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The Case Against Strict Liability Protection for New Home Buyers in Ohio

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THE CASE AGAINST STRICT LIABILITY PROTECTION FOR NEW HOME BUYERS IN OHIO

I. INTRODUCTION

Traditionally, the new home buyer has had no sure method of redress against the builder when confronted with significant structural or mechanical defects. In recent years, however, a number of alternatives have been made available to the buyer to enable him to gain satisfaction and be assured of the benefit of his bargain.¹

In Ohio, home buyers have several means available to protect their investment and assure themselves of getting their money's worth. First, and foremost, the Ohio courts, while not mandating either implied warranties of habitability or strict liability, have offered some protection to the consumer in holding builders to a standard of workmanship commensurate with that prevailing in the trade locally.² Ohio courts also recognize collateral covenants with regard to construction that do not merge with the deed when title is transferred.³

Aside from these court-sanctioned protections, the home buyer who obtains government financing through either the Veterans Administration (VA) or the Federal Housing Administration (FHA) is protected by a statutory guarantee⁴ as well as by government stipulated inspections of the home during certain phases of construction.⁵ The opportunity to inspect is not limited to those purchasers using VA or FHA financing. All home buyers can and should hire independent general contractors or architects to inspect the construction during certain key phases.⁶ The home buyer or his attorney should require that the contract stipulations, or the plans and specifications, are recited in the deed and should be alert to any "as-is" provisions in the deed to the property.⁷ An additional self-protection measure that should be taken by anyone in the market for a new home is an investigation of possible builders. Factors which should be taken into consideration include: general reputation, references from past customers, and the quality of units presently under construction.

Recently the building industry has taken it upon itself to provide an extensive ten year warranty on major structural defects as well as one to two year warranties for appliances and mechanical systems. Despite these protections, the courts in many states have extended the doctrine of strict liability to home purchasers. While this protection has previously only been available to purchasers of consumer goods, it is only natural that attention should begin to focus on the home buyer, since the magnitude of the investment is so great in relation to the income of the purchaser. As a result of this trend, the traditional doctrine of Caveat Emptor is being eroded.

II. CAVEAT EMPTOR AND CONSUMER RESPONSIBILITY

The rationale behind the movement to eliminate the applicability of the doctrine of Caveat Emptor to the building industry was succinctly stated by the court in Humber v. Morton:

The Caveat Emptor rule as applied to new houses is an anachronism patently out of harmony with modern home buying practices. It does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.

Others who support the decline of Caveat Emptor in the building industry draw analogies between homes and consumer goods. These advocates of strict liability note that a consumer purchasing a ten dollar toaster or a seventy-nine cent dog collar is afforded more protection than the purchaser of a $50,000 home.

One problem that is perceived with Caveat Emptor is that it presumes a relative equality of bargaining power between the builder and the buyer. In the past, the purchase of a new home was essentially a transaction involving only the purchaser and the builder, the negotiations involving only one house. Those favoring the elimination of Caveat Emptor from real estate

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8 HOMEOWNER WARRANTY CORPORATION, EXPLAIN HOW, (HOW Pamphlet No. 64, rev. 1978).
10 The average cost of a new home today is $74,200. It was estimated that at a cost of $78,000, 75% of the population would be eliminated as potential home buyers. Effect of Government Regulations Upon Home Building and Related Construction: Hearings Before the Select Senate Comm. on Small Business, 95th Cong., 1st Sess. (1977) (statement of Senator Gaylord Nelson) (hereinafter cited as 1977 Hearings).
11 426 S.W.2d 554, 562 (Tex. 1968).
12 Id.
transactions generally feel that there has been an erosion of this equality and that as a result, the home buyer no longer occupies as favorable a position as the builder. The proponents of this argument focus on the advent and prevalence in the market place of the “tract house,” analogizing home building to mass production.\textsuperscript{14}

The erosion of Caveat Emptor in real estate transactions was first apparent in England in Miller v. Cannon Hill Estates, Ltd.\textsuperscript{15} The Miller court found an implied warranty of habitability, but limited the warranty to houses sold while still under construction. The court reasoned that the purchaser of a completed home could inspect the premises and assure himself that the home was built in a satisfactory manner. The home buyer who purchased prior to completion did not have this same opportunity and thus needed the warranty protection of the court.\textsuperscript{16}

Since 1931, inroads into the doctrine of Caveat Emptor in the United States have been steadily increasing. The court in Schipper v. Levitt & Sons, Inc.\textsuperscript{17} held the builder-vendor of a tract house strictly liable for injuries to a minor child of vendee’s lessee. The child’s injury was caused by over-heated water from the bathroom faucet. The builder had given the vendee a Home Owner’s Guide which warned of the water temperature and instructed the buyer in the proper method of drawing water from the faucet. This was not sufficient to absolve the builder from liability, however, even though the builder was unaware of the extent of risk of injury involved.\textsuperscript{18} Following Schipper, the buyer was afforded similar protection in other states.\textsuperscript{19}

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\textsuperscript{14} Id. at 208, 209; Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314, 326 (1965); D.R.I. Staff, \textit{Defense Memo No. 10: Liability of Builder-Vendor of Homes, 12 FOR THE DEFENSE 715 (1971).}
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\textsuperscript{15} [1931] 2 K.B. 113.
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\textsuperscript{16} Id.
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\textsuperscript{17} 44 N.J. 70, 207 A.2d 314 (1965).
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\textsuperscript{18} 44 N.J. at 74, 88, 207 A.2d at 314, 324.
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While recognizing the advantage that the knowledgeable builder-vendor has over the purchaser in many transactions, it is impossible to ignore the fact that many home buyers purchase in haste, concerning themselves with neither inspections of the premises nor investigations of their chosen builders.\(^{20}\) The issue thus becomes whether *Caveat Emptor* is the anachronism found in *Humber*, or whether consumers have been lulled into complacency, looking to the courts for assistance where they should be exercising ordinary care in selecting their homes.

The need for strict liability in the form of a warranty of habitability would seem critical when viewed in a vacuum. The new home buyer has several other means of protection, however, which will enable him to enter the market place on a relatively equal footing with the builder, and thus obviate the need for strict liability protection.

### III. Facts About New Home Construction

In order to better understand the movement toward strict liability protection in the home building industry, it is helpful to look at current construction statistics. Since 1965, the cost of a new home has risen 345%.\(^{21}\) The same home that in 1965 could have been purchased for $21,500 now costs $74,200.\(^{22}\) As the price of a new home has increased, expectations have risen commensurately. The hardwood floors and plaster walls of yesterday can only be had for a premium price in today’s market, where even a modest home is expensive.

The following statistics are illustrative of the trend in new housing. The overall increase in housing component costs between 1970 and 1978 has been 202%.\(^{23}\) Add to this the current inflation rate and the high cost of financing, and the builder's package becomes prohibitively expensive. This is borne out by a look at the progression in housing costs over the past decade. In Ohio, housing authorizations decreased from 58,000 in 1970 to 48,700 in 1976, increasing again to 59,900 in 1978.\(^{24}\) At the same time, costs have increased from $871 million in 1970, to $1.39 billion in 1976, to $2.14 billion in 1978.\(^{25}\) Thus, median value of new housing construction in Ohio went from $14,800 to $28,500 to $35,700.\(^{26}\) This trend is not unique to Ohio. Nationwide, the number of new housing starts val-


\(^{21}\) *United States Bureau of the Census, Construction Quarterly*, Table 2, (1980).

\(^{22}\) *Id.*


\(^{24}\) *Id.*, Table 1373.

\(^{25}\) *Id.*

\(^{26}\) *Id.*
ued at over $50,000 increased from 20,000 in 1970, to 134,000 in 1975, to 501,000 in 1978. This is even more startling when viewed as a percentage of the new housing starts: 4%, 47%, and 61% respectively.

The disparity between relative value and price is apparent, and as a result, the vendee's expectation of quality is often unreasonable. Professor Bearman notes:

While the average department store customer would not expect the same from a one dollar fountain pen that he has reason to demand from a fifteen dollar model, this same person, when he buys an $8,000-$10,000 home, loses sight of the fact that though it may be his castle, he cannot expect it to be built like one. As a Tennessee builder adroitly stated, “when you buy a $10,000 house, you just can’t expect gold doorknobs.” Inflated expectations are causing a great deal of the current dissatisfaction in the housing industry. Although many of the complaints may be legitimately grounded, many are not, and most builders will tell of customers who are never satisfied, or who will purposely break a housing component to avoid making the final payment. Furthermore, when people pay premium prices, they often expect the impossible, for instance, concrete drives and walks that are impervious to cracks. The state of the art simply can not comply with the expectations of many new home buyers.

Ohio courts have recognized this disparity between buyer expectations and the state of the art in construction. In Tibbs v. National Homes Construction Corporation, the plaintiff complained about the quality of material in his tract house, alleging that he relied on defendant's representation that the material would be of the “highest quality.” The court noted that the representation would by necessity have meant that the “material would be of the highest quality for comparable housing,” and that the plaintiff obviously had no right to expect sandalwood and teak to be incorporated into a $25,000 house.

Bearing in mind the tendency of buyers to forget that the ravages of inflation have struck the building industry, we turn now to problems that

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27 Id., Table 1397.
28 Id.
29 Bearman, supra note 20, at 573.
30 Id. at note 143.
31 Id. at 412.
32 Interview with Contractor Richard Huth of Huth-Westwood Builders, Akron, Ohio (Jan. 18, 1980).
34 Id. at 289, 369 N.E.2d at 1224.
35 Id.
36 See notes 21-30 supra, and accompanying text.
go beyond the mere frustrations of buyer expectancy, for there obviously
are problems with new homes that encompass faulty workmanship or
negligence on the part of the builder.

IV. PROTECTION OFFERED BY THE OHIO COURTS

Ohio courts, while not embracing the quasi-strict liability found in
Schipper, offer two avenues of protection to the Ohio new home buyer. First,
the courts recognize construction contract provisions which are collateral
and therefore do not merge with the deed when the title passes from vendor
to vendee. The second means of buyer protection is an implied warranty of
workmanlike quality.

The doctrine of merger by deed, if invoked, estops the vendee from
alleging and proving that the contract for sale of the house has been
breached. The vendee’s acceptance of the deed extinguishes specific items
in the contract of sale, and unless they are enumerated in the deed, they
cease to be binding. In 1954, an Ohio court in Galvin v. Keen held that
where a house under construction was to be finished in accordance with
detailed plans and specifications, the subsequent passing of title to the prop-
terty did not absolve the builder from responsibility for latent defects. The
court offered this protection to the buyer in those instances where non-com-
pliance with the contract or specific latent defects were not discoverable
through normal inspections. Later, in Rapp v. Murray the court refined
its position on the doctrine of merger by deed as it relates to construction
contracts:

The true rule seems to be that where a contract provides for the transfer
of the title to real estate, and nothing else, the deed conveying

37 Carpenter v. Donohoe, 154 Colo. 78, 88 P.2d 399 (1964) (basement wall cracked and
wall must be shorn up with lumber); Waggoner v. Midwestern Dev., Inc., 83 S.D. 7,
154 N.W.2d 803 (1967) (water seepage in basement); Humber v. Morton, 426 S.W.2d 554
(Tex. 1968) (fireplace improperly constructed and house burns). See generally Annot., 25

38 Shipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (defective hot water tap);
Freeman v. Mazzera, 150 Cal. App.2d 61, 309 P.2d 510 (1957) (decorative lattice work
pulls loose and child is injured); State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss.
1966), explosion demolishes a house; builder liable for defective valve on hot water heater).


40 100 Ohio App. 100, 135 N.E.2d 769 (1954).

41 Id. at 100; 135 N.E.2d at 770 (Syllabus by the Court):
Where a contract with detailed plans and specifications is entered into with a builder
for the purchase of a house then under construction, the house to be completed in
accordance with such plans and specifications; where, during the construction period,
but not until after the basement is completed and the first-floor studding is up, the
vendee sees the house several times; and where such vendee accepts delivery of the
deed, pays the consideration and moves into the house; the execution of the contract
is not merged in the deed as to latent and concealed effects which a normal inspection
on the vendee’s part could not reveal; and the vendee may recover therefor.

42 Id.

the title is in fact full performance, and is accepted as full performance of the contract. In such a case the contract can properly be said to be merged in the deed.

But where a contract contains many provisions relating to more than one subject, one of which provides for the transfer of title to real estate, the transfer of title to the real estate is only part performance of the obligations. There are other obligations and the transfer of the real estate can in no sense be said to be performance of all the obligations or to have been intended as actual or substituted performance.44

The application of this form of protection is viable only in instances where there is more to the transaction than a mere passage of title. Although this limits the doctrine's application, it could be a valuable tool for the buyer whose contract for sale included the plans and specifications for the house. To afford themselves the protection offered in Galvin and Rapp, a homebuyer could require that the construction plans and specifications be incorporated into the sales contract.

The second means of protection offered is an implied warranty of workmanlike quality. This is perhaps the most far-reaching protection offered by Ohio courts. The types of defects that have come under this heading are varied. Leaking roofs and collapsing plaster ceilings,48 irregular settling of the house,46 cracking stucco exterior,47 water seeping into heat ducts,48 collapsing of a basement wall,49 and concealing a drainage ditch under the garage floor,50 are all examples of unworkmanlike quality found in other jurisdictions. In Ohio, problems such as foundation cracks,51 improper fill,52 substitution of fiberboard for plywood,53 loose floor tiles,54 settling floors,55 and improperly installed windows56 have been found to constitute "unworkmanlike quality."

The leading Ohio case on new home warranties is Mitchem v. Johnson.57 In Mitchem, the plaintiff sued a builder alleging, inter alia, that drain

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44 Id. at 384, 171 N.E.2d at 376-77.
47 Id.
51 Galvin v. Keen, 100 App. 100, 135 N.E.2d 769.
52 Id.
53 Id.
55 Id. See also Rapp v. Murray, 112 Ohio App. 144, 171 N.E.2d 374.
57 Mitchem v. Johnson, 7 Ohio St.2d 66, 218 N.E.2d 549.
tiles had not been properly installed given the location of the house on the low portion of the lot. As a result, during heavy rainfalls, the soil became too sodden, rendering the septic tank ineffective and the interior toilet facilities inoperative. While the supreme court in *Mitchem* took away the warranty of habitability sanctioned earlier in *Vanderschrier v. Aaron*, it recognized an obligation on the part of the builder to construct the home in a workmanlike manner:

A duty is imposed by law upon a builder-vendor of a real-property structure to construct the same in a workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, including those inherent in its site. If the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, the vendor is answerable to the vendee for the resulting damages.

Although the supreme court recognized the existence of a duty owed to the buyer, subsequent decisions have not expanded either the extent of the duty or its applicability. In *Hubler v. Bachman*, the court found that cracking plaster in the home one year following the sale did not, absent evidence to the contrary, imply a breach of the builder's duty to complete the structure in a workmanlike manner. In evaluating the builder's workmanship, the court noted that the cracked plaster was the only problem encountered, and that defendant had subcontracted the job to a plasterer who enjoyed a good reputation in the building community. The court went on to delineate the scope of the builder's duty: "It is the duty of a builder of a structure to perform his work in a workmanlike manner, that is, the work should be done as a skilled workman should do it and the law exacts from a builder, ordinary care and skill only . . . ." The builder's liability is thus limited to the extent that he adheres to the customary trade practices in the community. As the *Hubler* court noted:

A builder is not an insurer and is not required to respond to an owner on account of defective construction, except in accordance with the precepts of ordinary care, unless a specific obligation is affixed on him through a specific contract to do so . . . . There is no absolute warranty implied by law against the builder, for the measure of his duty is to be ascertained by reference to the standard of ordinary care and skill in the circumstances which beset the particular situation.
The implications, after *Hubler*, are that the plaintiff must allege a defect that is serious or more than one minor defect. Thus, while poor plastering by itself may not constitute shoddy workmanship, if combined with numerous other problems, major or minor, it could give rise to a cause of action for breach of implied warranty of workmanlike quality.

The *Hubler* and *Mitchem* protections were temporarily diluted by the holding in *Benson v. Dorger* which narrowly construed *Mitchem*. In Benson, the plaintiffs purchased a home, and completed the transaction after the house was finished. After the plaintiffs moved in, problems developed. The court refused to apply the warranty of workmanlike quality, noting that it was essentially a negligence action, and subject to the four year negligence statute of limitations which had run out.

The following year, the Court of Appeals of Franklin County reached a contrary holding in *Lloyd v. William Fannin Builders, Inc.* stating that "Whatever name is attached to such duty, it is a duty which is implied in law and comes from the contract between builder-vendor of the real property structure and the vendee." Five years later, the holding in *Benson* was overruled in *Tibbs v. National Homes Construction Corp.* In interpreting the *Mitchem* decision, the *Tibbs* court found that although the *Mitchem* court used language often associated with tort actions, the cause of action was one arising *ex contractu*. Since the action was one of contract the need for disgruntled vendees to prove elements of actual negligence was obviated.

Although Ohio court-afforded protection falls short of the warranty of habitability found in other districts, it does protect the home buyer from the "sloppy work and jerry-building" perceived as being the rationale for discarding the doctrine of *Caveat Emptor* and promoting the concept of a warranty of habitability in the building industry. The problems inherent in the strict/product liability approach have been recognized by the Ohio

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64 Id.
66 Id. at 115, 292 N.E.2d at 922.
68 Id. at 510, 320 N.E.2d at 741.
70 Id. at 1226.
courts. In *Mitchem*, the court explored the result of holding the builder liable absent a showing of unworkmanlike quality:

Having constructed the building, the vendor [would be] held to his bargain irrespective that the work or materials, or both, utilized in its construction may have been reasonably suitable for their purpose and the care and skill utilized may have been that which was commensurate with the gravity of the risk involved in protecting the structure against hazards, including those inherent in its site. Such result avoids the harsh truth that unfortunate problems arise on real estate and in real structures which no prudence can avoid and which defy every reason-able skill.\(^\text{14}\)

The Ohio Supreme Court was not willing to hold the builder liable as an insurer against any and all defects in the product. Absolute liability of the builder is inequitable for several reasons. In many cases it would be difficult to determine whether the defect was a result of the ordinary wear and tear of the elements rather than a lack of skill. For example, very few “products” are exposed to constant seasonal extremes of weather as are houses. Exposure to the elements puts stress on all the components of the home. Furthermore, improper maintenance can cause abnormal wear for which a builder should not be liable.\(^\text{75}\)

Strict liability for new home defects would cause other problems. Valid questions of causation could be raised if the time lapse involved between sale and discovery of defect is great. This would make insurance a costly venture for any builder.\(^\text{76}\)

V. VA AND FHA FINANCING

In addition to the implied warranty of workmanlike quality, buyers who finance through either the Veterans Administration (VA) or Federal Housing Administration (FHA) have the advantage of periodic inspections of their new home during the construction phase by FHA/VA approved architects. These inspections are required by statute,\(^\text{77}\) and when coupled with the one year warranty that the building will be completed in substantial conformity with the approved plans and specifications\(^\text{78}\) required by the government, provide another means of redress to this class of home buyer. This is reflected in the housing finance statistics. Between 1960 and 1978,
the percentage of new housing starts financed by FHA decreased from 20% of total starts to only 8.6%.

Thus, this opportunity for inspections afforded 20% of new home buyers in 1960 is now affecting less than 10% of the market. The market for VA financing has remained relatively stable, accounting for 5.8% of new home financing in 1960 and 6.2% in 1978.

Although the FHA/VA home buyer is protected during the first year of occupancy, procedures for seeking redress require strict compliance. An illustration of the degree of strictness and the harsh results following failure to comply is seen in the holding in New Home Construction Corp. v. O'Neil. In that case, the plaintiff moved into his VA financed home on February 1, 1957. On July 5, 1957, he sent a letter to the builder listing numerous defects. On July 17, 1957 he wrote to the VA to request an arbitration. Out of a total of 108 defects, the FHA inspector felt that eleven should be remedied by the builder. The plaintiff could not recover, however, because he had not alleged the failure to comply with plans and specifications within a year. The court held that his letter of July 5 alleged 108 defects in workmanship and material rather than a deviation from plans and specifications. Thus the courts in Texas have limited the FHA/VA warranties solely to deviations from plans and specifications. Court-imposed strict compliance with notification requirements presents a pitfall to the unsophisticated home owner seeking redress under his government warranty. Despite the problems involved in utiliziation of these protections and in their limited permeation into the housing market, they do provide a measure of protection for some home buyers.

VI. THE HOME OWNER WARRANTY PROGRAM

In 1973, the Board of Directors of the National Association of Home Builders (NAHB) began to develop an insured home warranty program for new home buyers. From this came the Home Owner Warranty Corporation (HOW Corporation). The HOW Corporation organized regional units known as HOW Councils. Since its inception, the HOW Corporation has engaged in an aggressive public relations campaign. The purpose of the campaign has been to educate the home buyer of the advantages of seeking homes built by members of the HOW Council and to encourage as many builders as possible to join the regional councils.

19 United States Bureau of the Census, supra note 23, Table 1326.
20 Id.
21 Id.
23 Id. at 799.
24 Id.
Although fear of government intervention in the area supplied the impetus to NAHB,\textsuperscript{86} the industry, nevertheless, came up with a strong warranty program to offer the home buyer. The HOW program has three facets. It regulates the industry itself, it protects the buyers, and it provides a mechanism for dispute settlement. The first part of the NAHB warranty program requires participating builders to register with the regional Home Owner's Warranty Council (HOW Council). Registration is not open to all builders. The HOW Council screens the applicants, and conducts a thorough check on their reputations among customers, fellow builders and suppliers. These screening interviews and fact sheets are kept on file in the offices of the regional HOW Councils.

The builder must re-register annually, and if he has changed suppliers, the HOW Council will contact the former supplier to find out what, if any, problems prompted the change.\textsuperscript{87} The rationale behind this close and constant review is to assure "[f]inancial stability, technical ability and customer satisfaction."\textsuperscript{88} Once a builder has registered in a council jurisdiction, every structure he erects is subject to the provisions of the HOW warranty. The builder can not selectively apply warranty protections.\textsuperscript{89}

After a builder has been accepted as a HOW member, he is required to conform his work to the Residential Construction Standards\textsuperscript{90} approved by the local HOW Council. To enforce these standards, HOW representatives conduct periodic site checks.\textsuperscript{91} The Residential Construction Standards booklet sets forth the HOW Council's standards or refers the builder to the local government building codes.\textsuperscript{92} The standards have two distinct features. First, they set a standard for actual building construction, such as mechanical, plumbing and electrical systems. Secondly, they set quality standards for workmanship such as parameters for number and types of permissible defects.\textsuperscript{93} With respect to construction, mechanical, plumbing and electrical categories, the builder follows the local building code. The requisite inspections by the local government jurisdiction provide evidence

\textsuperscript{86} Comment, Home Owners Warranty Program: An Initial Analysis, 28 STAN. L. REV. 357, 358 (1976).
\textsuperscript{87} Interview with Scott Beckett, Regional Director, Northeast Ohio HOW Council (Jan. 24, 1980); Interview with contractor Richard Huth, \textit{supra}, note 32.
\textsuperscript{88} Id.
\textsuperscript{89} HOME OWNER WARRANTY CORPORATION, TEN YEARS OF PROTECTION (HOW Pamphlet No. 401, 1978).
\textsuperscript{90} HOME OWNER WARRANTY REGISTRATION COUNCIL OF NORTHEAST OHIO, RESIDENTIAL CONSTRUCTION STANDARDS, on file with the Akron Law Review, also available upon request from Regional HOW councils.
\textsuperscript{91} HOME OWNER WARRANTY CORPORATION, \textit{supra} note 89.
\textsuperscript{92} HOME OWNER WARRANTY REGISTRATION COUNCIL OF NORTHEASTERN OHIO, \textit{supra} note 90.
of compliance. Absent local standards, the builder follows the Minimum Property Standards (MPS) of the United States Department of Housing and Urban Development (HUD), or select model codes. Appliances, fixtures and equipment generally carry the manufacturer’s warranty. Absent the manufacturer’s warranty, they are guaranteed for one year. The standards delineate the areas covered by the warranty, giving examples of possible deficiencies, acceptable defect tolerance and builder responsibility. The standards also inform buyers of areas which are not covered by the warranty.

The warranty itself is executed in three phases:

Year One—During the first year, the warranty covers all of the components listed in HOW’s Approved Standards. This includes everything from major structural problems to kitchen cabinets.

Year Two — During the second year, the coverage includes major structural defects and defects in the electrical, plumbing or mechanical systems. These are limited in that the warranty does not extend to fixtures related to the systems. Thus a defective master switch would be covered under the electrical system warranty, but a defective light switch would not be.

Years Three to Ten—After the second year, the plan protects against “major construction defects.” This term is defined in the Warranty Agreement as:

Actual damage to the load-bearing portion of the home (including damage due to subsidence, expansion or lateral movement of soil from causes other than flood or earthquake) which affects its loadbearing function and which vitally affects (or is imminently likely to produce a vital effect on) the use of the home for residential purposes.

The warranties offered for all ten years are covered by a national insurance program that costs the builder $2 per $1000 of construction cost. As a result, the builder is insured against any loss, and the homebuyer does not run the risk that the builder will be insolvent and therefore unable to pay any judgments obtained against him. Essentially, the home buyer has a warranty of habitability that he need not resort to the courts to enforce.

94 Id.
95 Id.
96 Id. Examples of non-warranted areas include concrete patios, sidewalks and driveways.
98 Id. at 4; HOME OWNER WARRANTY CORPORATION, HOME OWNERS WARRANTY: A BRIEF REVIEW (HOW Pamphlet No. 377, 1979).
99 HOME OWNER WARRANTY CORPORATION, supra note 97, at 4.
100 HOME OWNER WARRANTY CORPORATION, FOR THE PEACE OF MIND YOU CANNOT BUY (HOW Pamphlet No. 380, 1978).
In addition, the warranty is transferrable. The home is insured for ten years whether or not ownership has changed.

The third major component of the HOW warranty is the availability of conciliation and arbitration to settle disputes. These procedures result in considerable savings in legal fees for both the home builder and the buyer. In describing their arbitration procedure, the HOW Council points out several features. First, the arbitration is available free to the homeowner. Second, the arbitration comes under the Magnuson-Moss Act\textsuperscript{101} which provides for the decision to be binding on the builder but only advisory with respect to the homeowner.

Arbitration is the final step in the HOW system for resolving complaints. The initial contact is between builder and buyer. If the parties fail to resolve their differences, the HOW Council arranges for a conciliation. The arbitration process only goes into effect if conciliation fails to settle the dispute.\textsuperscript{102} There are four HOW Councils in Ohio: Northwest Ohio (Toledo), Northeast Ohio (Cleveland), Miami Valley (Dayton), and Central Ohio (Columbus). The Toledo and Columbus councils were formed in 1977, while the Cleveland and Dayton councils have been in existence for over four years. To date, there have been approximately 273 conciliation cases and 87 arbitration cases.\textsuperscript{103}

The HOW Program is far more comprehensive than the Model Act proposed by Bearman, which limits the remedies to the initial vendee and forces the disgruntled buyer into the courts for relief.\textsuperscript{104} It offers more protection than its British counterpart, the British National House-Builder's Registration Council (BHBRC) which has a more comprehensive second year warranty but has placed ceilings on the cost of repairs allowed per house.\textsuperscript{105}

The BHBRC has, however, overcome one problem that has resulted in a large increase in the number of buyers covered, and could be adopted in this country with equal success. The British equivalent of saving and loan associations, which finance 80\% of the houses in the United Kingdom,

\textsuperscript{101} Bearman, \textit{supra} note 20, at 545.

\textsuperscript{102} The conciliation and arbitration procedures are discussed in the following Home Owner Warranty Corporation publications: \textit{Conciliate, Don't Litigate} (HOW Pamphlet No. 81, 1979); \textit{Benefits for Builders} (HOW Pamphlet No. 65, 1978); \textit{For the Peace of Mind You Cannot Buy} (HOW Pamphlet No. 380, 1979). For arbitrations see \textit{American Arbitration Association, Instructions for Arbitrators Serving Under the Expedited Home Construction Arbitration Rules} (AAA Pamphlet No. 103-3M, 1979).

\textsuperscript{103} Letter from Scott Beckett, Northeast Ohio HOW Council Regional Director, to Karen Doty (Feb. 1, 1980).

\textsuperscript{104} Bearman, \textit{supra} note 20, at 576-77.

\textsuperscript{105} \textit{Future of FHA: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess.} (1977).
requires that any new home they finance be covered by BHBRC warranties.\textsuperscript{106} A move of this kind would fortify the applicability of the HOW warranty. Certainly, more favorable consideration should be given by both buyers and financing institutions to homes insured for ten years than to those without such protection. The United States government recognizes and supports HOW by waiving certain requirements of FHA/VA inspections on HOW built homes.\textsuperscript{107}

The HOW program has deficiencies such as too few builders registered, lack of any saturation establishment of HOW councils, and cost of the program to the builders.\textsuperscript{108} Most of the suggestions for improvement can be accomplished via administrative changes and do not require changes in any provisions in the warranty. The deficiencies in the program do not require judicial or governmental prodding to be rectified. The passage of time should see an increase in both the number of builders registered and the establishment of additional HOW councils. Increased patronizing of registered builders should encourage other builders to register. Costs of the program can and should be passed on to the buyers.

VII. ADDITIONAL MEASURES

The tendency of both our legislative and judicial bodies to protect the consumer has been obvious in past decades. Since 1916, when Justice Cardozo extended judicial protection to MacPherson and his defective Buick,\textsuperscript{109} the key word in describing the progress in the area of consumer protection has been "expand." The concepts of both Caveat Emptor and consumer responsibility have been on the decline. There are no longer any "bad bargains" for consumers.

The housing industry is threatened by consumerism. It is felt that the consumer can hardly be expected to know a bad weld or faulty foundation if he sees one. Even a buyer's failure to engage a knowledgeable professional to inspect the home for him is explained by Professor Bearman:

The high cost of hiring a skilled examiner would place that particular safeguard beyond the reach of most vendees, particularly the average homebuyer who has very likely mortgaged heavily in order to purchase even a modest unit in a typical housing development. Further there is very little which even a skilled examiner could uncover if he must inspect after the house has been completed, since many defects over which litigation has occurred are found in the home's foundation, which

\textsuperscript{106} Id. at 401.
\textsuperscript{107} HOME OWNER WARRANTY CORPORATION, BENEFITS FOR BUILDERS, supra note 102. The FHA has waived the first two construction inspections and the VA has authorized an expedited handling process for HOW homes.
\textsuperscript{108} Comment, HOME OWNERS WARRANTY PROGRAM: AN INITIAL ANALYSIS, supra note 86, at 374.
can be effectively checked only before any more of the building has been constructed.  

In Northeast Ohio, a "skilled examiner" (architect or contractor) will charge around $30 an hour for job inspections. The average inspection takes approximately two and one half hours including driving to and from the site, inspecting and writing up a report. For full protection, the examiner would need to inspect the house during five stages of construction: when the foundation has been poured, when the framing is up, when the exterior is enclosed, after the mechanical, electrical and plumbing is installed but prior to the enclosing of the interior with drywall, and finally, after completion. Thus, complete inspection would cost the buyer $375, a figure that hardly seems prohibitive when spending in excess of $30,000 on a home. One limitation is that the first four inspections are not available to buyers of "tract houses." Buyers can protect themselves by engaging builders who either offer their own express warranty or who are HOW builders. 

VIII. CONCLUSION

One thing is certain, the housing industry, caught between the inflationary squeeze and the tight money market, does not need judicial or federal government intervention. The average home building corporation is a small business and ill-equipped to handle the cost of government supervision and reports. Additional regulatory costs would be passed on to the consumer creating an even smaller class of potential buyers.

The obvious answer is the prudent use of protections presently available including: astute consumer appraisal of potential builders, inspections where possible, support of HOW builders, and government warranties when either VA or FHA financing is utilized. Through consumer education of the protections available, the need to resort to government regulations or court imposed strict liability is obviated. The cautious consumer in Ohio who inspects, investigates and protects himself can not be cheated by builders since the court will allow recovery against those who fail to complete their structures in a workmanlike manner.

Karen Doty

110 Bearman, supra note 20, at 545.
111 Interview with Architect Steven Cohen of Cohen & Frederick in Akron, Ohio (Feb. 15, 1980). See also A. Sokol, Jr., supra note 6, at 43-64 for a detailed description of the five phases of construction inspection.
112 Interview with Steven Cohen, supra, note 111.
113 Id.
114 "What many Americans do not realize is that homebuilding and construction has traditionally been a field for the small and independent business. No builder in this country builds more than 1 percent of the homes. Over 80 percent of the homebuilders have gross receipts of less than $250,000. Building has been one of the great strongholds of small enterprise in the economy. In manufacturing, by contrast, the top 200 firms control almost 70 percent of the total assets." 1977 Hearings, supra note 10, at 2.
115 Id. at 1. Less than one-fourth of the population of the United States can afford to buy a new home.