REAL PROPERTY—COURT INDICATES IT WILL IN THE FUTURE FIND IMPLIED WARRANTIES IN SALES OF NEW HOUSES.—*Busker v. Sokolowski* (Iowa 1972).

Plaintiffs approached defendant, an experienced house builder, with a rough floor plan for a house. Defendant orally agreed to build plaintiffs a "first-class house" for $29,983 on a lot purchased by defendant. Plaintiffs took possession in early winter and by spring they began to observe defects in the concrete driveway, the garage floor and the patio surface. The garage floor cracking and heaving was caused by defendant's failure to place the garage footings below the frost line; the driveway popouts were attributed to use of concrete with gravel instead of limestone aggregate; the patio settling was caused by building the patio on fill without anchoring it either to the foundation of the house or to the earth below the fill. The trial court awarded plaintiffs judgment against the defendant predicated upon breach of oral contract and oral express warranty. The Supreme Court of Iowa *held, inter alia,* that the trial court's finding of breach of contract and express warranty was supported by sufficient evidence, but the court also stated that there are in construction contracts implied warranties of good workmanship and fitness for intended purpose. *Busker v. Sokolowski,* 203 N.W.2d 301 (Iowa 1972).

The major significance of *Busker* is the dictum of the Iowa supreme court on implied warranties in contracts for the construction of new houses. The arrangement between the plaintiffs and the defendant was interpreted as an oral contract for the construction of a new house and a written contract for the purchase of the lot on which the house was to be built for the total sum of $29,983.[1] Consequently, the Iowa supreme court was not clearly confronted by the issue of whether the doctrine of caveat emptor should be applied in Iowa to the purchase of new houses.[2]

The general rule of caveat emptor[3] in sales was strongly established in the common law during the seventeenth and eighteenth centuries,[4] while in the civil law the rule was caveat venditor.[5] The doctrine of caveat emptor has

1. Record at 217, Brief for Appellant at 3, Brief for Plaintiffs-Appellees at 3.

2. Strangely, according to the Record at 13-14, the consideration in the written contract for the purchase of the lot with existent improvements was stipulated at $29,983. This would seem to indicate that the arrangement between the parties was really a contract to purchase a house.

3. "The motto *caveat emptor* stood for the charming proposition that, since the buyer had had his chance to inspect the merchandise at the counter, it was his tough luck if it turned out to be a lemon." Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It,* 52 CORNELL L.Q. 835 (1967). Technically, this statement is inaccurate because it gives credit only to one major premise that has resulted in the conclusion of caveat emptor. *See* pages 4-6 of the text for other premises which have been used in justification for caveat emptor.

4. *See* Hamilton, *The Ancient Maxim Caveat Emptor,* 40 YALE L.J. 1133 (1931). Hamilton's article is an excellent history of the doctrine of caveat emptor.

5. "Note, that by the civil law, every man is bound to warrant the thing he selleth

been very nearly abrogated in the sale of personalty by the *Uniform Commercial Code*,[6] but in the sale of realty it lingers[7] in a large number of jurisdictions to trap the unsuspecting vendee of a new house.[8]

The Iowa supreme court has not yet had occasion to decide a case raising the issue of the existence of implied warranties in a contract to buy a new house. But the Iowa court has held in *Markman v. Hoefer*,[9] a case concerning the construction of an onion warehouse on the plaintiffs' own land, and subsequently quoted in *Busker*,[10] that "[i]n building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.[11] However, there is a distinction that is not to be missed: a contract to buy a new house is not a contract to build a house.[12] A counterpart of caveat emptor did not develop in the area of the common law dealing with the building and construction of houses, and it was held[13] that the builder must do the job in a workmanlike manner.

Various justifications have been advanced in support of the doctrine of caveat emptor in the sale of new houses. An Illinois appellate court in *Coutrakon v. Adams*[14] stated that a deed made in full execution of a contract of sale merges the terms of the contract therein, thereby eliminating any implied warranty, the antithesis of caveat emptor. In *Levy v. C. Young Construction Co.*,[15] the Superior Court of New Jersey, Appellate Division, in support of caveat emptor relied on the following rationale:

> Were plaintiffs successful [on a breach of implied warranty] under the facts presented to us, an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability.[16]

Lastly, it has been stated that the seller and the buyer of real estate are dealing at arms length, and consequently, the purchaser has the opportunity to in-

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or conveyeth, albeit there be no express[e] warranty, either in deed or in law . . . ." 2 COKE, LITTLETON 102 (a), c.7, § 145 (1633).

6. UNIFORM COMMERCIAL CODE §§ 2-314, 315.

7. 7 S. WILLISTON, CONTRACTS § 926, at 779 (3d ed. Jaeger 1963).

8. Annot., 25 A.L.R.3d 383, 391 (1969); Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults on the Rule*, 14 VAND. L. REV. 541, 543 (1961) [hereinafter cited as Bearman].

9. 252 Iowa 118, 106 N.W.2d 59 (1960).

10. 203 N.W.2d 301, 303 (Iowa 1972).

11. Markman v. Hoefer, 252 Iowa 118, 123, 106 N.W.2d 59, 62 (1960).

12. Bearman, *supra* note 8, at 542-43 n.7, 571.

13. Duncan v. Blundel, 3 Stark N.P. 6, 171 Eng. Rep. 749 (1820).

14. 39 Ill. App. 2d 290, 300, 188 N.E.2d 780, 785 (1963), *aff'd on other grounds*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964).

15. 46 N.J. Super. 293, 134 A.2d 717 (1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958).

16. *Id.* at 297-98, 134 A.2d at 719. The New Jersey supreme court has subsequently rejected this argument for the application of caveat emptor in the sale of a new house. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

spect[17] and he may bargain for an express warranty to protect himself;[18] thus eliminating the need for an implied warranty.

Twenty years ago one would have difficulty finding any American jurisdiction recognizing the existence of an implied warranty in the routine sale of a new house.[19] But as the reasons for the retention of caveat emptor have been subjected to close scrutiny, the courts have with rapidity and near unanimity[20] cast aside caveat emptor in favor of implied warranties in the sale of a new house. Currently, twenty American jurisdictions apply implied warranties to the sale of a new house by a builder-vendor, although they recognize the warranties in varying degrees.[21]

As one refutation of the argument of *Coutrakon* (that there are no implied warranties in the sale of a new house because all the terms of the contract are merged in the deed) it has been held that the delivery of the deed constitutes only part performance of the sales contract, and that other matters, such as implied warranties, remain obligatory.[22] In *Humber v. Morton,*[23] the Texas supreme court noted that it would be anomalous for the law to raise an implied warranty from a sale and then to defeat that warranty by

17. Vernali v. Centrella, 28 Conn. Supp. 476, 479, 266 A.2d 200, 202 (Super. Ct. 1970); Tudor v. Heugel, 132 Ind. App. 579, 582-83, 178 N.E.2d 442, 444 (1961); Fegeas v. Sherrill, 218 Md. 472, 477, 147 A.2d 223, 226 (1958); Rothberg v. Olenik, 128 Vt. 295, 297, 262 A.2d 461, 462 (1970).

18. *See* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91, 207 A.2d 314, 326 (1965). *Compare* Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 298, 134 A.2d 717, 719-20 (1957) *with* Tudor v. Heugel, 132 Ind. App. 579, 582-83, 178 N.E.2d 442, 444 (1961).

19. Wawak v. Stewart, 247 Ark. 1093, 1094, 449 S.W.2d 922, 923 (1970).

20. There are a few jurisdictions which have recently held that caveat emptor applies in the sale of a new house by a builder-vendor, despite the increasing trend among American jurisdictions to find implied warranties in the sale of a new house. *See* Amos v. McDonald, 123 Ga. App. 509, 181 S.E.2d 515 (1971); Thomas v. Cryer, 251 Md. 725, 248 A.2d 795 (1969).

21. *See* Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971) (warranty of fitness and habitability); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) (warranty of fitness); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969) (warranty of fitness); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964) (warranty of workmanlike construction and suitability for habitation); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (Super. Ct. 1970) (warranty of workmanlike construction and suitability for habitation); Gable v. Silver, 258 So. 2d 11 (Fla. Dist. Ct. App. 1972) (warranties of fitness and merchantability); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966) (warranty of fitness); Theis v. Heuer, 280 N.E.2d 300 (Ind. 1972) (warranty of fitness); Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969) (warranty of workmanlike construction); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503 (Ct. App. 1970) (warranty of fitness); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972) (warranties of merchantable quality and fitness); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (warranty of workmanlike construction and fitness); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972) (warranty of habitability); Padula v. J.J. Deb-Cin Homes, Inc., — R.I. —, 298 A.2d 529 (1973) (warranties of good workmanship and habitability); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970) (warranty of workmanlike construction and suitability for habitation); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967) (warranties of good workmanship and habitability); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (warranty of workmanlike construction and suitability for habitation); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970) (warranty of fitness); House v. Thorton, 76 Wash. 2d 428, 457 P.2d 199 (1969) (warranty of fitness); LA. CIV. CODE ANN. art. 2520 (West 1952) (warranty of merchantability).

22. Glisan v. Smolenske, 153 Colo. 274, 280, 387 P.2d 260, 263 (1963).

23. 426 S.W.2d 554, 556 (Tex. 1968).

the doctrine of merger. Obviously, the jurisdictions which have held the builder-vendor liable for breach of an implied warranty have rejected the merger argument, perhaps either on the view, mentioned above, that the acceptance of the deed does not constitute full performance of the contract of sale,[24] or on the rule that executory covenants collateral to the passing of title do not merge in the deed.[25]

In response to the argument that uncertainty and instability would pervade the real estate field if implied warranties were held to exist in sales of new houses, the Idaho supreme court in *Bethlahmy v. Bechtel*[26] stated, "In the situation here the imposition of an implied warranty of fitness would work no more uncertainty or chaos than the warranties commonly applied in sales of personal property."[27] As a matter of fact, one court has stated that no uncertainty and chaos has resulted in the field of chattel sales because of the imposition of implied warranties.[28] If that court's evaluation is accurate, then the argument that uncertainty and chaos would pervade the real estate field is specious for there is no meaningful distinction between the sale of a chattel and the sale of a new house.[29]

In most cases, the premise that the purchaser and the builder-vendor deal at arms length is false, and the concomitant argument based on that premise is unsound as the housing market is basically a seller's market[30] where knowledge of construction rests almost entirely in one party.[31] Not only is the builder-vendor superior in knowledge, but it is pecuniarily and practically impossible for the buyer to obtain outside help for a competent inspection of a new house.[32] By and large, buyers of new houses are no more able to protect themselves by exacting express warranties than are purchasers of automobiles able to protect themselves in a bill of sale.[33] Yet in a situation where the vendor is the builder, there is an implicit representation that the builder built the house in a workmanlike manner and that it is fit for human habitation;[34] and the purchaser surely relies on that representation, or else why would he desire the house?

One writer has stated that *Markman* seems to indicate that if a purchaser of a new house sought to hold his builder-vendor liable upon the theory of implied warranty in Iowa, he would be successful.[35] It has been subsequently indicated by the Iowa supreme court in *Busker* that it will hold that there are implied war-

24. Annot., 25 A.L.R.3d 383, 434 (1969).
25. *Id.* at 432.
26. 91 Idaho 55, 415 P.2d 698 (1966).
27. *Id.* at 64, 415 P.2d at 707.
28. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 92, 207 A.2d 314, 326 (1965).
29. Moore v. Werner, 418 S.W.2d 918, 920 (Tex. Civ. App. 1967).
30. *Cf.* Reitmeyer v. Sprecher, 431 Pa. 284, 290, 243 A.2d 395, 398 (1968).
31. Bearman, *supra* note 8, at 574.
32. *Id.* at 545.
33. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 91-92, 207 A.2d 314, 326 (1965).
34. 7 S. WILLISTON, CONTRACTS § 926A, at 810 (3d ed. Jaeger 1963).
35. Valore, *Product Liability For a Defective House*, 18 CLEV.-MAR. L. REV. 319, 325-26 (1969).

ranties of reasonably good workmanship and reasonable fitness if the court could read a contract to build into the total agreement of the parties. It would seem incongruous if Iowa would not extend implied warranties to sales of new, completed houses in that the vendee draws no distinction between the purported arrangement existent in *Busker* and the purchase of a newly completed house. Concerning the distinction drawn by some courts between contracts to buy and contracts to build, the Court of Appeals of Kentucky in *Crawley v. Terhune*[36] has stated:

> Because the caveat emptor rule is completely unrealistic and inequitable as applied in the case of the ordinarily inexperienced buyer of a new house from the professional builder-seller, and because a contract by the builder to sell a new house is not much distinguishable from a contract to build a house for another, we are disposed to adopt the minority view to the extent of holding that in the sale of a new dwelling by the builder there is an implied warranty that in its major structural features the dwelling was constructed in a workmanlike manner and using suitable materials.[37]

If the Iowa supreme court's attitude, evidenced in *Mease v. Fox*,[38] as to the existence of an implied warranty of habitability in leases is any indication of its willingness to form the law to meet modern exigencies, it is very likely in the future that the court will find implied warranties in sales of new houses, and thereby discard caveat emptor as a doctrine applicable to other times and situations. "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. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected . . . ."[39]

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36. 437 S.W.2d 743 (Ky. 1969).
37. *Id.* at 745. *See also* Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 627, 180 N.W.2d 503, 506 (Ct. App. 1970).
38. 200 N.W.2d 791 (Iowa 1972).
39. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965).

TORTS—AN INSURER IS UNDER AN IMPLIED-IN-LAW DUTY OF GOOD FAITH AND FAIR DEALING IN THE SETTLEMENT OF CLAIMS BY THE INSURED, THE BREACH OF WHICH MAY CONSTITUTE THE ELEMENT OF OUTRAGEOUS CONDUCT IN A PRIMA FACIE CASE FOR THE TORT OF INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS. *Amsden v. Grinnell Mutual Reinsurance Co.* (Iowa 1972).

Plaintiff brought an action for intentional infliction of severe emotional distress by the defendant insurers, alleging that they demonstrated bad faith in failing and refusing to pay plaintiff's fire loss claim. The state fire marshall concluded that the fire which destroyed plaintiff's business building and its contents was set by an arsonist. Plaintiff was among those investigated, but was later exculpated. The claim was paid within sixty days after plaintiff determined the extent of the loss, and plaintiff and defendants agreed as to the value of the loss. The trial court directed a verdict in favor of the defendant insurers. *Held*, affirmed. The petition stated a cause of action for intentional infliction of severe emotional distress, but the plaintiff failed to prove it. *Amsden v. Grinnell Mutual Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972).

In Iowa,[1] compensation for mental distress has suffered a confused development.[2] Originally, no recovery could be had for intentional infliction of severe emotional distress unaccompanied by another tort.[3] This exception to the maxim that "for every wrong there must be a remedy" was blamed alternately on Lord Wensleydale's frequently quoted comment,[4] the fact that mental distress was too speculative to be equated with any dollar value,[5] that the proximate cause of mental distress could not be sufficiently established,[6] or fear that the court would be reduced to a forum for the determination of what is to be considered bad manners.[7]

In early case law the Iowa court allowed compensation for mental distress or

1. The scope of this case note is limited primarily to Iowa law. For a discussion of the status of the tort of intentional infliction of severe emotional distress in other jurisdictions, see W. PROSSER, TORTS § 12 (4th ed. 1964); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

2. Barnett v. Collection Service Co., 214 Iowa 1303, 242 N.W. 25 (1932).

3. Collins v. City of Council Bluffs, 35 Iowa 432 (1872); Lynch v. Knight, 9 H.L. 577, 11 Eng. Rep. 854 (1861).

4. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

5. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). In *Collins v. City of Council Bluffs*, 35 Iowa 432, 436 (1872) the court stated: "The party injured by such a casualty should have compensation for the injury. Not such a speculative amount as would be equivalent for the bodily pain and mental anguish. . . . [P]ain and mental anguish can have no adequate compensation in dollars and cents."

6. Lee v. City of Burlington, 113 Iowa 356, 85 N.W. 618 (1901); Mahoney v. Dankwart, 108 Iowa 321, 79 N.W. 134 (1899). In *Lee* the opinion stated: "If there had been any physical injury to the horse . . . there would undoubtedly be liability. But where death results from fright alone the defendant is not liable in damages. . . . [O]ne could hardly anticipate such results. . . . [T]he law will not consider it the proximate result. . . ." 113 Iowa 356, 357, 85 N.W. 618, 619 (1901).

7. Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).