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Contract Language Stating No Warranties, Express or Implied, Is Effective Disclaimer of Implied Warranty of Fitness and Habitability in Sale of New House by Builder-Vendor Symposium - Selected Topics on Land Use Law - Case Note.

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REAL PROPERTY—Implied Warranty of Fitness and Habitability—Contract Language Stating No Warranties, Express or Implied, Is Effective Disclaimer of Implied Warranty of Fitness and Habitability in Sale of New House by Builder-Vendor.

G-W-L, Inc. v. Robichaux,
643 S.W.2d 392 (Tex. 1982).

The Robichaux and G-W-L entered into a contract in which G-W-L agreed to construct a house for the Robichaux using its own design and providing its own materials.[1] As part of the agreement between the parties, the promissory note signed by the Robichaux contained the provision that there were "no . . . warranties, express or implied, in addition to said written instruments."[2] After G-W-L completed construction of the house, the roof sagged substantially.[3] The Robichaux sued G-W-L under the Texas Deceptive Trade Practices-Consumer Protection Act for breach of express and implied warranties.[4] The jury found no breach of express warranties, but did find that the roof was not constructed in a workmanlike manner and that the house was not merchantable when completed.[5] The court of appeals affirmed the trial court, holding that, in order for a disclaimer of the implied warranty of fitness and habitability created in *Hum-*

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1. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 392 (Tex. 1982).

2. *See id.* at 393. The entire provision in the promissory note read:

> This note, the aforesaid Mechanic's and Materialmen's Lien Contract and the plans and specifications signed for identification by the parties hereto constitute the entire agreement between the parties hereto with reference to the erection of said improvements, there being no oral agreements, representations, conditions, warranties, express or implied, in addition to said written instruments.

Id. at 393.

3. *See id.* at 392.

4. *See id.* at 392; *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1982-1983) ("A consumer may maintain an action where any of the following constitute a producing cause of actual damages: . . . breach of an express or implied warranty . . . ."). The Texas Deceptive Trade Practices-Consumer Protection Act applies to real estate transactions. *See id.* § 17.45(1) (" '[g]oods' means tangible chattels or real property purchased or leased for use").

5. *See* G-W-L, Inc. v. Robichaux, 622 S.W.2d 461, 462 (Tex. App.—Beaumont 1981), *rev'd,* 643 S.W.2d 392 (Tex. 1982). The judgment was for $10,000 in actual damages which represented the difference between the fair market value of the house with and without the defects, $2,000 under the Texas Deceptive Trade Practices-Consumer Protection Act, and attorney's fees less $689.21 which the Robichaux owed G-W-L. *See id.* at 462.

ber v. Morton[6] to be effective, the disclaimer language must be clear and unambiguous and the language in the promissory note did not meet that test.[7] G-W-L's application for writ of error was granted by the Texas Supreme Court.[8] Held—*Reversed and rendered.* Contract language stating "no warranties, express or implied," is an effective disclaimer of the implied warranty of fitness and habitability in the sale of a new house by a builder-vendor.[9]

The centuries-old doctrine of caveat emptor developed at a time when the buyer had knowledge of the goods, and he and the seller were in equal bargaining positions.[10] Because the buyer and seller were dealing at arm's

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6. 426 S.W.2d 554 (Tex. 1968). Humber sued Morton alleging her house was unfit for habitation because the house partially burned due to an improperly constructed fireplace chimney. *See id.* at 555. The court rejected the application of the doctrine of caveat emptor to the sale of a new house by the builder-vendor and recognized the implied warranty of fitness and habitability. *See id.* at 561.

7. *See* G-W-L, Inc. v. Robichaux, 622 S.W.2d 461, 464 (Tex. App.—Beaumont 1981), *rev'd,* 643 S.W.2d 392 (Tex. 1982). Without discussion, the court of appeals rejected G-W-L's contention that the implied warranty of merchantability was inapplicable to real estate transactions and followed the holding in MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). *See* G-W-L, Inc. v. Robichaux, 622 S.W.2d 461, 464 (Tex. App.—Beaumont 1981), *rev'd,* 643 S.W.2d 392 (Tex. 1982). In *Mobley,* the court held that TEX. BUS. & COM. CODE ANN. § 2.316 (Tex. UCC) (Vernon 1968) providing for the exclusion or modification of warranties in the sale of goods applied to real estate sales. *See id.* at 919. Section 2.316 provides that the language in the contract must be conspicuous and mention merchantability in order for the implied warranty of merchantability to be excluded or modified and that the exclusion or modification of the implied warranty of fitness must be both written and conspicuous. *See* TEX. BUS. & COM. CODE ANN. § 2.316(b) (Tex. UCC) (Vernon 1968). Language such as " 'There are no warranties which extend beyond the description on the face hereof' " is sufficient to exclude the warranty of fitness, however. *See id.*

8. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982).

9. *See id.* at 393. This holding is implied since the court explicitly held the disclaimer language at issue was clear and unambiguous. *See id.* at 393. The court also held that the provisions in section 2.316 providing for exclusions or modifications of warranties do not apply to real estate sales because chapter 2 of the Uniform Commercial Code is limited to the sale of goods, which are defined as things that are "movable." *See id.* at 394. Generally a house is not "movable." *See id.* at 394 (citing TEX. BUS. & COM. CODE ANN. § 2.107 (Tex. UCC) (Vernon Supp. 1982-1983)).

10. *See, e.g.,* Vernali v. Centrella, 266 A.2d 200, 202 (Conn. Super. Ct. 1970) (doctrine presupposes buyer and seller are on equal footing and buyer "relies on his own reasoning and judgment"); McDonald v. Mianecki, 398 A.2d 1283, 1287 (N.J. 1979) (caveat emptor developed in sixteenth century, was especially prevalent in early 1800's); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 326 (N.J. 1965) (when caveat emptor developed, buyer and seller were bargaining equals and each was expected to protect himself in the deed); *see also* Comment, *Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings,* 43 DEN. L.J. 379, 379 (1966) (one reason for caveat emptor doctrine is that buyer and seller are dealing at arm's length and buyer is able to inspect and request an express warranty); Note, *Commercial Law—Implied Warranties in Sales of Real Estate—The Trend to Abolish Caveat*

length, the buyer had the right to inspect the product, thus gaining adequate information as to its quality; moreover, since the buyer could require an express warranty, only he should be given the protections for which he contracted were viewed as necessary.[11] The obvious fallacy in applying this theory today is that few buyers have the requisite skill or expertise to determine a product's quality through inspection or the wherewithal to request an express warranty in order to protect themselves if the product should prove defective.[12]

Implied warranties developed as a means of abrogating the harshness of the doctrine of caveat emptor and became widespread in the sale of goods because of mass production.[13] The buyer lost direct contact with the manufacturer and, because of the complexity of the product and the produc-

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Emptor, 22 DE PAUL L. REV. 510, 511 (1972) (doctrine developed in sixteenth century England when trade practices presupposed buyer's knowledge of goods and buyer and seller were in equal bargaining positions). Lord Coke is given credit for coining the phrase "caveat emptor" in the seventeenth century, in the oft-quoted statement: "Note, that by the civil law, every man is bound to warrant the thing he selleth or conveyeth, albeit there be no expresse warranty in either deed or in law; but the common law bindeth him not, for *caveat emptor* . . . ." 2 E. COKE, LITTLETON 102(a), c.7, § 145 (1633), *quoted in* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule,* 14 VAND. L. REV. 541, 542 n.5 (1961). *See generally* Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133 (1931) (surveys history of doctrine of caveat emptor).

11. *See, e.g.,* Vernali v. Centrella, 266 A.2d 200, 202 (Conn. Super. Ct. 1970) (doctrine applies when buyer has opportunity to investigate and inspect); Elderkin v. Gaster, 288 A.2d 771, 774 (Pa. 1972) (since buyer and seller deal at arm's length and have equal knowledge of product, buyer should only be given protections for which he specifically contracts); Humber v. Morton, 426 S.W.2d 554, 557 (Tex. 1968) (doctrine based on premise of arm's length dealing between buyer and seller and that buyer and seller had equal means and opportunity to obtain facts about product); *see also* Pitcher, *Breach of Implied Warranty of Fitness in Construction of Residence,* 10 PROOF OF FACTS 2d 111, 118 (1976) (doctrine based on theory of arm's length dealing between buyer and seller; since buyer has right to inspect goods he should only receive protection for which he contracts).

12. *See, e.g.,* Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974) (buyer usually does not have builder's knowledge and lacks ability to fully examine finished house); Bethlahmy v. Bechtel, 415 P.2d 698, 707 (Idaho 1966) (buyer without knowledge, notice, or warnings unable to require express warranty); Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1158 (Ill. 1979) (most buyers lack knowledge of building practices and must rely on builder-vendor's expertise and integrity).

13. *See, e.g.,* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1157-58 (Ill. 1979) (vast changes in construction and marketing of new houses warrants imposition of implied warranty of habitability to avoid injustice of caveat emptor); McDonald v. Mianecki, 398 A.2d 1283, 1287 (N.J. 1979) (pressure to abandon or modify caveat emptor increased with post-World War II mass production of homes and resulting change in home buying practices); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 77 (N.J. 1960) (Uniform Sales Act which codifies law of implied warranties intended partly to ameliorate harshness of caveat emptor); *see also* Bearman, *Caveat Emptor in Sales of Reality—Recent Assaults Upon the Rule,* 14 VAND. L. REV. 541, 542 (1961) (implied warranty for chattels created exception to doctrine of caveat emptor); Roberts, *The Case of the Unwary Home Buyer: The Housing*

tion process, was forced simply to rely on the skill, expertise, and integrity of the manufacturers.[14] Because of this reliance by the buyer on the seller, implied warranties arise by operation of law without regard to the intentions of the buyer and the seller.[15] The key to the imposition of an implied warranty is the extent of reliance by the buyer on the seller's skill, expertise, integrity, and representations.[16] As a result of judicial enforcement of implied warranties and the adoption of the Uniform Sales Act and the Uniform Commercial Code (UCC), the buyer now has a remedy if a product he has purchased proves defective.[17]

Merchant Did It, 52 CORNELL L.Q. 835, 837 (1967) (great reforms occurred in twentieth century changing caveat emptor doctrine in sale of chattels).

14. *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 83 (N.J. 1960) (today's ordinary buyer does not have chance or ability to determine if automobile is fit and must rely on manufacturer); Elderkin v. Gaster, 288 A.2d 771, 776 (Pa. 1972) (buyer of development house justifiably relies on developer's skill); Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975) (today's buyer forced to rely on builder's skill and expertise). As one court has recognized, "when a vendee buys a development house from an advertised model, . . . he clearly relies on the skill of the developer. . . .' " Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325 (N.J. 1965).

15. *See, e.g.,* Peterson v. Hubschman Constr. Co., 389 N.E.2d 1154, 1158 (Ill. 1979) (implied warranty of habitability arises as result of execution of agreement between buyer and seller); Griffin v. Wheeler-Leonard & Co., 225 S.E.2d 557, 567 (N.C. 1976) ("implied warranty . . . arises by operation of law, not by specific factual agreement between the parties"); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 807 (S.D. 1967) (implied warranties arise by operation of law with intent to hold sellers to course of fair dealing).

16. *See, e.g.,* Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974) (less knowledgeable buyer usually relies on builder-vendor to assure quality of product); Yepsen v. Burgess, 525 P.2d 1019, 1022 (Or. 1974) (buyer must rely on seller's skill and expertise as to elements of adequately built house); Padula v. J. J. Deb-Cin Homes, Inc., 298 A.2d 529, 531 (R.I. 1973) (in era of mass production and commercialism, buyer must rely on seller's skill and workmanship). As noted by one commentator, the reliance of the buyer on the seller appears to increase with the cost of the product. *See* Case Comment, Byrd *Property—Implied Warranty of Fitness in the Sale of a New House,* 71 W. VA. L. REV. 87, 89 (1968). The buyer who purchases a new home relies on the building skills of the builder-vendor even though their agreement is a purchasing rather than a building contract. *See id.* at 89. That the buyer relies on the builder-vendor's skill is evident when one considers that the average buyer does not have his own architect, and is unable to make a competent inspection. *See id.* at 89; *see also* Comment, *Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings,* 43 DEN. L. J. 379, 383 (1966) ("basic principle underlying the doctrine of implied warranty is . . . reliance"); Note, *Products Liability—Breach of Implied Warranty—Injection of Contaminated Drug By Hospital Employee Sufficient to Constitute Sale of Product for Purposes of Implied Warranty,* 13 ST. MARY'S L. J. 431, 432 (1981) (imposition of implied warranty limited by extent to which buyer relied on seller's representations). Patent defects which should be discovered by the buyer through a reasonable inspection of the product will not give rise to an implied warranty, while the existence of latent defects will. *See* Griffin v. Wheeler-Leonard & Co., 225 S.E.2d 557, 567 (N.C. 1976).

17. *See, e.g.,* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1157 (Ill. 1979) (implied warranty of habitability exists in order to support action by buyer against builder-

In Texas, implied warranties are recognized in the Texas Uniform Commercial Code[18] and in the Texas Deceptive Trade Practices-Consumer Protection Act.[19] The Texas Uniform Commercial Code applies to the sale of goods which are defined as "movable" whereas the Texas Deceptive Trade Practices-Consumer Protection Act applies to real estate as well as "movable" goods.[20] A buyer may sue under both statutes for breach of express or implied warranties, but if the breach occurs in a real estate transaction, the buyer's only remedy is under the Texas Deceptive Trade

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vendor for latent defects); Weeks v. Slavick Builders, Inc., 180 N.W.2d 503, 505 (Mich. Ct. App.) (implied warranty of fitness has replaced doctrine of caveat emptor since Uniform Sales Act and Uniform Commercial Code), *aff'd,* 181 N.W.2d 271, 272 (Mich. 1970); Lane v. Trenholm Bldg. Co., 229 S.E.2d 728, 730 (S.C. 1976) (rejection of caveat emptor evidenced by adoption of Uniform Sales Act and Uniform Commercial Code); *see also* Bearman, *Caveat Emptor in Sales of Realty— Recent Assault Upon the Rule,* 14 VAND. L. REV. 541, 542 (1961) (doctrine of caveat emptor has practically disappeared with respect to sale of chattels due in great extent to Uniform Sales Act and Uniform Commercial Code). The Uniform Commercial Code recognizes the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. *See* U.C.C. §§ 2-314, 2-315 (1978). The implied warranty of merchantability 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." *Id.* § 2-314. Section 2-314 lists six criteria necessary for goods to be merchantable. The goods must

> (a) pass without objection in the trade under the contract description; and
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> (b) in the case of fungible goods, are of fair average quality within the description; and
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> (c) are fit for the ordinary purposes for which such goods are used; and
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> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
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> (e) are adequately contained, packaged, and labeled as the agreement may require; and
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> (f) conform to the promises or affirmations of fact made on the container or label if any.

Id. § 2-314. The implied warranty of fitness for a particular purpose is narrower than that of merchantability and provides that:

> [w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified . . . an implied warranty that the goods shall be fit for such purpose.

Id. § 2-315.

18. *See* TEX. BUS. & COM. CODE ANN. §§ 2.314, 2.315 (Tex. UCC) (Vernon 1968). Section 2.314 recognizes the implied warranty of merchantability, while section 2.315 acknowledges the implied warranty of fitness for a particular purpose. *See id.*

19. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(2) (Vernon Supp. 1982-1983). Section 17.50(a)(2) provides the consumer with a cause of action for the breach of express or implied warranties. *See id.*

20. *Compare* TEX. BUS. & COM. CODE ANN. § 2.105 (Tex. UCC) (Vernon 1968) (" '[g]oods' means all things . . . which are movable at the time of identification to the contract for sale . . .") *with* TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon Supp. 1982-1983) (leased or purchased real property included with tangible chattels in definition of "goods").

Practices-Consumer Protection Act.[21]

Until recently, the doctrine of caveat emptor was consistently applied to the sale of new houses due to the reluctance of courts to extend implied warranties to the sale of realty.[22] The implied warranty of fitness and habitability became a judicial innovation used to abrogate the harsh doctrines of caveat emptor and merger[23] and to afford buyers a means of relief when they discovered latent structural defects in their new houses.[24] American

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21. *See* TEX. BUS. & COM. CODE ANN. § 2.714 (Tex. UCC) (Vernon 1968) (buyer who has accepted goods may sue for damages for breach of warranty); *id.* § 17.45(1) (Vernon Supp. 1982-1983) (definition of "goods" includes real property); *id.* § 17.50(a)(2) (Vernon Supp. 1982-1983) (consumer may sue for breach of express or implied warranty under Texas Deceptive Trade Practices-Consumer Protection Act).

22. *See, e.g.,* Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 90, 115 Cal. Rptr. 648, 650 (1974) (courts have historically applied caveat emptor in ordinary land and building sales); Vernali v. Centrella, 266 A.2d 200, 203 (Conn. Super. Ct. 1970) (Uniform Commercial Code practically eliminated doctrine of caveat emptor in the sale of personalty, but doctrine still applied to sale of realty); Weeks v. Slavick Builders, Inc., 180 N.W.2d 503, 505 (Mich. Ct. App.) (doctrine of caveat emptor almost universally applied to sale of real property), *aff'd,* 181 N.W.2d 271, 272 (Mich. 1970). Even though reforms were taking place in the laws with respect to the sale of chattels, the old rules continued in the sale of houses. *See* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835, 837 (1967). Louisiana was an exception to this general rule; under Louisiana civil law the doctrine of redhibition creates an implied warranty in all sales transactions unless it is expressly excluded or unless the defect is one which the buyer should discover by reasonable inspection. *See* Perkins v. Chatry, 58 So.2d 349, 352 (La. Ct. App. 1952); LA. CIV. CODE ANN. art. 2521 (West 1952). The doctrine applies to real estate sales as well as personalty. *See* Kolwe v. Owens, 357 So.2d 1333, 1334 (La. Ct. App. 1978).

23. *See, e.g.,* Vernali v. Centrella, 266 A.2d 200, 201 (Conn. Super. Ct. 1970) (result would be harsh if buyer of new home were denied right to seek damages for defects in construction not visible to eye); Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1157 (Ill. 1979) (recent judicial innovation of implied warranty of habitability created to avoid harsh doctrines of caveat emptor and merger); Padula v. J. J. Deb-Cin Homes, Inc., 298 A.2d 529, 531 (R.I. 1973) (caveat emptor harsh and unjust doctrine when applied to sale of real estate). Under the doctrine of merger, any warranties in the contract of sale were lost if they were omitted from the deed; the contract merged into the deed and the deed was considered to reflect the entire agreement between the parties. *See* Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 800 (Mo. 1972); Humber v. Morton, 426 S.W.2d 554, 555-56 (Tex. 1968). *See generally* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835, 857-62 (1967) (discusses complicating factor of merger doctrine in implying warranties in sale of new house).

24. *See* Peterson v. Hubschman Constr. Co., 389 N.E.2d 1154, 1157 (Ill. 1979). The first case to recognize the implied warranty of habitability was the English case, Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113. *See* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835, 838 (1967). The *Miller* court recognized the implied warranty of habitability for a house purchased prior to completion, but a buyer who purchased a house after construction was completed had no implied warranty. *See* Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113, 120-21; *see also* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835, 838 (1967) (implied warranty applies to unfinished houses, but rationale that buyer can re-

courts did not recognize the implied warranty of fitness and habitability until 1957,[25] when the circumstances were finally right.[26] Once this first step was taken, other American courts recognized the implied warranty of fitness and habitability with unusual speed.[27]

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quire express warranty in sale of new house remains); Note, *Contracts—Caveat Emptor—Implied Warranty of Habitability,* 12 DUQ. L. REV. 109, 111-12 (1973) (*Miller* created distinction that implied warranty of habitability applies to purchase of incomplete house but not to purchase of completed house). According to most courts, the implied warranty requires reasonably workmanlike construction and fitness for the intended purpose of human habitation. *See* Pitcher, *Breach of Implied Warranty of Fitness in Construction of Residence,* 10 PROOF OF FACTS 2d 111, 123 (1976). One commentator has suggested that the warranty should be characterized as one of merchantability rather than one of habitability; thus by analogy to the Uniform Commercial Code, the builder-vendor would warrant upon sale that "the house would be of fair average quality, that it would pass without objection in the building trade, and that it would be fit for the ordinary purpose of living in it." *See* Comment, *Washington's New Home Implied Warranty ofHabitability—Explanation and Model Statute,* 54 WASH. L. REV. 185, 211 (1978); U.C.C. § 2-314 (1978). The commentator cites, *inter alia,* Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Yepsen v. Burgess, 525 P.2d 1019 (Or. 1974) as examples of courts which have moved in this direction. *See* Comment, *Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute,* 54 WASH. L. REV. 185, 212 (1978). Another court has applied this reasoning to hold that a builder-vendor impliedly warrants that a completed house would be suitable for its intended purposes. *See* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1159 (Ill. 1979).

25. *See* Vanderschrier v. Aaron, 140 N.E.2d 819, 821 (Ohio Ct. App. 1957); *see also* Note, *Commercial Law—Implied Warranties in Sales of Real Estate—The Trend to Abolish Caveat Emptor,* 22 DE PAUL L. REV. 510, 514-15 (*Vanderschrier* was first American case to completely adopt English rules). The *Vanderschrier* court adopted the English rules in their entirety, including the complete/incomplete dichotomy. *See* Vanderschrier v. Aaron, 140 N.E.2d 819, 821 (Ohio Ct. App. 1957). This dichotomy was abandoned by the American courts beginning with Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964). *See* Note, *Implied Warranty of Fitness for Habitation in Sale of Residential Dwellings,* 43 DEN. L.J. 379, 381 (1966). The Colorado court saw the dichotomy as incongruous and extended the implied warranty of habitability to the sale of a new house whether purchased before or after construction was completed. *See id.* at 402.

26. *See* Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975). Since World War II, houses have been built in great numbers. Home construction today is complex and controlled by governmental codes and building regulations. The average buyer has neither the skill nor the training to discover defects in the plumbing, wiring or structure of a house. *See id.* at 1279. Mass production and commercialism are a part of the home construction industry of today and a buyer is forced to rely on the builder's skill and workmanship. *See* Padula v. J. J. Deb-Cin Homes, Inc., 298 A.2d 529, 531 (R.I. 1973); *see also* Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule,* 14 VAND. L. REV. 541, 542 (1961) (even with development of mass production of houses and consequent rush of buyers seeking relief, courts were reluctant to overrule doctrine of caveat emptor); Note, *Commercial Law—Implied Warranties in Sales of Real Estate—The Trend to Abolish Caveat Emptor,* 22 DE PAUL L. REV. 510, 515 (1972) (complete/incomplete dichotomy indicates courts' reluctance to reject completely doctrine of caveat emptor in real estate sales).

27. *See* Wawak v. Stewart, 449 S.W.2d 922, 923 (Ark. 1970) (within last twenty years,

The buyer today generally buys from a model home or from plans already drawn up by the builder-vendor.[28] The buyer, for whom buying a

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courts have moved with rapidity and unanimity away from harsh doctrine of caveat emptor in sale of new houses). Courts in at least 35 jurisdictions have recognized an implied warranty of fitness and habitability in the sale of a new house: *See* Cochran v. Keeton, 252 So.2d 313, 314 (Ala. 1971); Columbia Western Corp. v. Vela, 592 P.2d 1294, 1299 (Ariz. Ct. App. 1979); Wawak v. Stewart, 449 S.W.2d 922, 926 (Ark. 1970); Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 91, 115 Cal. Rptr. 648, 651 (1974); Glisan v. Smolenske, 387 P.2d 260, 263 (Colo. 1963); Vernali v. Centrella, 266 A.2d 200, 204 (Conn. Super. Ct. 1970); Gable v. Silver, 258 So. 2d 11, 18 (Fla. Dist. Ct. App.) (holding applies to condominiums), *aff'd,* 264 So. 2d 418, 418 (Fla. 1972); Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966); Weck v. A:M Sunrise Constr. Co., 184 N.E.2d 728, 734 (Ill. App. Ct. 1962); Theis v. Heuer, 270 N.E.2d 764, 769 (Ind. Ct. App. 1971); Crawley v. Terhune, 437 S.W.2d 743, 745 (Ky. Ct. App. 1969); Banville v. Huckins, 407 A.2d 294, 296-97 (Me. 1979); Krol v. York Terrace Bldg., Inc., 370 A.2d 589, 594 (Md. Ct. Spec. App. 1977) (recognition of statutorily imposed implied warranty); Weeks v. Slavik Builders, Inc., 180 N.W.2d 503, 506 (Mich. Ct. App.), *aff'd,* 181 N.W.2d 271, 272 (Mich. 1970); Brown v. Elton Chalk, Inc., 358 So. 2d 721, 722 (Miss. 1978); Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 801 (Mo. 1972); Chandler v. Madsen, 642 P.2d 1028, 1031 (Mont. 1982); Norton v. Burleaud, 342 A.2d 629, 630 (N.H. 1975); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325 (N.J. 1965); Centrella v. Holland Constr. Corp., 370 N.Y.S.2d 832, 835 (N.Y. Dist. Ct. 1975); Hartley v. Ballou, 209 S.E.2d 776, 783 (N.C. 1974); Dobler v. Malloy, 214 N.W.2d 510, 516 (N.D. 1973); Vanderschrier v. Aaron, 140 N.E.2d 819, 821 (Ohio Ct. App. 1957); Jones v. Gatewood, 381 P.2d 158, 160 (Okla. 1963); Yepsen v. Burgess, 525 P.2d 1019, 1022 (Or. 1974); Elderkin v. Gaster, 288 A.2d 771, 777 (Pa. 1972); Padula v. J. J. Deb-Cin Homes, Inc., 298 A.2d 529, 532 (R.I. 1973); Rutledge v. Dodenhoff, 175 S.E.2d 792, 795 (S.C. 1970); Waggoner v. Midwestern Dev., Inc., 154 N.W.2d 803, 809 (S.D. 1967); Dixon v. Mountain City Constr. Co., 632 S.W.2d 538, 542 (Tenn. 1982); Humber v. Morton, 426 S.W.2d 554, 555 (Tex. 1968); Rothberg v. Olenik, 262 A.2d 461, 467 (Vt. 1970); Hoye v. Century Builders, Inc., 329 P.2d 474, 476 (Wash. 1958); Tavares v. Horstman, 542 P.2d 1275, 1282 (Wyo. 1975). *But see* P.B.R. Enterprises v. Perren, 253 S.E.2d 765, 767 (Ga. 1979) (caveat emptor applies to sale of realty, no implied warranties); Gosha v. Woller, 288 N.W.2d 329, 331 (Iowa 1980) (no recognition of implied warranty of habitability in sale of new house unless buyer contracts with builder-vendor before construction); Bruce Farms, Inc. v. Coupe, 247 S.E.2d 400, 404 (Va. 1978) (sale of new house carries no implied warranties; overruling caveat emptor best left to legislature).

28. *See, e.g.,* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1158 (Ill. 1979) (buyer frequently purchases from model home or standard plans with little or no chance to inspect); Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 799 (Mo. 1972) (house was shown as model to give idea of what kind of houses builder-vendor built); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325 (N.J. 1965) (buyer clearly relies on developer's skill when he buys development house after looking at advertised model). Until the end of World War II, most people bought a piece of land, hired an architect to design the house and supervise the construction, and hired a builder to do the construction. *See* Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835, 837 (1967). If the house had any defects, the person had a cause of action against the architect for negligence or against the builder for failure to build in a good and workmanlike manner. *See id.* at 837. The suit against the builder was based on the construction contract which contained an express or implied promise that the house would be built in a workmanlike manner and in accordance with the specifications. *See* Vernali v. Centrella, 266 A.2d 200, 203 (Conn. Super. Ct. 1970).

house is a major lifetime investment, usually has little or no opportunity to inspect the house during construction, lacks knowledge of the construction business, and must rely on the builder-vendor's expertise and integrity.[29] Because of these factors, the underlying reason for the implied warranty of fitness and habitability is, as enunciated by one court,[30] that "[t]he [buyer] has a right to expect to receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence."[31]

Texas was a pioneer in this area with the decision in *Humber v. Morton.*[32] In *Humber,* the Texas Supreme Court traced the development of implied warranties in the sale of new houses, the reasons behind their development, and their rapid adoption by American courts.[33] The court was aware of the public policy reasons for implied warranties[34] and did not hesitate to recognize the implied warranty of fitness and habitability in Texas.[35]

With the implied warranty of fitness and habitability in the sale of new houses firmly established, the next major question was whether such a warranty could be disclaimed, and if so, what were the requirements for an effective disclaimer.[36] Courts generally do not look with favor on dis-

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29. *See, e.g.,* Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966) (purchase of house not everyday transaction for most families and frequently is significant lifetime transaction); Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1158 (Ill. 1979) (purchase of home major investment for buyers often unfamiliar with construction practices); Tavares v. Horstman, 542 P.2d 1275, 1279 (Wyo. 1975) (home buyer should be able to rely on builder-vendor in making largest single investment of lifetime).

30. *See* Peterson v. Hubschman Constr. Co., 389 N.E.2d 1154 (Ill. 1979).

31. *See id.* at 1158.

32. 426 S.W.2d 554 (Tex. 1968).

33. *See id.* at 557-62. The court surveyed cases from other jurisdictions which had already recognized the implied warranty. *See id.* at 557-62.

34. *See id.* at 561 (court discussed need for abrogating harsh and unjust doctrine of caveat emptor in sale of new houses).

35. *See id.* at 555.

36. *See, e.g.,* Belt v. Spencer, 585 P.2d 922, 925 (Colo. Ct. App. 1978) (implied warranty may be limited by express provision, but limitation must be in clear and unambiguous language); Crowder v. Vandendeale, 564 S.W.2d 879, 881 n.4 (Mo. 1978) (disclaimer must be conspicuous and completely disclose its consequences); Casavant v. Campopiano, 327 A.2d 831, 833-34 (R.I. 1974) ("as is" clause insufficient to exclude implied warranty in sale of personalty unless language is specific; language in real estate contract did not meet this specificity test); *see also* Comment, *Liability of the Builder-Vendor Under the Implied Warranty of Habitability—Where Does It End?,* 13 CREIGHTON L. REV. 593, 594 (1979) (imposition of implied warranty raises question of whether liability can be avoided through contractual disclaimer). "The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." Twin City Pipe Line Co. v. Harding Glass Co., 238 U.S. 353, 356 (1931).

claimers, but no court has held disclaimers of the implied warranty of fitness and habitability to be contrary to public policy.[37] Almost every court considering the question has held that general language of disclaimer is not sufficient, that the disclaimer must be specific and conspicuous so that the buyer knows he is waiving his right to a house built in a good and workmanlike manner, and that any disclaimers of doubtful meaning will be strictly construed against the party raising the disclaimer as a defense.[38] Some courts have specifically held that disclaimers in contract "boilerplate" will not be enforced.[39] Some courts also place the burden on the builder-vendor to prove that the buyer knew what rights he was waiving.[40] Other courts have stated that, since the reasons for the implied warranty of fitness and habitability and for the implied warranties of fitness for a particular purpose and merchantability are similar, by analogy, the laws applicable to the latter should be applicable to the former.[41]

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37. *See, e.g.,* Belt v. Spencer, 585 P.2d 922, 925 (Colo. Ct. App. 1978) (warranties that home built in workmanlike manner and suitable for habitation may be limited by express provision in parties' contract); Herlihy v. Dunbar Builders Corp., 415 N.E.2d 1224, 1228 (Ill. App. Ct. 1980) (public policy not violated or offended when implied warranty of habitability knowingly disclaimed); Griffin v. Wheeler-Leonard & Co., 225 S.E.2d 557, 567 (N.C. 1976) (buyer and builder-vendor can agree that implied warranty of habilitability will not apply to transaction); *see also* Comment, *Liability of the Builder-Vendor Under the Implied Warranty of Habitability—Where Does It End?,* 13 CREIGHTON L. REV. 593, 595 (1979) (no court has held disclaimer to be against public policy even though not favored by courts).

38. *See* Sloat v. Matheny, 625 P.2d 1031, 1034 (Colo. 1981); Belt v. Spencer, 585 P.2d 922, 925 (Colo. Ct. App. 1978); Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1159 (Ill. 1979); Herlihy v. Dunbar Builders Corp., 415 N.E.2d 1224, 1228-29 (Ill. App. Ct. 1980); Crowder v. Vandendeale, 564 S.W.2d 879, 881 n.4 (Mo. 1978); Griffin v. Wheeler-Leonard & Co., 225 S.E.2d 557, 567-68 (N.C. 1976); Casavant v. Campopiano, 327 A.2d 831, 833-34 (R.I. 1974). *But see* Arnold v. New City Condominiums Corp., 433 N.Y.S.2d 196, 198 (N.Y. App. Div.) (UCC article 2 requirement that disclaimer be conspicuous does not apply to real estate), *appeal dism'd,* 422 N.E.2d 583, 583, 439 N.Y.S.2d 922, 922 (1980); G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982) (general language sufficient to disclaim implied warranty; section 2.316 does not apply to real estate); Tibbetts v. Openshaw, 425 P.2d 160, 161-62 (Utah 1967) (general "as is" provision sufficient to disclaim implied warranty).

39. *See* Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. 1978). The burden is on the builder-vendor to prove the parties made a bargain to waive the implied warranty of habitability and "[b]y this approach, boilerplate clauses, however worded, are rendered ineffective, thereby affording the consumer the desired protection . . . ." *See id.* at 881; *see also* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1159 (Ill. 1979) (quoting *Crowder* "boilerplate" statement).

40. *See* Herlihy v. Dunbar Builders Corp., 415 N.E.2d 1224, 1229 (Ill. App. Ct. 1980); Crowder v. Vandendeale, 564 S.W.2d 879, 881 n.4 (Mo. 1978).

41. *See, e.g.,* Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325 (N.J. 1965) (since no meaningful difference between sale of house and sale of automobile, warranty principles should be transferred to realty sales); Yepsen v. Burgess, 525 P.2d 1019, 1022 (Or. 1974) (because no substantial difference between sale of house and sale of goods, implied warranties of fitness should attach to both); MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ.

The Texas Supreme Court in *G-W-L, Inc. v. Robichaux*[42] purported to follow the reasoning used by courts in other states as well as the appeals court's opinion[43] and the reasoning in *MacDonald v. Mobley,*[44] in holding that the implied warranty of fitness and habitability recognized in *Humber v. Morton*[45] can be waived and that the disclaimer language must be "clear and free from doubt."[46] The court disagreed with the lower court's holding that the disclaimer language at issue did not meet the test.[47] The court held that the disclaimer was sufficiently clear and free from doubt, and that the Robichaux were under a duty to read what they signed in order to protect themselves. Thus, through implication, by signing the promissory note the Robichaux waived the implied warranty of fitness and habitability, and they had no cause of action against G-W-L for breach of that implied warranty.[48] Reasoning that the responsibility was the legislature's and not the court's, the court also refused to follow those courts which have extended chapter 2 of the Uniform Commercial Code by analogy to the sale of new houses.[49] By so holding, the court refused to extend the

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App.—Austin 1977, writ ref'd n.r.e.) (statutes applicable to implied warranties in sale of goods apply also to sale of real estate), *overruled by* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982); *see also* Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 799 (Mo. 1972) (purchase of house equated to purchase of any manufactured product and deserves as much protection). In Lane v. Trenholm Bldg. Co., 229 S.E.2d 728, 730 (S.C. 1976), the court stated that "[a] house is the sale of a product, similar to the sale of personalty . . . . [T]here is little reason to apply ancient doctrines of real property law which are inconsistent with the current and historical treatment of sales of personalty in this State." *Id.* at 730; *accord* Bolkum v. Staab, 346 A.2d 210, 211 (Vt. 1975) (citing Rothberg v. Olenik, 262 A.2d 461, 467 (Vt. 1970)). "[T]here was no rational doctrinal basis for differentiating between the sale of a newly constructed house by the builder-vendor and the sale of any other manufactured product." *Id.* at 211.

42. 643 S.W.2d 392 (Tex. 1982). The decision was 6-3. *See id.* at 392, 394.

43. G-W-L, Inc. v. Robichaux, 622 S.W.2d 461 (Tex. App.—Beaumont 1981), *rev'd,* 643 S.W.2d 392 (Tex. 1982).

44. 555 S.W.2d 916 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). In *Mobley,* the escrow sales contract contained the statement "in the same condition as it is on this date." *See id.* at 919. The builder argued that section 2.316(c)(1) of the Texas Business and Commerce Code authorized such an "as is" disclaimer and that the provision should apply to the sale of a new home. *See id.* at 919. The court agreed, but went on to hold that section 2.316(b) also applied to the sale and by its terms required the disclaimer to be conspicuous. *See id.* at 919. Since the "as is" disclaimer in question was not conspicuous in that there was no distinctive type, color contrast or other means calling attention to the disclaimer, the disclaimer was not effective. *See id.* at 919.

45. 426 S.W.2d 554 (Tex. 1968).

46. G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982).

47. *See id.* at 393.

48. *See id.* at 393-94.

49. *See id.* at 394. The court's refusal to follow other courts is implied since the court merely stated that chapter 2 of the Texas UCC does not apply to new house sales or construction. *See id.* at 394.

UCC requirements of specificity and conspicuousness to disclaimers in the sale of new houses.[50]

The strong dissenting opinion disagreed with the majority's holding that the disclaimer language at issue was sufficiently clear and free from doubt.[51] The dissent would require any disclaimer to be clear and specific so that the buyer knows he is waiving his warranty of fitness and habitability before such a waiver would be effective.[52] The dissent stated that the court had upheld requirements that disclaimer language be clear and specific in analagous areas of contract law and saw no reason why the same requirements should not apply to the disclaimer of an implied warranty of fitness and habitability in the sale of a new house.[53]

The *Robichaux* court broke with the rationale behind the line of Texas cases preceding its decision.[54] The court chose to ignore the underlying policy considerations which caused courts to create the implied warranty of fitness and habitability in the first place.[55] The *Humber* court had relied heavily on decisions by other courts and cited favorably the decline of the doctrine of caveat emptor in the sale of personal property in recognizing the implied warranty of fitness and habitability in Texas.[56] The *Mobley* court had relied on the Uniform Commercial Code as adopted by Texas in the Texas Business and Commerce Code to hold that disclaimers of the implied warranty must give notice to the buyer that he is waiving his rights under the implied warranty.[57] Both courts used their common law powers

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50. *See id.* at 394. Again, the court's refusal to extend the UCC's specificity and conspicuousness requirements to new house sale disclaimers is implied by its holding that chapter 2 does not apply to new house sales and construction. *See id.* at 394.

51. *See id.* at 394-95 (Spears, J., dissenting).

52. *See id.* at 395 (Spears, J., dissenting).

53. *See id.* at 395 (Spears, J., dissenting).

54. *See* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Holifield v. Coronado Bldg., Inc., 594 S.W.2d 214 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); Richman v. Watel, 565 S.W.2d 101 (Tex. Civ. App.—Waco), *writ ref'd per curiam,* 576 S.W.2d 779 (Tex. 1978); MacDonald v. Mobley, 555 S.W.2d 916 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); Hollen v. Leadership Homes, Inc., 502 S.W.2d 837 (Tex. Civ. App.—El Paso 1973, no writ); Moore v. Werner, 418 S.W.2d 918 (Tex. Civ. App.—Houston [14th Dist.] 1967, no writ). *But see* Turner v. Conrad, 618 S.W.2d 850, 853 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.) (because "as is" clause written in contract, buyers waived right to claim reliance on implied warranty).

55. *See* Humber v. Morton, 426 S.W.2d 554, 561 (Tex. 1968) (noting harshness and injustice of caveat emptor and inability of average buyer to discover defects in house's construction).

56. *See id.* at 557-61.

57. *See* MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); *cf.* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1159 (Ill. 1979) (reference to UCC as to nature of implied warranty invites thought on the effect of disclaimer provisions in contract for sale of realty).

to provide protection for the consumer,[58] yet the *Robichaux* court failed to do this by refusing to adopt the UCC's requirements of specificity and conspicuousness for application to the sale of a new house.[59] Since the implied warranty is a judicial creation, the highest court of the state, not the legislature, is the proper entity to change the law.[60] Had the *Robichaux* court wanted to conform to the rationale in the previous Texas cases and in those cases from other jurisdictions, and abrogate the doctrine of caveat emptor to provide protection for the home buyer, it could have done so.[61]

The *Robichaux* court also disregarded underlying policy reasons by allowing the implied warranty of fitness and habitability to be disclaimed by general language contained in contract boilerplate.[62] Today's builder-ven-

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58. *See* Humber v. Morton, 426 S.W.2d 554, 561-62 (Tex. 1968); MacDonald v. Mobley, 555 S.W.2d 916, 919 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.). The *Mobley* court's use of its common law power is inferred since chapter 2 of the Texas UCC by its terms does not apply to real estate sales. *See* TEX. BUS. & COM. CODE ANN. § 2.105 (Tex. UCC) (Vernon 1968).

59. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982). In Arnold v. New City Condominiums Corp., 433 N.Y.S.2d 196, 198 (N.Y. App. Div.), *appeal dism'd,* 422 N.E.2d 583, 583, 439 N.Y.S.2d 922, 922 (1980), the court followed reasoning similar to the court in *Robichaux* by holding that article 2 of the UCC applies to the sale of goods and not to real estate; the disclaimer was legibly displayed, and thus not invalid under article 2.

60. *See, e.g.,* Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1157 (Ill. 1979) (implied warranty of habitability is judicial innovation to afford relief to buyers of defective houses); Weeks v. Slavick Builders, Inc., 180 N.W.2d 503, 506 (Mich. Ct. App.) (caveat emptor is judicial innovation, not legislative creation, so court can change the law), *aff'd,* 181 N.W.2d 271 (Mich. 1970); Rothberg v. Olenik, 262 A.2d 461, 462 (Vt. 1970) (doctrine of caveat emptor is of judicial origin, thus court not restricted in delimiting doctrine's application); *see also* 2 TEX. CONSUMER L. RPTR. 13, 15-16 (1983) (implied warranty is judicial creation).

61. *See* Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 324-25 (N.J. 1965).

> Law as an instrument for justice has infinite capacity for growth to meet changing needs and mores . . . . The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times.

Id. at 324-25. Under TEX. BUS. & COM. CODE ANN. § 2.316(b) (Tex. UCC) (Vernon 1968), the implied warranty of fitness can be disclaimed by very general language; however, the warranty of merchantability can only be disclaimed if the language mentions merchantability. *See id.* § 2.316(b). The language for both disclaimers must be conspicuous. *See id.* § 2.316(b).

62. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982). *Compare* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982) (disclaimer need not be conspicuous or specific to be effective) *with* Crowder v. Vandendeale, 564 S.W.2d 879, 881 n.4 (Mo. 1978) (disclaimer provision must not only be conspicuous but seller must also prove buyer knew he was waiving his rights). The court, in Herlihy v. Dunbar Builders Corp., 415 N.E.2d 1224, 1225 (Ill. App. Ct. 1980), was faced with a disclaimer which read: "No . . . warranties . . . other than those expressed herein whether oral, implied or otherwise shall be considered a part of this transaction." *Id.* at 1225. This disclaimer is almost identical to that in

dor, frequently in a superior bargaining position, has greater expertise in the sale of a house than the average buyer.[63] If this home buyer is so inexperienced to require the imposition of an implied warranty of fitness and habitability, his position is no better in negotiating and understanding contracts especially when a standard form or adhesion contract is used in the sale.[64] It is strange reasoning which provides a buyer rights under the implied warranty of fitness and habitability but then declares his rights can be taken without his even being aware of the loss.[65]

The dissent's argument that a disclaimer must specifically name the warranty being disclaimed[66] is more in keeping with the rationale of *Humber, Mobley,* and the weight of authority from other jurisdictions.[67] The dissent recognized that a basic public policy underlying the creation of the

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Robichaux. See G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982). The *Herlihy* court held that the implied warranty of habitability "is implied by law for the protection of consumers [and] is a matter of public policy and should not be considered waived except by clear and specific language." Herlihy v. Dunbar Builders Corp., 415 N.E.2d 1224, 1228-29 (Ill. App. Ct. 1980). Where the disclaimer language appears "near the end of a standard form contract in the same print size and type as other clauses; does not mention or refer to a warranty of 'habitability'; and does not explain the consequences of the disclaimer" the court was unable to say, as a matter of law, that the clause was an effective disclaimer of the implied warranty of habitability. *See id.* at 1229. The burden is on the seller to prove that the buyer knew he was waiving his rights under the implied warranty. *See id.* at 1229.

63. *See, e.g.,* Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966) (denial of justice to apply caveat emptor to transaction between inexperienced buyer and builder who daily engages in business of building and selling houses); Crawley v. Terhune, 437 S.W.2d 743, 745 (Ky. Ct. App. 1969) (rule of caveat emptor unrealistic and unjust when applied to ordinary, inexperienced home buyer dealing with professional builder-vendor); McDonald v. Mianecki, 398 A.2d 1283, 1290 (N.J. 1979) (in most cases, seller is in superior bargaining position).

64. *See* Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325-26 (N.J. 1965). The court recognized that today's home buyer "has no architect or other professional advisor of his own, he has no real competency to inspect on his own . . . and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder-vendor is negligible." *Id.* at 325-26; *see also* McDonald v. Mianecki, 398 A.2d 1283, 1290 (N.J. 1979) (standard form contracts are usually used in house sale; express warranties seldom given because expensive and impractical for average buyer to negotiate).

65. *Compare* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 393 (Tex. 1982) (buyer under duty to know what he signs) *with* Crowder v. Vandendeale, 564 S.W.2d 879, 881 (Mo. 1978) (seller must prove that buyer knew he was waiving his rights under the implied warranty).

66. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 394 (Tex. 1982) (Spears, J., dissenting).

67. *See, e.g.,* Herlihy v. Dunbar Builders Corp., 415 N.E.2d 1224, 1229 (Ill. App. Ct. 1980) (language which does not contain or refer to word "habitability" not sufficient disclaimer); Crowder v. Vandendeale, 564 S.W.2d 879, 881 n.4 (Mo. 1978) (disclaimer must be conspicuous and seller must fully disclose consequences of its inclusion); Griffin v. Wheeler-Leonard & Co., 225 S.E.2d 557, 568 (N.C. 1976) (disclaimer must be in clear and unambiguous language, "reflecting the fact that the parties fully intended such result").

implied warranty of fitness and habitability is the protection of the consumer.[68] By allowing the implied warranty to be disclaimed by general language hidden in the contract's fine print, the reason for the implied warranty is defeated and the courts' holdings in *Humber* and subsequent cases are emasculated since only the buyer with sufficient expertise in contract formation would know that to preserve his rights he must request an express warranty.[69]

G-W-L, Inc. v. Robichaux[70] represents a return to the doctrine of caveat emptor by the Texas Supreme Court. The court has retreated from the position of consumer protection expressed in *Humber* and its progeny and in other jurisdictions.[71] If the doctrine of caveat emptor was an anachronism in 1968,[72] it is no less so now and should not have been resurrected by the Texas Supreme Court.

Judy K. Lytle

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68. *See* G-W-L, Inc. v. Robichaux, 643 S.W.2d 392, 395 (Tex. 1982) (Spear, J., dissenting).

69. *See id.* at 395. "The ordinary consumer when signing a contract for sale would not even conceive of the possibility that his house would not be built in a good and workmanlike manner." *Id.* at 395. In other words, the court has reinstated the doctrine of caveat emptor in the sale of a new home. *See* 2 TEX. CONSUMER L. RPTR.13, 15 (1983).

70. 643 S.W.2d 392 (Tex. 1982).

71. *See, e.g.,* Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966) (application of caveat emptor to purchase of new house by inexperienced buyer denial of justice); Crawley v. Terhune, 437 S.W.2d 743, 745 (Ky. Ct. App. 1969) (implied warranty of habitability recognized because caveat emptor unrealistic and inequitable when applied to purchase of new house by inexperienced buyer); Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 326 (N.J. 1965) (implied warranty of habitability helps to protect buyers of mass produced development houses who are not on equal footing with builder-vendors).

72. *See* Humber v. Morton, 426 S.W.2d 554, 562 (Tex. 1968) (doctrine of caveat emptor "is an anachronism patently out of harmony with modern home buying practices.").