{Id.} § 2-208 comment 1, 13 U.L.A. at 608.
\end{footnotes}
transactions recognizes that the vendor’s promises with respect to rights incident to land ownership should be enforceable as warranties. While the model act acknowledges the importance of the home, it further recognizes that the purchaser may also value the accompanying amenities in the subdivision or development. For example, a purchaser faced with a choice of two substantially similar homes may decide to buy the home located in the neighborhood which promises a community swimming pool, tennis courts, and extensive recreational programs for children. Indeed, a less appealing home may have been selected solely because of these offered benefits. Under the ULTA, promises of these benefits would be enforceable by the buyer, even though the benefits are not located on the land in question.

2. Implied Warranties

a. Rights

The notion that a seller impliedly guarantees quality in a land sale contract is a radical departure from the antiquated rule of caveat emptor. Both the ULTA and the Maryland statute, through the vehicle of implied warranty, incorporate a seller’s promises of quality into a contract of sale or a deed which is otherwise silent on the matter.

The two implied warranty schemes under the ULTA and the Maryland statutory scheme are similar. The first implied warranty is that a buyer is protected against the use of defective materials, improper plans, and faulty workmanship. The second implied warranty is that of habitability, defined by the ULTA as a promise “that the real estate is suitable for the ordinary uses of real estate of its type.”

Maryland courts, when analyzing the parameters of the implied warranty of habitability, have determined that the test is one of reasonableness to be decided on the particular facts and circumstances of each case. When reasonable minds can differ, the jury may look to factors such as government regulations, building codes, and evidence of “cus-

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89. ULTA § 2-309 comment 1, 13 U.L.A. 611 (1980).
90. In Loch Hill Constr. Co. v. Fricke, 284 Md. 708, 399 A.2d 883 (1979), the court of appeals first articulated a test of habitability. A buyer who had purchased a new $132,500 home successfully brought an action on the basis of a breach of the warranty of habitability because the well on the property became dry after 80 days.
tomy or usual conditions" for homes of like kind and quality in the area.91 When reasonable minds cannot differ, the issue of habitability falls to the court as a matter of law.92

The buyer of a new home in Maryland, however, may lose both implied warranty protections if he fails to discover a defect which a "reasonably diligent purchaser" would have discovered.93 The ULTA, unlike Maryland, does not condition these protections on an inspection of the property.94

b. Assessment

Maryland's requirement that no promise of quality be implied when the defect could have been discovered by an inspection is unduly burdensome and analytically unsound. At a minimum, it adds an additional element to a consumer's breach of warranty claim which forces the buyer to present evidence of his competent inspection.95 More importantly, the requirement undermines two of the basic purposes for imposing guarantees by operation of law.

The typical residential real estate purchaser lacks the expertise to make the inspection required to determine whether a home and its component parts are free from defective materials, poor planning, or faulty workmanship.96 Modern residential homes are complex structures. Once plumbing is installed, wells dug, or electricity provided, walls and floors hide the completed work.97 Consequently, not only does the buyer lack the professional expertise98 to discover problems, but potential defects are hidden from view.

In addition, demanding an inspection of the property prior to the imposition of a warranty undermines the policy consideration for im-

91. Id. at 715-16, 399 A.2d at 888.
92. In Loch Hill, the court found that reasonable minds could not differ over whether a failure to provide an adequate water supply constituted a lack of habitability. Id. at 715, 399 A.2d at 888.
94. ULTA § 2-309(b)-(c), 13 U.L.A. 609-10 (1980).
95. Presumably, evidence of a buyer's competent inspection could be provided by his own testimony.
98. The cost of hiring a professional to inspect a home to discover latent defects imposes a prohibitive burden on the buyer. McDonald v. Mianecki, 79 N.J. 275, 288, 398 A.2d 1283, 1289 (1979) (citing Note, The Doctrine of Caveat Emptor as Applied to Both Leasing and Sale of Real Property: The Need for Reappraisal and Reform, 2 Rut.-Cam. L.J. 120, 137 (1979)).
posing liability on builders for shoddy workmanship. Since vendors are in the best position to prevent problems which render a house uninhabitable, they should be charged with the responsibility for defects attributable to their work, regardless of the buyer’s ability to discover the defect.

3. Buyers Protected

a. Rights

The number of consumers protected by a warranty scheme is a function of the different causes of action it creates for potential plaintiffs. Generally, warranty schemes provide that breaches of warranty may give rise to any of the following actions: (1) the original buyer can sue the original seller; (2) the subsequent buyer can sue the original seller; or (3) the subsequent buyer can sue a subsequent seller.

In Maryland, the warranty scheme only permits the original buyer to sue the original seller. The definitional section sets forth the purchasers protected by both express and implied warranties. The statutory definition of improvement limits real estate buyers to those who purchase “newly constructed private dwelling units.” “Purchaser” is similarly limited to the first or original consumer of improved realty. “Vendor,” though, is somewhat more broadly defined to include those to whom a completed improvement has been sold for resale. Contractors, developers, and real estate agents who market the completed product are conceivably included in this definition. Nevertheless, these definitions severely limit the class of buyers protected by Maryland’s express and implied warranties of quality. Apparently this limitation is based on outdated notions of privity of contract.

The ULTA by contrast greatly expands the classes of protected purchasers. A seller’s liability depends largely upon the kind of guar-


100. The builder is the party responsible for placing the defective product in commerce. McDonald v. Mianecki, 79 N.J. 275, 290, 398 A.2d 1283, 1291 (1979). Arguably the inspection prerequisite merely requires that the buyer examine the property carefully prior to taking title; it may reflect an understanding between the parties that the buyer will accept the realty with any obvious defects. Unfortunately, it is just as likely that the seller promised to repair whatever defect appeared from the inspection. The inspection requirement is unnecessary and rewards shoddy builders.


102. Id. § 10-201(c).

103. Id. § 10-201(e).

104. The privity requirement, which limits the builder’s liability to the first purchaser of a home, reflects a view that warranty claims sound in contract rather than in tort. Mallor, Extension of the Implied Warranty of Habitability to Purchasers of Used Homes, 20 Am. Bus. L.J. 360, 366-69 (1982). And in a contract action, only the actual parties to a contract may recover. Id.
antee made. For instance, all residential real estate purchasers are potentially covered under the ULTA. When the requirements for express warranties are met, any residential real estate seller in the chain of title may be held liable. Thus, it is irrelevant whether the consumer has bought a used home, or whether the seller is a layman. The only limitations on the creation of explicit guarantees are the requirements of the law of express warranty. Original and subsequent buyers in all three classes identified above may maintain an action for breach of express warranty under the ULTA.

Implied warranties under the ULTA provide some coverage to all classes of consumers. Because the guarantee of habitability arises any time a professional seller conveys real estate, original buyers are always protected. In addition, since the promise of habitability is transferred with the property, subsequent purchasers who sue original sellers are always able to enforce the warranty. Lastly, in the final classification of actions, the ULTA overcomes parity problems by allowing some subsequent buyers to sue subsequent sellers. Buyers are protected when they purchase a used home from a professional seller. This extension of implied warranties to the sale of used homes reflects the ULTA's adoption of the most recent trend in warranty of habitability law, and clearly underscores the most serious defect in the Maryland scheme.

b. Assessment

Nine courts and two legislatures have determined that profes-

105. ULTA § 2-308(a), 13 U.L.A. 607 (1980). The statutory language places no limitation on the classes of buyers and sellers for express warranty purposes, but the concepts of good faith and unconscionability are always factors to be considered under the ULTA. Id. §§ 1-301, -311, 13 U.L.A. at 563, 574.
106. Because any seller may expressly guarantee quality, a lay seller of a used home may presumably warrant quality to a professional buyer.
107. Unlike the concept of habitability, the professional seller's warranty as to the quality of construction, id. § 2-309(b), 13 U.L.A. at 609-10, is intended to cover new construction only. Id. comment 2, 13 U.L.A. at 611.
108. The ULTA term is a "person in business of selling real estate." Id. § 2-309(b), 13 U.L.A. at 609.
109. Id.
110. Id. § 2-312(b), 13 U.L.A. at 615. When a purchaser decides to sell, he may do so without prejudicing any rights against his seller. Id. Thus, the purchaser may sell the home at a substantial loss, because of obvious defects, and still maintain an action against his vendor. In addition, when a warranty of quality is made to a consumer who intends to live in the home, the warranty's protection runs to that party's successors despite any disclaimer or limitation of liability. Id. § 2-312(c), 13 U.L.A. at 615.
111. Id. § 2-312(b), 13 U.L.A. at 615.
112. See infra notes 113-14 for a list of jurisdictions which have extended coverage to subsequent purchasers.
sional vendors should be liable for breach of implied warranties despite
the transfer of the realty from the original to a subsequent buyer. While the ULTA reflects this recent development, Maryland law only
protects first purchasers.

Barnes v. Mac Brown & Co., a 1976 decision of the Supreme
Court of Indiana, initiated this trend. After noting the elimination of
the doctrine of caveat emptor in a transaction between the original ven-
dor and buyer, the court analogized real property to personal property
by referring to the diminishing role of privity in products liability cases
and in the law of personal property. The Barnes court then con-
cluded that the “logic which compelled this change in the law of per-
sonal property is equally persuasive in the area of real property.

The traditional requirement of privity between a builder-vendor and a
purchaser is an outmoded one."

The debate in the courts over the extension of vendor liability to
subsequent purchasers deals largely with the privity requirement. When warranty law was first being developed with respect to personal

925 (1981); McMillan v. Brune-Harpenau-Torbeck Builders, Inc., 8 Ohio St. 3d 3,
Neely, 275 S.C. 395, 271 S.E.2d 768 (1980); Gupta v. Ritter Homes, Inc., 646
S.W.2d 168 (Tex. 1983); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo.
1979).

114. MINN. STAT. ANN. § 327A (West Supp. 1983); N.J. STAT. ANN. § 46:33-3 (West
Supp. 1983). A number of commentators have applauded the extension of builders'
liability to subsequent purchasers. Mallor, supra note 104; Comment, supra
note 33; Comment, Builders' Liability for Latent Defects in Used Homes, 32 STAN.
L. REV. 607 (1980); Note, Implied Warranties in Ohio Sales, 30 CLEV. ST. L. REV.
177 (1981); Case Comment, Extension of Implied Warranties to Subsequent Pur-
chasers of Real Property: Insurance Company of North America v. Bonnie Built
Homes, 43 OHIO ST. L.J. 951 (1982); Note, Real Property—Warranty of Habitabil-
ity Expanded to Subsequent Purchaser—Hermes v. Staiano, 181 N.J. Super. 424,
437 A.2d 925 (1981), 12 SETON HALL L. REV. (1982); Note, Elden v. Simmons:
The Standard of Reasonableness Prevails—Implied Warranties of New Home Con-
struction Do Not “Necessarily” Terminate on Resale in Oklahoma, 17 TULSA L.J.
753 (1982).

115. 264 Ind. 227, 342 N.E.2d 619 (1976). For a recent discussion of the law of warrant-
ies in Indiana, see Comment, Implied Warranty of Fitness for Habitation: Limited
Protection for Used Home Buyers, 57 IND. L.J. 479 (1982).

116. Barnes, 264 Ind. at 229, 342 N.E.2d at 620.

117. Id.

118. Id. at 229, 342 N.E.2d at 621 (DeBruler, J., dissenting). Justice DeBruler, in dis-
sent, argued that privity should be required since the action was in contract rather
than in tort. Id. at 230-33, 342 N.E.2d at 621-22. For similar discussions, see
Redarowicz v. Ohlendorf, 92 Ill. 2d 171, 183, 441 N.E.2d 324, 330 (1982); McMil-
lan v. Brune-Harpenau-Torbeck Builders, Inc., 8 Ohio St. 3d 3, 455 N.E.2d 1276
(1983); Elden v. Simmons, 631 P.2d 739, 741 (Okla. 1981); Terlinde v. Neely, 275

Other states have retained the privity requirement and have refused to extend
warranty coverage to subsequent purchasers. See, e.g., Coburn v. Lenox Homes,
Inc., 173 Conn. 567, 378 A.2d 599 (1977); Brown v. Fowler, 279 N.W.2d 907 (S.D.
1979).
property, courts grappled with similar problems, and ultimately rejected the privity requirement. It seems only a matter of time before a majority of courts will decide with Indiana and the ULTA that privity is an irrational concept by which to limit liability. Maryland should not lag behind.

In addition to the rejection of privity, important policy considerations support the ULTA’s coverage of subsequent purchasers by implied warranties. A residential real estate buyer expects that the residence he is purchasing will provide shelter for his family, which is the essence of the concept of habitability. This expectation does not substantially differ whether a new or a used home is purchased; the minimum requirements of habitability should be present in both situations. In a mobile society individuals move for a number of reasons, such as a job transfer, the end of a marriage or the death of a working spouse, which makes it impossible to carry the monthly maintenance charges on the property. Any of these situations may arise


120. Forty-two states have adopted some version of U.C.C. § 2-318 (1983), which extends liability to third party beneficiaries of warranties. U.C.C. § 2-318, Action in Adopting Jurisdictions, 1 A.U.L.A. 52, 54-56 (1976 & Supp. 1983). In Maryland the requirement has been abrogated in implied warranty actions. Md. Com. Law Code Ann. § 2-314(1)(a) (1975). Under Maryland law, actions on express and implied warranties may be brought by family members, household guests, and any other ultimate consumer if it is “reasonable to expect that such person may use, consume or be affected by the goods.” Id.; see also Phipps v. General Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 961 (1976) (same result in strict liability). In the real property context, courts which have permitted recovery by subsequent purchasers for breach of warranty have relied on the abrogation of privity requirements in personal property cases. See, e.g., Elden v. Simmons, 631 P.2d 739 (Okl. 1981); Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980).

121. See supra notes 40-41.

122. A home buyer, whether buying a new or used home, continues to rely on the builder’s ability to construct a functioning home. While the used home buyer does not know the builder, as the original purchaser did, this lack of personal knowledge “does not negate the reality of the ‘holding out’ of the builder’s expertise and reliance which occurs in the market place.” Terlinde v. Neely, 275 S.C. 395, 398, 271 S.E.2d 768, 769 (1980); see also Mallor, supra note 104, at 385-87 (discusses buyer’s expectations).


124. Divorce, like the death of a spouse, may make the payment of monthly charges financially impossible.

125. Id. The Supreme Court of Wyoming also noted that a profit motive alone may
shortly after the original settlement. While Maryland's scheme denies warranty protection to subsequent purchasers based merely on the number of times title has been transferred, the ULTA more appropriately recognizes that buyers' expectations are based on the age of the residence, and not on the number of previous owners.

Similarly, the inability of the buyer to make a competent inspection applies with equal force to subsequent purchasers. Indeed, in some instances the subsequent purchaser is less able to inspect since he has not had the same opportunity to observe construction of the improvement as the original purchaser may have had. The policy of discouraging shoddy workmanship likewise cannot be furthered if the liability of the builder-vendor is limited to the first purchaser. The quality of his construction ought to be reliable regardless of whether the property has been transferred. While slight wear and tear may result from transfers, the foundation will not crumble any more readily if two families have occupied the home. As a result, the ULTA's extension of coverage to subsequent purchasers better implements the policies underlying consumer protection than does Maryland's limitation of builder liability to the first purchaser.

4. Exclusions and Limitations of Warranties

a. Rights

Both the Maryland statutory scheme and the ULTA provide that parties may exclude or modify warranties by agreement. In Maryland, an exclusion or modification must: (1) be in writing; (2) explain the warranty to be excluded or modified; (3) be signed by the purchaser; and (4) set forth the terms or agreement that are applicable to the improvement. Nothing in a land sale contract or a deed will effectively exclude or modify the warranty.

The ULTA scheme is more complex. For example, the ULTA directs that express warranties and their disclaimers be construed "when

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128. Because the builder has sole detailed knowledge of how the building was built, it is irrelevant whether there has been an intervening owner. The effect of a latent defect can be just as devastating on a subsequent owner as on an original owner; the builder "is no more able to justify his improper work as to a subsequent owner than to the original buyer." Gupta v. Ritter Homes, Inc., 646 S.W.2d 168, 169 (Tex. 1983).
130. See authorities supra note 129.
ever reasonable as consistent with each other." This rule applies when a sample, model, or description of the real estate is used to create an explicit guarantee, but a contractual clause purports to disclaim all warranties. Only when it is impossible to harmonize the express warranty with the disclaimer does the warranty control.

Disclaimers of implied warranties, by contrast, whether couched in general language or the language of warranty, are ineffective against a residential real estate buyer under the ULTA. Thus, the insertion of "as is" or "with all faults" in the contract of sale will not limit the seller's liability. Despite these limitations, a seller may specifically disclaim a defect which has become "part of the basis of the bargain." The ULTA makes the enforcement of disclaimers somewhat difficult in two ways. First, the presence of a specific disclaimer creates only a presumption that it formed part of the basis of the bargain. Despite the inclusion of a disclaimer, a buyer may prove he did not consent to the alteration of the warranty. Second, the disclaimer may be challenged as unconscionable regardless of the seller's compliance with the ULTA's disclaimer provisions.

b. Assessment

The disclaimer and exclusion sections of any warranty statute are of critical importance. To the extent that warranties are easily disclaimed or excluded, the protection given to buyers under the statute becomes illusory. Aside from being able to invest considerable time and effort in the development of modification and exclusion provisions, contractors, developers, and others in the business of selling real estate are in a substantially better bargaining position than the buyer because of their expertise in contract drafting and warranty law. The most stringent requirements should be imposed so that clever drafting of standard contract clauses does not eviscerate newly

132. Id. § 2-311 comment 1, 13 U.L.A. at 613.
133. Id. § 2-311(a), 13 U.L.A. at 612.
134. Id. § 2-311(c), 13 U.L.A. at 613. For the definition of "protected party," see supra note 1.
135. Id. § 2-311(b)(2), 13 U.L.A. at 613.
136. Id. § 2-311(c), 13 U.L.A. at 613.
137. Id. § 2-311(d), 13 U.L.A. at 613.
138. Id. § 2-311(e), 13 U.L.A. at 613.
139. A professional seller has a strong incentive to modify the contract since by merely creating an additional contract clause, he can eliminate substantial liability for defects.
141. The classic personal property warranty case, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), illustrates the ingenuity of professional sellers. A national automobile manufacturers' association developed a limited warranty which it argued disclaimed all liability, including liability for personal injury, except for replacement of defective parts. The Henningsen court, in strik-
created rights. Therefore, a combination of the Maryland and ULTA provisions would best protect residential real estate consumers.

Maryland's requirements for exclusion or modification should be retained in their entirety. Thus, the exclusion or modification would be a written agreement which reflects the buyer's consent. This would substantially ensure that the purchaser is actually aware of the legal rights he has relinquished.

To further protect the purchaser, two ULTA requirements should be engrafted onto the Maryland scheme. First, the Maryland statute should include the ULTA requirement that a writing creates only a presumption that the modification or exclusion was part of the basis of the bargain. A purchaser of a home would be permitted to present evidence of his failure to agree to the exclusion or modification despite the existence of a writing. Second, unconscionability should be specifically identified as a defense to a waiver of warranty rights. This concept protects purchasers against the seller's sophistication and experience. The combination of the most rigorous parts of each statutory scheme ensures that warranty rights will not be minimized.

5. Duration of Express and Implied Warranties

a. Rights

The duration of express and implied warranties may enhance or severely limit the buyer's protections. While apparent defects in quality can be remedied at the time the purchaser takes the property, latent defects may remain undiscovered for many years. To the extent a warranty has a short duration, a purchaser's assurance of quality is limited. In any statutory scheme, two provisions are relevant to the determination of the length of the warranty. First, a statute may specify the duration of the guarantee. Second, the statute of limitations for maintaining a warranty cause of action can be determinative.

In Maryland, the duration of the warranties is one year,\textsuperscript{142} and the statute of limitations for bringing a warranty action is two years.\textsuperscript{143} The effect of these provisions is subject to interpretation.\textsuperscript{144} One interpretation is that only those defects discovered in the first year of home ownership are actionable. The purchaser would have two years after the discovery of the defect to bring suit. Thus, if in the second month

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\textsuperscript{142} MD. REAL PROP. CODE ANN. § 10-204(b) (1981). The one year period begins, if the home is completed at the time of the delivery of the deed, at the time of the taking of the deed or possession, whichever is first. If the home is not completed, the one-year period begins at the earlier of the completion of the home or the taking of possession. \textit{Id}.

\textsuperscript{143} Id. § 10-204(c).

of home ownership the well ran dry, the consumer would have two years from the date of discovery to sue. A defect, though, discovered in the thirteenth month of home ownership would not be actionable because the one year warranty period would have expired.

Another possible interpretation of the statute is to combine the warranty and statute of limitations periods to provide a total of three years in which to discover defects and to bring suit. For instance, if a well ran dry in the thirty-fifth month of home ownership, the purchaser would have but one month to bring his cause of action. Under the second interpretation, the statute of limitations would act to extend coverage while placing an outside limit (three years) on the vendor's liability.\(^\text{145}\)

The ULTA duration of warranty provisions adopts the latter approach. When there is no explicit agreement as to the duration of the warranty,\(^\text{146}\) latent defects must be discovered and sued upon within six years after the buyer to whom the warranty was first made enters into possession of the real estate.\(^\text{147}\)

\textit{b. Assessment}

Both the ULTA and Maryland statutory schemes have the advantage of terminating builder liability at a certain time. Some courts addressing the question of the duration of warranties have adopted tests based upon reasonableness.\(^\text{148}\) In these jurisdictions, the jury must determine whether the warranty was in effect at the time the defect was discovered.\(^\text{149}\) The statute of limitations will begin to run after the defect is discovered.\(^\text{150}\)

Two arguments militate against this extension of warranty coverage. First, the use of a reasonableness test makes the statutory scheme more difficult to administer. A court or jury would be forced to decide on a case-by-case basis the duration of the warranty.\(^\text{151}\) Second, the

\begin{footnotes}
\item[145] Given the adoption of the discovery rule for the running of the statute of limitations, Poffenberger v. Risser, 290 Md. 631, 431 A.2d 677 (1981), the Maryland judiciary may be inclined to take this view.
\item[146] ULTA § 2-521 comment 3, 13 U.L.A. 651 (1980).
\item[147] Id.
\item[149] Since these courts have characterized the test as one of reasonableness, presumably a jury should decide the question.
\item[150] Elden v. Simmons, 631 P.2d 739, 741-42 (Okla. 1981) (purchaser had five years after “the cause of action shall have accrued” to bring suit). Since liability is limited to latent defects, it is logical that the statute of limitations will not begin to run until the defect has been discovered. \textit{Id}.
\item[151] If each of the component parts of a home has a different warranty period, a homeowner might not discover defects such as deteriorating carpets and clogged
\end{footnotes}
exposure of vendors to extended liability may be problematic because of the amount and uncertainty of time involved. This extended liability may deter participation in the important home construction industry.\(^{152}\)

Since neither the ULTA nor the Maryland statute adopt the vagaries of the discovery rule, the determination of which statute better protects the consumer must be based on the length of the warranty and statute of limitations periods. The ULTA allows for discovery of latent defects for a six year period, twice as long as the Maryland statute under a liberal interpretation, and six times as long, given a strict construction. Obviously, the ULTA position is better.

While a great number of defects may be discovered within Maryland's one year warranty period,\(^ {153}\) defects caused by deterioration may be undiscoverable. A basement, for example, may not begin to leak until three years after it has been poured.\(^ {154}\) A faulty site selection, with its attendant problems of sticking doors and kitchen cabinets separating from the ceiling, may not become detectable until the land has settled.\(^ {155}\) Faulty workmanship in the electrical system may not surface until reasonable wear and tear has occurred.\(^ {156}\) Consumer protection interests dictate that Maryland adopt the ULTA's six year statute of limitations period.

IV. CODIFICATION AND UNIFORMITY: MARKETABLE TITLE AND REMEDIES FOR BREACH OF WARRANTY

In addition to the goal of consumer protection, the drafters of the ULTA designed the Act to realize the benefits of codification and uniformity.\(^ {157}\) Codification of any area of the law provides for that area a "pre-emptive, systematic, and comprehensive enactment."\(^ {158}\) A code is systematic and is organized in a logical fashion.\(^ {159}\) A code's methodol-
ogy enables courts to implement its underlying policies in varying factual situations. This type of enactment simplifies the law, makes it more accessible, efficient, and easier to understand. The uniformity of real estate transactions law serves similar goals of simplicity and efficiency.

The adoption of a code such as the ULTA has substantial advantages over the amalgam of decisional law and statutes that presently govern Maryland's residential real estate law. For example, a lawyer with little experience in real estate transactions may represent a buyer who has received a title report revealing major defects. The competent lawyer will first search for a controlling state statute. When buyer's remedies are codified, the search would be completed except for a review of the opinions interpreting the statute. Accessible law likewise reduces legal fees. For clients who are billed on an hourly basis, accessibility means fewer research hours and reduced costs. Codification thus serves an important consumer protection function.

Uniformity serves similar goals. Given the mobility of individuals and businesses and frequent multistate transactions, uniform interstate laws significantly reduce costs. A lawyer in one state would not be forced to expose his client to the onerous cost of canvassing the laws of every state affected by an upcoming real estate venture.

One may well question the costs for codification and uniformity. In the areas of marketable title and remedies for breach of warranty, the cost is very small indeed. In these areas, adoption of the ULTA would codify existing Maryland law with nominal differences. By retaining present Maryland law, the benefits of codification and uniformity can be achieved without drastic changes.

A. Marketable Title

The promise to convey marketable title is an implied warranty in land sale contracts. A title search is conducted between the time the contract is signed and the time that legal title is transferred. This
search may reveal defects which a seller cannot cure. If so, the guarantee of marketable title allows the buyer to avoid the contract.

The Maryland and ULTA marketable title provisions are substantially similar, with both providing adequate protection for the buyer. By implying a warranty of marketable title in every contract, the ULTA reflects Maryland's standard common law position. Also, the ULTA drafters have adopted the traditional definition of marketability.

B. Remedies


For a discussion of possible title defects, see 3 AMERICAN LAW, supra note 24, § 11.49.

See infra text accompanying notes 172-73.


Id § 2-304 comment 1, 13 U.L.A. at 602. In Maryland, the following definition of marketability has been applied at least since 1948:

A marketable title is a title free from encumbrances and any reasonable doubt as to its validity. . . . The general rule is that the purchaser is entitled to a deed which will enable him to hold the land in peace and, if he wishes to sell it, to be reasonably certain that no flaw will appear to disturb its market value. . . . In other words, a marketable title is one which a reasonable purchaser, who is well informed as to the facts and their legal bearings, and ready and willing to perform his contract, would be willing to accept in the exercise of that prudence which business men ordinarily use in such transactions.


While Maryland places the burden and expense of the title search on the buyer, Heckrotte v. Riddle, 224 Md. 591, 168 A.2d 879 (1961), the ULTA imposes these obligations on the seller. ULTA § 2-304(e), 13 U.L.A. 601 (1980). The Maryland rule is preferable because both parties have equal access to public title records and the buyer, by paying for the search, has the best incentive to ensure quality.

Monetary remedies are discussed in this article because they are unique to warranties of title and quality. The additional remedy of specific performance is granted more often in the area of real estate conveyancing than in any other contract. Glendale Corp. v. Crawford, 207 Md. 148, 114 A.2d 33 (1955). In marketable title litigation, the ULTA allows the buyer to seek specific performance to force a conveyance of real estate, even when the seller would rather pay damages and retain title. ULTA § 2-511(a), 13 U.L.A. 640 (1980); accord Styers v. Dickey, 261 Md. 225, 274 A.2d 374 (1971).
breach of these promises. The ULTA and Maryland law are substantially similar in this regard. While the ULTA sets forth these remedies in a comprehensive scheme, Maryland remedies are primarily found in decisional law.

1. Marketable Title

Under the ULTA and Maryland law, the measure of damages permitted buyers faced with an unmarketable title depends upon whether the seller knew his title was defective at the time of contracting. If the seller was aware of the defect, the buyer is entitled to collect the benefit of his bargain. The damages are measured as the difference between the fair market value of the realty at the time for conveyance and the contract price, plus any incidental and consequential damages, such as the expense of the title search. If the seller was unaware of the defect in his title, however, the buyer would be limited to recovery of the amounts previously paid on the contract plus incidental damages. Typically, the seller will return the buyer's deposit and pay the cost of the title search.

Both the ULTA scheme and Maryland decisional law provide for situations when a defect is discovered in the title examination which, while not rendering the title unmarketable, reduces the value of the property. For example, the seller may not have title to the whole lot which was promised. Under these circumstances, both the Maryland and ULTA remedy is an abatement of the purchase price, the ULTA language being that the party aggrieved will be "put in as good a position as he would have been had the other party performed."
2. Warranties of Title

The remedies for breach of covenants of title are identical under the ULTA and Maryland law. Both provide that damages are measured as the “difference at the time of conveyance to the buyer between the value of the real estate and the value it would have had at the time if it had been as warranted.”\(^{176}\) These damages are limited to the value of the consideration paid to the seller.\(^{177}\) In addition, the buyer is also entitled to incidental damages, which may include the costs of defending the title and attorney’s fees.\(^{178}\)

3. Warranties of Quality

Remedies for defects of quality are set out in a complete statutory scheme in the ULTA.\(^{179}\) Maryland’s statute merely allows a court to award “legal or equitable relief or both, as justice requires.”\(^{180}\) Because of Maryland decisional law in other areas,\(^{181}\) relief under the Maryland statute would most likely conform to relief under the ULTA.

Defects in quality may arise both before and after the buyer takes title to the property. As with marketable title problems, the defects arising prior to the time the purchaser takes title may be so severe that he refuses to accept the home or may be so minimal that he decides to take title and recover damages.\(^{182}\) The measure of damages when the seller has substantially breached is the difference between the fair market value at the time for conveyance and the contract price, plus incidental and consequential damages.\(^{183}\)
When defects of quality are discovered after the acceptance of the property, two alternative measures of damages are available. The first is to calculate the difference at the time of acceptance between the value of the real estate and the value it would have had it been as warranted. Alternatively, the consumer may choose to recover the cost of any repairs or improvements necessary to bring the real estate up to the anticipated quality. This second alternative, however, is limited by the doctrine of economic waste. This doctrine provides that the buyer may not force the seller to pay for repairs which might exceed the value of the real estate itself.

V. CONCLUSION

Existing Maryland law fails to provide purchasers of realty with adequate warranties of title and quality. The burden of negotiating adequate warranties of title is squarely on the often unsophisticated consumer. Unless he demands these guarantees, the law will provide him none. Maryland's warranties of quality are likewise limited. While a statutory warranty of quality exists, the scheme is too narrow in coverage, too short in duration, and too restrictive in protections afforded purchasers.

The ULTA provides more comprehensive protection to the buyer in warranties of both title and quality than the Maryland scheme. In recognizing the inability of the typical residential real estate purchaser to protect himself, the ULTA's drafters have fully implemented the values of consumer protection. By implying warranties of title and quality, the drafters have shifted the burden from the buyer to the more sophisticated vendor. The drafters have also adopted the most liberal and rational view by extending guarantees of quality to subsequent purchasers.

Unlike the law of warranties of title in deeds and warranties of quality, the ULTA and Maryland law are substantially similar with respect to the law of marketable title and remedies for breach of warranty. In these areas, the benefits of codification and uniformity can be obtained with minimal disruption of existing law.

184. ULTA § 2-513(1), 13 U.L.A. 642 (1980); see also Fran Realty, Inc. v. Thomas, 30 Md. App. 362, 354 A.2d 196 (1975) (trial judge correctly measured damages as the difference between the contract price and the market value of the property as of the date of the breach).

185. ULTA § 2-513(1), 13 U.L.A. 642 (1980). The ULTA, by giving the purchaser the option of measuring damages as the cost of repairs, protects the purchaser's ability to enforce the contract according to its terms. Although a specific improvement or repair might not, in itself, affect the market value of the property, it might affect the buyer's notion of aesthetics. Id. § 2-513 comment 1, 13 U.L.A. at 643. The Maryland rule is identical. A district court awarded damages for the cost of repairs. Loch Hill Constr. Co. v. Fricke, 284 Md. 708, 710 n. 1, 399 A.2d 883, 885 n.1 (1979).

Maryland has the opportunity to be for the ULTA what Pennsylvania was for the UCC, the first state to adopt a new code.\footnote{Pennsylvania adopted the UCC in 1953. \textit{Pa. Stat. Ann.} tit. 12A, at v (Purdon 1970).} Any reluctance for change should be seen through the eyes of David Dudley Field, an important figure in the early codification movement. He believed laws were "now in sealed books, and the lawyers object to the opening of those books."\footnote{L. Friedman, \textit{A History of American Law} 580 (1973).} Maryland should not allow the traditional reluctance to change property law to stand in the way of the accomplishment of goals of consumer protection, codification, and uniformity.