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## Elden v. Simmons: The Standard of Reasonableness Prevails-- Implied Warranties of New Home Construction Do Not Necessarily Terminate on Resale in Oklahoma

Emily Duensing

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**ELDEN v. SIMMONS: THE STANDARD OF  
REASONABLENESS PREVAILS—IMPLIED  
WARRANTIES OF NEW HOME  
CONSTRUCTION DO NOT  
“NECESSARILY” TERMINATE ON  
RESALE IN OKLAHOMA**

I. INTRODUCTION

In July, 1981, the Oklahoma Supreme Court, in *Elden v. Simmons*,<sup>1</sup> allowed the second purchaser of a home to sue the home's builder-vendor<sup>2</sup> and the manufacturer of allegedly defective bricks used to construct the home. Calling the requirement of contractual privity in actions by plaintiffs without vertical privity<sup>3</sup> an "antiquated notion,"<sup>4</sup> the court held that warranties of habitability and workmanlike construction implied in a home's first sale do not "necessarily" terminate on resale.<sup>5</sup> The court ruled, instead, that the warranties are governed by a "standard of reasonableness," their duration to be determined by a jury.<sup>6</sup>

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1. 631 P.2d 739 (Okla. 1981).

2. Builder-vendor has been defined as follows:

[A] person who is in the business of building or assembling homes designed for dwelling purposes upon land owned by him, and who then sells the houses, either after they are completed or during the course of their construction, together with the tracts of land upon which they are situated, to members of the buying public.

*Jeanguneat v. Jackie Hames Const. Co.*, 576 P.2d 761, 762 n.1 (Okla. 1978).

3. There are two types of nonprivity plaintiffs, vertical and horizontal. The vertical, nonprivity plaintiff is a buyer within the distributive chain who did not buy directly from the defendant. An example is a man or woman who buys a lathe from a local hardware store and later sues the manufacturer. The horizontal, nonprivity plaintiff, however, is not a buyer within the distributive chain but one who uses or consumes the goods, such as a woman poisoned by a bottle of beer purchased by her husband. The terms generally have been used in connection with § 2-318 of the Uniform Commercial Code, "Third Party Beneficiaries of Warranties Express or Implied." J. WHITE, & R. SUMMERS, *HANDBOOK ON THE UNIFORM COMMERCIAL CODE*, §§ 11-1 to 11-7, (2d ed. 1980). As will be seen, the distinction was crucial to the case under discussion.

4. 631 P.2d at 742. The court noted that "given today's market structure . . . [a] manufactured product placed in the chain of distribution may literally pass through dozens of hands before it reaches the ultimate consumer," and that "[i]t defies common sense to require such an endless chain of litigation" as would be produced by limiting the ultimate consumer of the product to redress only from his immediate seller, who would then sue his immediate seller, and so on. *Id.*

5. *Id.* at 742.

6. *Id.*

With this decision Oklahoma joined a growing minority of jurisdictions chipping away at the doctrine of caveat emptor<sup>7</sup> that traditionally has blocked implied warranty claims by purchasers of used homes.<sup>8</sup> Several commentators have advocated such an extension for years.<sup>9</sup> Other authors<sup>10</sup> and other courts<sup>11</sup> have warned against the potential danger of unlimited liability being placed on builders, of lulling consumers into complacently "looking to the courts for assistance where they should be exercising ordinary care in selecting their homes,"<sup>12</sup> and of vagueness in decisions allowing the warranty extension.<sup>13</sup>

In light of the facts of *Elden*, the court's decision seems sound. However, the opinion, which is fewer than three pages long, is vague about the elements that will be necessary in the future to form a prima facie case under a claim of breach of implied warranty of habitability

7. Under common law the doctrine of caveat emptor applied to both real and personal property. It holds that, in the absence of fraud or misrepresentation, a vendor is responsible for the quality of the personal or real property that he is conveying only to the extent that he expressly agrees to responsibility. 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926 (3rd ed. 1963). For a discussion of the decline of the doctrine, see Bixby, *Let the Seller Beware: Remedies for the Purchase of a Defective Home*, 49 J. URBAN L. 535, 549 (1973):

The doctrine of *caveat emptor*, with its long history of protecting the seller of both real and personal property at the expense of the buyer, is near its end. The last bastion of this doctrine, the sale of second-hand real property, stands alone, while in all related areas the doctrine has recently suffered major setbacks. It seems only a matter of time until the last stronghold of this discredited doctrine will also fall, and purchasers of used homes will receive the protections denied them for so long.

*Id.*

8. As of October, 1981, four jurisdictions, in addition to Oklahoma, had extended protection to subsequent purchasers on the theory of implied warranty. The relevant decisions are *Blagg v. Fred Hunt Co.*, — Ark. —, 612 S.W.2d 321, 322 (1981); *Barnes v. Mac Brown & Co.*, 264 Ind. 227, —, 342 N.E.2d 619, 620 (1976) (one of five justices dissenting); *Terlinde v. Neely*, — S.C. —, 271 S.E.2d 768, 769 (1980); and *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 736 (Wyo. 1979).

9. See, e.g., 7 S. WILLISTON, *supra* note 7, at §§ 926-926A; *Let the Seller Beware*, *supra* note 7, at 549-52; Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL EST. L.J. 291, 299 (1980); Comment, *Builders' Liability for Latent Defects in Used Homes*, 32 Stan. L. Rev. 607, 614-18 (1980).

10. See, e.g., Comment, *The Case Against Strict Liability Protection for New Home Buyers in Ohio*, 14 AKRON L. REV. 103 (1980); Comment, *Liability of the Builder-Vendor Under the Implied Warranty of Habitability—Where Does It End?* 13 CREIGHTON L. REV. 593 (1979).

11. E.g., *Wright v. Creative Corp.*, 30 Colo. App. 575, —, 498 P.2d 1179, 1182 (1972); *Oliver v. City Builders, Inc.*, 303 So. 2d 466, 469 (Miss. 1974) (three of nine justices dissenting); *Brown v. Fowler*, 279 N.W.2d 907, 910 (S.D. 1979).

12. *The Case Against Strict Liability*, *supra* note 10, at 106.

13. *Barnes v. Mac Brown & Co.*, 264 Ind. 227, —, 342 N.E.2d 619, 622 (1976) (DeBruler, J., dissenting). Justice DeBruler charged that "the judicially created warranty of fitness for habitation is an ill-defined concept [which] should not be extended to cover [subsequent purchases, which he termed] doubtful situations." *Id.* The dissent wondered, also, at the type of defect to which the warranty would be applied, the time of accrual of the cause of action, and the difficulty in establishing damages if the warranty was extended. *Id.*

or workmanlike construction.<sup>14</sup> Issues left unresolved include: (1) The type of defect covered; (2) the standard of care to which a builder will be held; (3) the effect of disclaimers given to a first purchaser; (4) the failure of a subsequent purchaser to notify the builder of a possible breach (defect); (5) what classes of parties will be permitted to sue or be sued; and (6) the duration of the warranties and the applicable statute of limitations.<sup>15</sup> The lack of clarity in these areas may exist because courts only recently have allowed such claims by subsequent purchasers, and the area is "being developed on a case by case basis."<sup>16</sup> The purpose of this Note is to examine other decisions which have been made in this area, as well as applicable existing Oklahoma law, in reference to the elements listed above. First, however, the facts and issues of *Elden* and the historical development in Oklahoma of implied warranties of construction and recovery by plaintiffs without privity will be reviewed.

## II. STATEMENT OF THE CASE

### A. *Facts Alleged*

The Eldens alleged that in April, 1976, they purchased a house from the Simmonses, who had bought the home from its builder, Harry

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14. The elements necessary to establish a claim for breach of implied warranties in the sale of goods are set out in U.C.C. §§ 2-314 to 2-315 (and comments). See OKLA. STAT. tit. 12A, §§ 2-314 to 2-315 (1976). However, no indication was given by the court in *Elden*, or any prior case, that standards established under the Code would apply to the area of subsequent purchases of real property.

15. See *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981); *Perry v. Lawson Ford Tractor Co.*, 613 P.2d 458 (Okla. 1980); *Old Albany Estates, Ltd. v. Highland Carpet Mills, Inc.*, 604 P.2d 849 (Okla. 1979); *Jeanguneat v. Jackie Hames Const. Co.*, 576 P.2d 761 (Okla. 1978); *Hepp Bros., Inc. v. Evans*, 420 P.2d 477 (Okla. 1966); *Jones v. Gatewood*, 381 P.2d 158 (Okla. 1963). For other discussions of these elements in relation to implied warranty actions, see Parker, *The Warranty Disclaimer v. Manufacturers' Products Liability—Stern Aero AB v. Page Airmotive, Inc.: Did the Tenth Circuit Bury the Disclaimer Alive?* 10 TULSA L.J. 612, 614-21 (1975) (discussing the advantages and disadvantages of a breach of warranty action for defective goods in terms of elements necessary for a prima facie case and potential defenses); Williams, *Developments in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses*, 10 TULSA L.J. 445 (1975) (examining implied warranty extension to newly constructed dwellings in terms of duration of the warranty, scope of builder's liability, applicable statute of limitations, and effect of disclaimers); Note, *Defective Housing: Remedies Available to the First and Subsequent Purchasers*, 25 S.D. L. REV. 333, 344-52 (1980) (discussing breach of warranty actions as available to home purchasers in South Dakota, including the apparent requisite elements of proof and unresolved areas such as identity of defendants, nature of construction, disclaimers, and duration of warranty); Comment, *The Case Against Strict Liability*, *supra* note 10, at 109-12 (discussion of implied warranty protection and types of actionable defects of construction); Comment, *Liability of the Builder-Vendor . . . Where Does It End?* *supra* note 10, at 594-604 (discussing effects of disclaimers, parties to action, and duration of construction warranties).

16. *Blogg v. Fred Hunt Co.*, — Ark. —, 612 S.W.2d 321, 322 (1981).

Riggs.<sup>17</sup> The house, constructed in 1974, had exterior walls made of brick which had been supplied to Riggs by the manufacturer, Acme Brick Company. Soon after the Eldens took possession, the bricks began to split, splinter, and fall away from the house, leaving the house frame exposed in several places and necessitating complete replacement of the exterior walls.<sup>18</sup> After receiving no relief from Riggs or Acme, the Eldens filed suit against the Simmonses, Riggs, and Acme, alleging breach of implied warranties of workmanlike construction, habitability, and reasonable fitness for intended use. The trial court sustained defendants' demurrers but allowed the Eldens to amend. The amended petition<sup>19</sup> alleged negligence and breach of warranty and claimed a latent defect of which the Eldens had no knowledge when they purchased the home. Again, the trial court sustained defendants' demurrers. The court of appeals reversed, holding that the amended petition stated a cause of action as to Riggs and Acme, but not as to the Simmonses, the previous owners. Acme and Riggs sought certiorari, which was granted.<sup>20</sup> The Eldens did not seek review of the appellate court decision on their suit against the Simmonses. Thus, the issue of whether a subsequent purchaser may bring a breach of implied warranty claim against his immediate seller who was not the builder-vendor of the home was not presented to the court.

#### B. *Issues Presented to the Oklahoma Supreme Court*

The court in *Elden v. Simmons* relied heavily on two previous opinions, *Jeanguneat v. Jackie Hames Construction Company*<sup>21</sup> and *Old Albany Estates Ltd. v. Highland Carpet Mills, Inc.*<sup>22</sup> In *Jeanguneat* the court extended an implied warranty of habitability and workmanlike construction to new homes.<sup>23</sup> In *Old Albany Estates* the court held, with respect to goods, that a "manufacturer may be liable for breach of implied warranty of merchantability or fitness for [a] particular purpose" to a remote purchaser within the distributive chain of sale (i.e., a

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17. The facts pertaining to alleged damages to the Elden home are taken from Brief for Appellant at 3-4, *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981).

18. Although the appellant's brief mentions no exact time when the brick deterioration began, the Eldens argued the deterioration started "immediately after" they moved into the home. *Id.* at 3. The Eldens filed suit on Dec. 16, 1977. *Id.* at 1.

19. The amended petition, filed July 13, 1978, is set out in the Brief of Appellee, Acme Brick Co., at 1-3, *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981).

20. 631 P.2d at 741.

21. 576 P.2d 761 (Okla. 1978).

22. 604 P.2d 849 (Okla. 1979).

23. 576 P.2d at 764.

vertical, nonprivity plaintiff).<sup>24</sup> The two basic issues in *Elden* were whether to extend the *Jeanguneat* and *Old Albany Estates* holdings to the fact situation presented in *Elden*. More specifically, whether the implied warranties established in *Jeanguneat* for a completed, newly built home terminate upon resale of the home, and, if not, whether the *Old Albany Estates*' holding as to vertical, nonprivity plaintiffs and the sale of goods would be extended to cover the sale of real property and, thus, the subsequent purchasers of such a home.<sup>25</sup>

### III. HISTORICAL DEVELOPMENT OF IMPLIED WARRANTIES IN HOME CONSTRUCTION AND RECOVERY BY PLAINTIFFS WITHOUT PRIVITY

#### A. *Development of Implied Warranties in Home Construction*

There is nothing new about an implied warranty attaching to a contractor's work. As early as 1884 the United States Supreme Court recognized an implied warranty of reasonable suitability for intended use and applied it to a bridge construction situation, holding a contractor liable for latent defects.<sup>26</sup>

In Oklahoma, too, implied warranties in straight construction contracts appear to have developed early.<sup>27</sup> A 1924 case discussed the right of a landowner or proprietor to sue an independent contractor for breach of contract due to latent defects in the contractor's work.<sup>28</sup> A 1931 case spoke of construction contracts containing an implied under-

24. 604 P.2d at 852.

25. 631 P.2d at 741-42.

26. *Kellogg Bridge Co. v. Hamilton*, 110 U.S. 108 (1884):

All the facts are present which, upon any view of the adjudged cases, must be held essential in an implied warranty. The transaction was, in effect, a sale of this false work, constructed by a company whose business it was to do such work, to be used in the same way the maker intended to use it, and the latent defects in which, as the maker knew, the buyer could not, by any inspection or examination at the time discover; the buyer did not, because in the nature of things he could not, rely on his own judgment; and, in view of the circumstances of the case, and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone of the parties to the contract had or could have knowledge of the manner in which the work had been done. The law, therefore, implies a warranty that this . . . work was reasonably suitable for such use as was contemplated by both parties.

*Id.* at 118-19. Latent defects are those defects which are undiscoverable upon reasonable inspection and which manifest themselves after purchase. *Barnes v. Mac Brown & Co.*, 264 Ind. 227, —, 342 N.E.2d 619, 621 (1976).

27. Straight construction contracts are contracts in which a landowner contracts with a builder to do construction work on the landowner's property.

28. *Armstrong v. Tulsa*, 102 Okla. 49, 51-52, 226 P. 560, 563 (1924).

taking to perform work in a proper and workmanlike manner.<sup>29</sup> In 1954 the Oklahoma Supreme Court held a general contractor liable for breach of implied warranties in a contract to repair a homeowner's driveway.<sup>30</sup>

Where one engaged in the business of a general contractor, who by contract undertakes to perform work for another requiring the exercise of care, skill and knowledge, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use.<sup>31</sup>

Significantly, in each of these cases the builder contracted with a landowner to do work on the landowner's property. If a transaction involved transfer of *title* to real property, however, the doctrine of caveat emptor remained the rule.<sup>32</sup> The application of caveat emptor arose from the ancient property doctrine of merger, which holds that the terms of a contract for the sale of real property merge with the deed, and the terms of the deed prevail.<sup>33</sup> While implied warranties of construction on another person's property were said to arise from the contract, the merger doctrine prevented recovery when a person bought a new home from the builder, even if warranties had been included in the contract for sale. The terms of the deed governed instead.<sup>34</sup> Not until the mid-1950s did American courts begin to acknowledge the injustice resulting from this approach.<sup>35</sup>

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29. *Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp.*, 49 F.2d 146, 148 (10th Cir. 1931).

30. *Cox v. Cumutt*, 271 P.2d 342 (Okla. 1954).

31. *Id.* at 343 (syllabus by the court).

32. See *Jones v. Gatewood*, 381 P.2d 158, 159 (Okla. 1963) (recognizing for the first time an implied warranty in a contract for sale of a home under construction at the time contract was signed). Little more than 10 years ago, a Georgia court used the caveat emptor rationale to deny implied warranty protection even to new homes. *Amos v. McDonald*, 123 Ga. App. 509, —, 181 S.E.2d 515, 517 (1971), *overruled on other grounds*, 159 Ga. App. 262, 282 S.E.2d 919 (1981).

33. See *Williams, Developments in Actions for Breach of Implied Warranties of Habitability in the Sale of New Houses*, 10 TULSA L.J. 445, 450-51 (1975).

34. *Id.*

35. The movement toward implied warranties of habitability began in the 1930s in England with the case of *Miller v. Canon Hill Estates, Ltd.*, 2 K.B. 113 (1931), where the court found an implied warranty when the contract for sale of the home was signed before construction was substantially complete. The court's rationale was that when a contract for sale is signed prior to completion of the home, the intent of the buyer—to have a house in which he can live—is known to the builder. The *Miller* rule was further explained in *Perry v. Sharon Dev. Co.*, 4 All E.R. 390 (C.A. 1937), in that when a house is under construction when the contract for sale is signed, the buyer does not have an opportunity to inspect the premises before purchase. See generally *Shedd, supra* note 9, at 293-94; *Williams, supra* note 34, at 446-47.

As one author has noted:

After World War II . . . the building industry underwent a revolution. It became com-

The earliest American decisions finding implied warranties of habitability or workmanlike construction in home sales held that the warranty attached only if the home's sale contract had been signed before construction was substantially complete.<sup>36</sup> In 1963 the Oklahoma Supreme Court, in *Jones v. Gatewood*,<sup>37</sup> adopted the rule that, "in [the] absence of [an] agreement to [the] contrary," the seller of an unfinished house impliedly warrants that the house "will be completed in [a] workmanlike manner and reasonably fit for occupancy as [a] place of abode."<sup>38</sup> The *Jones* decision did not discuss the merger doctrine; in fact, the court apparently has never directly addressed the issue of merger in the context of a warranty claim, beyond alluding to warranty in dictum in a later case as simply surviving delivery of the deed.<sup>39</sup>

The year after *Jones* was decided, the Colorado Supreme Court, which previously had held that implied warranties attached only when the contract was signed prior to substantial completion,<sup>40</sup> extended the warranty to contracts signed after completion.<sup>41</sup> Once begun, the trend

mon for the builder to sell the house and land together in a package deal. Indeed, the building industry outgrew the old notion that the builder was an artisan and took on all the color of a manufacturing enterprise, with acres of land being cleared by heavy machinery and prefabricated houses being put up almost overnight. Having learned their law by rote, however, the lawyers tended to insist that *caveat emptor* nonetheless applied to these sales.

Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 837 (1967).

36. *Vanderschrier v. Aaron*, 140 N.E.2d 819 (Ohio Ct. App. 1957), generally is cited as the first American decision to apply the *Miller* rule even though it specifically relied on *Perry v. Sharon Dev. Co.*, 4 All E.R. 390 (C.A. 1937).

37. 381 P.2d 158 (Okla. 1963).

38. *Id.* at 158 (syllabus by the court). In *Jones* plaintiffs alleged breach of warranty for damages caused by water seepage into the floor coverings of their home within months after they took possession. At trial expert testimony indicated the damage was caused by either a failure to provide a waterproof membrane between the concrete slab foundation and the house or a puncture in the membrane, if one had been provided. *Id.* at 159.

39. *Jeanguneat v. Jackie Hames Const. Co.*, 576 P.2d 761, 764 (Okla. 1978). The court cited with approval *Waggoner v. Midwestern Dev., Inc.*, 83 S.D. 57, —, 154 N.W.2d 803, 809 (1967) (holding that warranty survived delivery of the deed).

However, as the Supreme Court of Texas explained when extending implied warranty protection to a completed new home, the merger doctrine "is a matter generally controlled by the intention of the parties" to the conveyance. *Humber v. Morton*, 426 S.W.2d 554, 556 (Tex. 1968), *aff'd*, 448 S.W.2d 494 (Tex. Civ. App. 1969). The implied warranty transcends the conveyance and thus is not affected by merger: "The implied warranty of fitness arises from the sale and does not spring from the conveyance." *Id.*

40. *Glisan v. Smolenske*, 153 Colo. 274, 387 P.2d 260 (1963).

41. *Carpenter v. Donohoe*, 154 Colo. 78, —, 388 P.2d 399, 402 (1964). The Colorado court stated:

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis . . . .



toward extension of implied warranties to completed homes initiated by the Colorado court continued steadily into the 1970s.<sup>42</sup> The reasons for extension were numerous and variously stated,<sup>43</sup> but the basic idea of each involved a builder's greater expertise and a buyer's reliance on that expertise.<sup>44</sup> Practical considerations included the difficulty and expense a buyer necessarily would encounter in launching a full-fledged inspection of a home or in changing the terms of standard contracts used by the building industry.<sup>45</sup>

Apparently, the opportunity for the Oklahoma Supreme Court to approve implied warranties for newly completed homes did not arise until 1978. In *Jeanguneat* the court considered the large number of other states which had opted for warranty protection for purchasers of new homes and decided, simply, that there was "no reasonable basis"<sup>46</sup> for limiting implied warranties to unfinished homes.<sup>47</sup> The doctrine of caveat emptor, the court noted, did a disservice to both purchasers and the housing industry by allowing unethical builders to get by with shoddy work.<sup>48</sup> However, the *Jeanguneat* decision did not require the builder to build a perfect home; it imposed only a "standard of reasonableness" as to construction and the duration of warranties of work-

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*Id.*

42. A table of all jurisdictions rejecting or extending implied warranties of habitability and workmanlike construction, as of May 1981, is available from the National Association of Home Builders' State, Local and Environmental Affairs Division in Washington, D.C. The chart also shows states which have extended warranties to subsequent purchasers.

43. *See, e.g.*, *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970) (contrast between implied warranty rules as to personal property and caveat emptor to real estate called indefensible); *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) (home purchase often the most important transaction of a lifetime).

44. *See, e.g.*, *Rutledge v. Dodenhoff*, 254 S.C. 407, —, 175 S.E.2d 792, 795 (1970) (extending warranty to new homes). The court stated:

[T]he primary purpose of the transaction is to provide the purchaser with a habitable dwelling and the transfer of land is secondary. The seller holds himself out as an expert in such construction, and the prospective purchaser, if he buys, is forced to a large extent to rely on the skill of the builder . . . . [T]he ordinary purchaser is precluded from making a knowledgeable inspection of the completed house not only because of expense and his unfamiliarity with building construction, but also because the defects are usually hidden rendering inspection practically impossible.

*Id.*

45. *McDonald v. Mianeki*, 79 N.J. 275, —, 398 A.2d 1283, 1290 (1979).

46. 576 P.2d at 763.

47. The *Jeanguneat* court also held that the warranty extended to a water well which the builder-vendor had installed for the home, and which, due to either a defect in the well or improper installation, caused the home's water to be unsuitable for human consumption. The court emphatically stated, however, that its ruling did not decide whether a builder-vendor guaranteed the quality of a home's water, provided the builder vendor had not ruined the quality himself. *Id.* at 765.

48. *Id.* at 763 (citing *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968)).

manlike construction and habitability.<sup>49</sup>

The *Jeanguneat* decision, while filling some gaps left by the *Jones* decision, obscured other areas that had appeared definitive after *Jones*. For example, *Jones* had not addressed questions regarding the duration of the warranties, the standard of construction to which builders would be held, or the applicable statute of limitations. On the other hand, it was clear that the *Jones* rule was intended to apply to defects that were "latent and undiscoverable by reasonable inspection"<sup>50</sup> of the premises, and that the implied warranty could be waived.<sup>51</sup> The *Jeanguneat* opinion answered the questions concerning duration of the warranties and the standard of construction to which builders would be held: The standard of reasonableness would prevail.<sup>52</sup> The decision also reinforced the idea that the warranties could be waived.<sup>53</sup> As to the type of defect which would be covered, however, *Jeanguneat* obscured the issue by not explicitly specifying latent and undiscoverable defects.<sup>54</sup> The court also changed terminology as to what warranty would be implied. The *Jones* warranty of reasonable fitness for occupancy as a place of abode became, in *Jeanguneat*, the warranty of habitability. There may be no difference in the meaning of the terms, but the court did not define either one. Finally, neither *Jones* nor *Jeanguneat* discussed the applicable statute of limitations. Despite the *Elden* decision, several of these areas remain obscure today.

#### B. *Development of Recovery by Plaintiffs Without Privity*

As seen in the previous section, the Oklahoma Supreme Court established in *Jeanguneat* that implied warranties of habitability and workmanlike construction would last for a reasonable time. This statement was made without limitation as to ownership of the property. In effect, the court appeared to be saying that the warranties attached to the structure itself. This view is substantiated in *Elden*, which held that the warranties do not necessarily terminate on resale of the home. However, the presence of the warranties would not have benefited the Eldens if the traditional requirement of contractual privity remained to

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49. *Id.* at 764.

50. 381 P.2d at 159.

51. *Id.* at 158 (syllabus by the court) (holding includes the phrase, "in the absence of an agreement to the contrary").

52. 576 P.2d at 764.

53. *Id.* ("in the absence of an agreement to the contrary").

54. *See id.* at 764. The court does not mention the type of defect covered or refer to the *Jones* decision on this point. *Id.* at 763.

prohibit a suit against the alleged warrantors—the home's builder-vendor and the manufacturer of material used to construct the home.

There appear to be four bases of liability upon which plaintiffs without privity have been permitted to recover in Oklahoma for defective goods: Negligence,<sup>55</sup> implied warranty in tort,<sup>56</sup> strict tort liability (manufacturers' products liability),<sup>57</sup> and extension of implied warranties in contracts.<sup>58</sup> The negligence and implied contractual warranty theories have been extended to the home construction area, permitting suits by plaintiffs without privity against the builder-vendor of a home.<sup>59</sup> Because the implied warranty in tort theory was merged with the newly adopted tort theory of manufacturers' products liability<sup>60</sup> and no longer appears to be applicable to new home construction, the

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55. See *infra* notes 67-81 and accompanying text.

56. The implied warranty in tort theory has done much to confuse the concept of implied warranty. Although warranty, in its infancy, was based on tort liability, "it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract." RESTATEMENT (SECOND) OF TORTS, § 402A, Comment m. (1965). A predecessor to strict tort liability, the doctrine generally has been said to be founded in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), where the court imposed an implied warranty of safety on a newly purchased automobile to allow the wife of the purchaser to recover for injuries she received due to a defect in the car. The *Henningsen* court said the warranty grew out of contract law, but later applications by other courts led to problems for consumers due to contractual defenses, such as disclaimers and notice. Because of these problems, many jurisdictions made exceptions for consumers in commercial transactions. Then, recognizing the tortious nature the action was assuming, jurisdictions began to drop the "implied warranty" cause of action in such situations and use, instead, the doctrine of strict liability in tort. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 95, 97 (4th ed. 1979). Oklahoma's flirtation with the doctrine began in 1965 with *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okla. 1965), when a purchaser of a defective battery which exploded was permitted to recover on a warranty from the manufacturer. The court, explicitly denying that it was considering any questions of privity, *id.* at 911, determined that implied warranty liability was established as soon as the plaintiff proved the product had left the manufacturer's possession in a defective condition, and that as a result of the defect the plaintiff was injured. *Id.* at 902 (syllabus by the court). Nine years later, in *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353 (Okla. 1974), the Oklahoma Supreme Court abolished the *Marathon Battery* rule, opting instead for strict products liability, which the court elected to call "Manufacturers' Products Liability." *Id.* at 1361. The court stated: "The theory of implied warranty recovery for injuries to person heretofore existing in this jurisdiction is merged into the theory and doctrine of manufacturers' products liability, and except for Uniform Commercial Code application, is no longer viable." *Id.* at 1355 (syllabus by the court). However, some courts continued to use the term "implied warranty," but considered it a tort cause of action in certain third-party situations. See, e.g., *Neofes v. Robertshaw Controls Co.*, 409 F. Supp. 1376-79 (S.D. Ind. 1976); *Humber v. Morton*, 426 S.W.2d 554, 557 (1968); *Builders' Liability for Latent Defects in Used Homes*, *supra* note 9, at 614. The doctrine of strict tort liability for defective products is embodied in section 402A of the RESTATEMENT (SECOND) OF TORTS (1965).

57. See *supra* note 56 and *infra* note 60.

58. See *infra* notes 79-86 and accompanying text.

59. *Elden v. Simmons* marks the extension of the latter theory.

60. *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353 (Okla. 1974). As one commentator has noted, "The application of strict tort liability to the real estate context is based on the analogy to

discussion will focus on negligence and implied contractual warranty.<sup>61</sup>

### 1. Negligence

Building contractors' liability to plaintiffs without privity "has tended to follow the same general path of development as that of suppliers of chattels, but to lag behind it by some twenty years."<sup>62</sup> Development in Oklahoma of a negligence cause of action by plaintiffs without privity against the builder of a defective home bears out this observation. The first Oklahoma Supreme Court decision dealing with a contractor's liability to third persons was *Armstrong v. City of Tulsa*,<sup>63</sup> which set forth the general rule of liability: In the absence of a willful or intentional wrong, after a contractor has completed his work and it has been accepted by the proprietor of the property, the contractor "incurs no further liability to third persons by reason of the condition of the work, but the responsibility . . . for maintaining or using it in its defective condition is shifted to the proprietor."<sup>64</sup> Ten years later, in *Crane Company v. Sears*,<sup>65</sup> the court adopted the doctrine established in 1916 in the New York case of *MacPherson v. Buick Motor Company*<sup>66</sup> as to defective chattels.<sup>67</sup> In 1958, twenty-four years after

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strict products liability: It treats the builder-vendor like the manufacturer of chattels and the home as a product." *Builder's Liability for Latent Defects*, *supra* note 9, at 612.

Approving the doctrine for subsequent purchasers are *Blagg v. Fred Hunt Co.*, — Ark. —, 612 S.W.2d 321 (1981) (approved along with implied warranty); *Kriegler v. Eichler Homes*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965). Decisions which have rejected the doctrine include *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P.2d 1179 (1972) and *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974) (three of ten justices dissenting).

It seems unlikely that Oklahoma would adopt such a theory, primarily due to the Oklahoma court's insistence that the loss to plaintiffs be tortious in nature if they are to employ the theory. See *Kirkland*, 521 P.2d at 1364 (the court distinguished the liability of a manufacturer for a defective product from any liability that is "contractual in nature"). In *Jones, Jeanguneat*, and *Elden* the loss resembled contractual loss on the bargain rather than outright property damage. See *infra* notes 77-78 and accompanying text. In addition, it would be difficult for a subsequent purchaser to prove that his home was "unreasonably dangerous," as required by section 402A, when it left the hands of its "manufacturer," the builder-vendor. The *Elden* court analogized a builder-vendor to the manufacturer of a product. 631 P.2d at 741. Courts traditionally have been reluctant to impose strict tort liability when the loss is strictly pecuniary, but instead have tended to insist on contractual implied or express warranties. See W. PROSSER, *supra* note 56, § 101.

61. 521 P.2d at 1361; see *supra* note 56.

62. W. PROSSER, *supra* note 56, § 104.

63. 102 Okla. 49, 226 P. 560 (1924).

64. *Id.* at 51, 226 P. at 563.

65. 168 Okla. 603, 35 P.2d 916 (1934).

66. 217 N.Y. 382, 111 N.E. 1050 (1916). The case imposed a duty of reasonable care upon manufacturers putting certain products on the market for sale. The doctrine established that a seller is liable for the manufacture or sale of any product which may reasonably be expected to have the capability of causing substantial harm if made negligently. For a discussion of the *Mac-*

*Crane*, the court in *Greenwood v. Lyles & Buckner*,<sup>68</sup> while not citing directly to *MacPherson*, recognized a similar doctrine in relation to a contractor's work on the state highway system:

Where the contractor has willfully created a condition which he knows to be immediately and certainly dangerous to persons other than the contractee, who will necessarily be exposed to such danger, considerations of public policy do not require the application of the general rule [of non-liability to persons other than the contractee].<sup>69</sup>

In 1961 the court officially applied the *MacPherson* doctrine to defective construction and, in *Leigh v. Wadsworth*,<sup>70</sup> allowed the tenant of a second purchaser to recover from the builder for personal injuries the tenant received when the front porch roof of the home collapsed on her. The decision acknowledged the general rule of a contractor's non-liability to third persons after his work had been accepted, but noted the *Greenwood* exception.<sup>71</sup> In response to the defendant builder's claim that he was exempt from liability because he did not actually know of the danger, and because the accident had occurred several years after he built the porch, the court defined "knowledge" and "immediately dangerous," stating:

The contractor's negligence . . . has been characterized as "willful negligence". . . . [I]f the facts show that defendant knew or by the exercise of ordinary diligence should have known that the porch as built was "immediately and certainly dangerous" he was guilty of willful negligence.

. . . .  
[T]he meaning intended [by the word "immediately"] was that where the defect created by a contractor is the imme-

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*Pherson* doctrine and later development of the negligence theory of products liability, see W. PROSSER, *supra* note 56, § 96.

67. The *Crane* court stated:

Where a manufacturer with information before him of the nature of the use to which an article manufactured by him is to be put and from the nature of such use must know that if the article when put to such use, if defective, will be imminently dangerous to persons who he knows must come in contact therewith, a duty rests upon such manufacturer to use ordinary care to ascertain the condition of the article to see that it is safe. If he fails to exercise ordinary care in this regard, and as a result sells the article in a defective condition, he is liable for personal injuries to that class of persons who must necessarily come in contact with such article, and liability is not limited to those with whom the manufacturer contracts.

168 Okla. at 603, 35 P.2d at 917 (syllabus by the court).

68. 329 P.2d 1063 (Okla. 1958).

69. *Id.* at 1063 (syllabus by the court).

70. 361 P.2d 849 (Okla. 1961).

71. *Id.* at 850-51, 853-54.

diate and proximate cause of the injury—immediate and proximate because there is no intervening cause that may have brought about or directly contributed to the injury, the contractor may . . . be held liable.<sup>72</sup>

In other words, a builder is liable to persons other than his contractee if he willfully creates a condition which he knows or should know will endanger such persons, and the condition is, in fact, the proximate cause of the injury. The *Leigh* court also asserted that the rule applied when property damage was caused by the builder's negligence in a similar situation.<sup>73</sup>

Although the rationale used in both *Leigh* and *Greenwood* has been reinforced in three later cases as the current rule governing builders' liability in negligence to persons without privity,<sup>74</sup> the rule has been applied by the court in only one other case in which plaintiffs without privity sought recovery from a contractor who did work on their home. In *Lowe v. Francis Construction Co.*<sup>75</sup> the Oklahoma Supreme Court allowed the owners of a home to bring a negligence action against a subcontractor who negligently installed a gas line that leaked, causing an explosion. Although the court allowed the plaintiffs to sue, it acknowledged the general rule of nonliability after the work is accepted.<sup>76</sup>

It appears unlikely that the Eldens could have recovered under a negligence claim against their builder-vendor, primarily due to the requirement of proof that the builder-vendor's "willful negligence" was the proximate cause of their home's deteriorating bricks, and that such deterioration was foreseeable. Another potential barrier to a negligence claim is the uncertain meaning of "property damage."<sup>77</sup> The

72. *Id.* at 853-54.

73. *Id.* at 852-53.

74. *Minor v. Zidell Trust*, 618 P.2d 392, 393 n.1 (Okla. 1980); *Lowe v. Francis Const. Co.*, 373 P.2d 51, 54 (Okla. 1962); *Schlender v. Andy Jansen Co.*, 380 P.2d 523, 524 (Okla. 1962) (syllabus by the court). In note 1 the court recognized *Leigh*, *Greenwood*, and *Schlender* as establishing the liability of a builder. The issue of a builder's liability, however, was not an issue before the court.

75. 373 P.2d 51 (Okla. 1962).

76. *Id.* at 54.

77. J. WHITE & R. SUMMERS, *supra* note 3, § 11-4:

In this discussion we use the terms "property damage" on the one hand and "economic loss" on the other to describe different kinds of damages a plaintiff may suffer. An action brought to recover damages for inadequate value, costs of repair, and replacement of defective goods or consequent loss of profits is one for "economic loss." Property damage, on the other hand, is the *Restatement's* (of Torts) "physical harm . . . to [user's] property" . . . . Of course, borderline cases can arise that do not fit comfortably in either the property damage or the economic loss category. Consider a car that throws a rod after a thousand miles of normal use. Is the loss property damage because the injury

damage in *Leigh* and *Lowe* involved personal injury or the nearly total destruction of a house. By comparison, the damage in *Elden* resembles mere pecuniary loss, or a loss on the bargain. In addition, the damage in *Elden* occurred gradually over a period of time, while in *Leigh* and *Lowe*, the damage was sudden and devastating. The direct question of whether a plaintiff without privity may recover on a negligence theory for mere pecuniary loss, unaccompanied by personal injury or major property damage, remains unaddressed by the Oklahoma court.<sup>78</sup>

## 2. Extension of Implied Contractual Warranties In The Sale of Goods

The *Elden* decision marked the extension of an implied warranty to allow a breach of warranty suit by the subsequent purchaser of a new home. Prior to *Elden* similar extensions had occurred only in the sale of defective personal property. Oklahoma has taken a two-pronged approach in the area, with one branch developing for nonprivity, horizontal, or third party plaintiffs under section 2-318 of the Oklahoma Commercial Code.<sup>79</sup> The other branch developed for verti-

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occurred suddenly? Or is the loss an economic one because the suit will be for replacement of the engine?

*Id.* The authors were discussing types of nonprivity recovery under a contractual warranty theory, but the distinction seems valid for negligence, also. A court might hesitate to impose negligence liability if the harm suffered appeared contractual in nature, such as a loss on the bargain, or lost profits. *But see* OKLA. STAT. tit. 12, § 109(i) (Supp. 1980). The section provides for limitations on tort actions arising out of construction work, including actions "for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property." *Id.* There are no reported cases dealing with this section's implications for recovery on a negligence theory for damage resembling contractual loss, however.

78. Decisions which have permitted recovery by subsequent purchasers on a negligence theory include *Coburn v. Lennox Homes, Inc.*, 173 Conn. 567, —, 378 A.2d 599, 603 (1977) (second purchaser allowed to recover for a foreseeable injury from a defective septic system); *Simmons v. Owens*, 363 So.2d 142, 143 (Fla. Dist. Ct. App. 1978) (subsequent purchasers permitted to recover on negligence theory for damages caused by water rot and termite infestation resulting from builder-vendor's failure to comply with building code in house structure); *Brown v. Fowler*, 279 N.W.2d 907, 910 (S.D. 1979) (subsequent purchasers permitted to sue builder-vendor on negligence theory for damages resulting from settling of basement of their homes, but not on implied warranty theory due to lack of privity).

79. OKLA. STAT. tit. 12A, § 2-318 (1971). The section deals with third party beneficiaries of warranties, express or implied. Oklahoma's chosen version of the Uniform Commercial Code's three alternatives is as follows:

A seller's warranty, whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

The section appears to take no position on the rights of vertical, nonprivity plaintiffs. J. WHITE & R. SUMMERS, *supra* note 3, § 11-2. U.C.C. § 2-318, Official Comment 3 states:

The first alternative expressly includes as beneficiaries within its provisions the family,

cal, nonprivity plaintiffs by case law,<sup>80</sup> due to the Code's failure to deal with vertical, nonprivity plaintiff recovery.<sup>81</sup>

Both methods are explained in *Old Albany Estates*,<sup>82</sup> on which the *Elden* court relied in justifying the implied warranty action by home purchasers without privity. In *Old Albany Estates* the defendant argued that Old Albany could not recover because it lacked the requisite privity of contract and could not qualify as a third party beneficiary of a warranty under Code section 2-318 because the section covers only "natural persons" in the family or household of the buyer, or guests whose use or consumption of the product is foreseeable.<sup>83</sup> The court, however, relying on its rationale in a 1979 case,<sup>84</sup> determined that Old Albany was entitled to recovery:

Section 2-318 comes into play only after a final sale has been made and reflects the Legislature's intent to limit warranties applicable to parties with *no contractual* relationship to any person within the distributive chain of ownership through purchase. It has no application to plaintiff here who was the ultimate purchaser of the carpet and in the "vertical" chain of distribution.<sup>85</sup>

Because of section 2-318's silence on the subject, recovery by

household, and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain . . . .

Oklahoma's adaptation of § 2-318 is listed as Alternative A in the Code. Alternatives B and C clearly extend to the vertical plaintiff without privity. Alternative A has been adopted by most states and extends warranty liability only horizontally to natural persons within the classes noted in the section. J. WHITE & R. SUMMERS, *supra* note 3, § 11-3.

80. For a definition of vertical and horizontal, nonprivity plaintiffs see *supra* note 3.

81. See 604 P.2d at 851 (U.C.C. does not apply to vertical, nonprivity plaintiffs).

82. *Id.* at 851-52. The plaintiff, Old Albany Estates, purchased carpet for an apartment complex from the defendant carpet company. After the carpet was installed, it became discolored and lost fiber. Highland, believing it had disclaimed all warranties by means of a disclaimer written on an invoice sent with the first shipment of carpet, refused to adjust the carpet's price. Old Albany sued for breach of implied warranties of merchantability and fitness, relying on OKLA. STAT. tit. 12A, §§ 2-314 & -315 (1971). After the trial court entered judgment for the defendant on the ground that defendant had effectively disclaimed the warranties, Old Albany appealed. 604 P.2d at 850.

83. 604 P.2d at 851; and *supra* note 79. Highland again argued that disclaimers contained within invoices sent with the first delivery of the carpet were effective to block the implied warranties of fitness and merchantability. Relying on OKLA. STAT. tit. 12A, § 2-207 (1971), concerning additional or conflicting terms, however, the court found the disclaimers were a material alteration of the contract, and thus invalid. 604 P.2d at 853.

84. *Barker v. Allied Supermarkets*, 596 P.2d 870 (Okla. 1979) (holding a warranty of merchantability as to packaged food products extended directly from the bottler to the buyer at a retail market, despite lack of privity by plaintiff).

85. 604 P.2d at 851 (emphasis in original).



plaintiffs without privity but in the direct chain of distribution is being developed by case law. The *Old Albany Estates* decision indicates that as long as a plaintiff is in the distributive chain, he may maintain a direct action against the manufacturer if the goods are defective, even if the damage is contractual in nature. The desired result of this approach is to avoid a "needless chain of actions whereby each buyer must seek redress from his immediate seller until the actual manufacturer is eventually reached."<sup>86</sup>

Two years after *Old Albany Estates*, in *Elden v. Simmons*, the court combined its *Old Albany Estates* holding—that a manufacturer may be liable for breach of implied warranties without regard to privity of contract with a remote purchaser—with its holding in *Jeanguneat*—that implied warranties of reasonable duration attach to new home construction—and allowed the subsequent purchasers of an allegedly defective home to sue the remote seller and the manufacturer of bricks used to construct their home.<sup>87</sup>

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86. *Id.* at 851-52.

87. All of the remedies for subsequent purchasers discussed in the text are judicially created. However, there are a number of other warranty programs, created by the building industry or by state legislatures, which give express provisions as to the extent of coverage, and the conciliation procedures between builder and home purchaser. Probably the most well known of the private warranty programs is the Home Owners Warranty Corp. (HOW). HOW was formed in the early 1970s by the National Association of Home Builders to improve the image of builders, avoid government interference in the building industry, and provide a means for dispute settlement. The program has established local HOW councils throughout the country, offering local builders who can meet HOW's building standards the opportunity to offer their purchasers HOW protection.

The program offers a 10-year warranty, backed by insurance, to cover major structural defects in new homes. During the first year after sale the builder promises to repair, replace, or pay for repair or replacement of faulty workmanship and defective materials, including defects in plastering, wall tiling, flooring drains, and "wet rot" on window frames, doors, and other millwork. The builder also warrants against defects in plumbing, heating, electrical and cooling systems, and is responsible for major structural defects, which are defined in HOW's "Approved Standards" booklet (No. 25, March 1980) as actual damage to the "load bearing portion of the home that affects its load bearing function and . . . vitally affect[s] or [is] imminently likely to produce a vital effect on the use of the home for residential purposes." During the second year, the builder is responsible for major structural defects and defects in the electrical, plumbing, and heating and cooling systems. During the third through tenth year of coverage, HOW's insurance—not the builder—warrants against major structural defects. The program's insurance underwriter also underwrites the builder, so that if he does not make the required repairs during the first two years, the insurance covers the costs. HOW also provides for conciliation and arbitration in the event of a builder-homebuyer dispute, but if the homebuyer chooses not to accept the decision in arbitration, he retains the right to sue.

Although HOW coverage is available in Oklahoma, a recent rift between HOW and Tulsa builders over the high number of foundation defect claims in the Tulsa area triggered the creation of the "New Home Warranty" program (NHW) by the Builders Association of Metropolitan Tulsa. As of April, 1982, the operation of the program appears to be temporarily suspended due to lagging construction activity. However, NHW offers five-year protection, backed by a performance bond. During the first year, the builder warrants against major structural defects and defects

IV. DECISION IN *ELDEN*

Although the Eldens alleged negligence by Acme in producing the bricks used to construct their home, their entire argument urged the court to apply an implied warranty. Defendant Riggs, the builder-vendor, argued that implied warranties terminate upon resale by the first owner,<sup>88</sup> and that because he had not been accused of negligence, his demurrer should be upheld. Defendant Acme argued that the Eldens had not supported their allegation of negligence, and that the accusation should be dropped. In addition, Acme contended that implied warranties did not extend to subsequent purchasers, and that because the Eldens were not within a class covered by Oklahoma Commercial Code section 2-318, they were not entitled to recover. The court apparently agreed as to negligence, for the theory is not discussed in the opinion.

Dealing first with the builder-vendor's liability, the court noted

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resulting from faulty workmanship or materials, including defects in plastering or slab work, tiling, flooring, wall coverings, defects affecting the heating or cooling capacity of those systems, and leaky plumbing. During the second year the builder warrants against major structural defects. During the third through fifth years, NHW will correct any major structural defects.

Both programs require a membership fee of the home builder and registration of warranted homes with the program. Each also sets standards which builders must meet to retain membership, and each costs the buyer a few dollars per \$1,000 of the closing price of the protected home. HOW pamphlets, the Home Owners Warranty Program and the Federal Housing Agencies No. 427-A (Feb. 1981); Approved Standards No. 25 (Rev. Mar., 1980), Home Warranty Agreement No. 104 (Rev. June, 1978); NHW booklet, New Home Warranty Limited Agreement No. 1 (Oct., 1981). See generally Comment, *The Home Owners Warranty Program: An Initial Analysis*, 28 STAN. L. REV. 357 (1976) (analyzing the HOW program and alternative legal and administrative remedies for purchasers of defective new homes and suggesting that self-regulation of the building industry is the optimal approach for both builder and purchaser, if some inherent difficulties in self-regulation, such as voluntary membership, are constantly monitored and mitigated). States which have imposed statutory warranty coverage include Connecticut, (CONN. GEN. STAT. §§ 47-116 to -120 (1978)), Maryland (MD. REAL PROP. CODE ANN. §§ 10-201 to -205 (1974) and MD. REAL PROP. CODE ANN. §§ 10-203 to -205 (Supp. 1980)), and New Jersey (N.J. STAT. ANN. §§ 46:3B-1 to -12 (West Supp. 1978-1979)). In 1975 the National Conference of Commissioners on Uniform State Laws adopted the UNIFORM LAND TRANSACTIONS ACT as a model for states. The Act is comprised of four articles. Article 1 contains definitions and the general purposes, one of which is to bring real estate law in line with that of personal property, where possible. Article 2 concerns contracts to convey real estate, contract formation, performance, breach, remedies, and warranties. Article 3 covers secured transactions, and article 4 contains the Act's effectiveness and repealer provisions. UNIFORM LAND TRANSACTIONS ACT (1975), reprinted in UNIFORM LAWS ANNOTATED (West 1980). The Act, as of March, 1981, had not been adopted by any state.

88. Brief for Appellee, Harry L. Riggs, at 4, *Elden v. Simmons*, 631 P.2d 739 (Okla. 1981):

Oklahoma has not, and should not, extend such implied warranty to used houses. To enforce such a rule against a builder who has not had control of the house for several years, while others have had possession, would . . . be very unfair to the builder. It does not stretch the imagination to conceive all sorts of maltreatment to a house (even to the outside bricks) in the years after it is initially sold.

*Id.*

that its decision in *Jeanguneat* had specifically established that warranties of workmanlike construction and reasonable fitness "for occupancy as a place of abode"<sup>89</sup> existed, as a matter of law, for a reasonable time. Then, referring to its holding in *Old Albany Estates* permitting suits by remote purchasers against manufacturers for breach of warranties of fitness and merchantability, the court said it could find no reason not to allow such suits for breach of warranties of workmanlike construction and habitability.<sup>90</sup> Just as the carpet company manufactured the allegedly defective carpet, Riggs might be considered the manufacturer of the home. The same rationale was applied to the liability of Acme, whose position was analogized to that of the manufacturer of component parts used in the manufacturing process. The only other rationale stated explicitly by the court was its purpose to avoid a long line of lawsuits reaching back to the one ultimately responsible for the defect.

Furthermore, the court decided that the question of whether the warranties were still in effect at the "time of the alleged breach"<sup>91</sup> was a factual question for the jury. Finally, the applicable statute of limitations allowed an action for breach for five years "after the cause of action shall have accrued"<sup>92</sup> because the claim was on a written contract for the sale of a home, and the warranties were implicitly part of that contract.<sup>93</sup>

## V. ANALYSIS

Equitably speaking, the *Elden* decision seems sound. As continually reiterated in cases applying implied warranties to new homes, the mere transfer of title does, indeed, seem a capricious and arbitrary termination point for the standard of reasonable care. The warranty attaches to the home, not the owner, and as the *Elden* court indicated, ownership should not be controlling.<sup>94</sup> If the bricks were inherently defective or fell apart due to unworkmanlike methods of construction, and the Eldens had no reasonable means of discovering the defect prior to purchase, it would be patently unfair to deny them redress. As Professor Haskell noted in 1965 when he urged the extension of implied warranty to home sales:

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89. 631 P.2d at 741.

90. *Id.*

91. *Id.*

92. *Id.* at 741. The court applied OKLA. STAT. tit. 12, § 95(1) (1971).

93. 631 P.2d at 742 n.1.

94. *Id.* at 742.

The law has evolved to the incongruous state where it offers greater protection to the purchaser of a seventy-nine cent dog leash than it does to the purchaser of a \$40,000 home. If the dog leash is defective, the purchaser can get his money back and he may be able to recover damages if he loses his dog because of the defective leash. If the purchaser of a house is required to replace the heating unit two months after the purchase, he probably has no recourse against the seller; quality is generally at the risk of the buyer of real property, absent an express warranty or fraud.<sup>95</sup>

Although the comment originally was meant to apply to first purchasers, it might well apply to subsequent purchasers in most states today; only a handful of jurisdictions have extended implied warranty protection beyond first purchasers.<sup>96</sup>

Practically speaking, however, the *Elden* decision leaves much to be desired. First, as noted earlier, neither *Elden* nor its two predecessors, *Jones* and *Jeanguneat*, expressly states an exception to the property doctrine of merger. The *Elden* decision states that the warranties are implied in the written contract for sale, but it does not explain how they survived transfer of title. Secondly, the court is inconsistent in its use of terms: In *Jones* the builder-vendor warranted the home to be "reasonably fit for occupancy as a place of abode;" in *Jeanguneat* the term "habitability" was introduced. In *Elden* the court said it had imposed a warranty of reasonable fitness for occupancy as a place of abode in *Jeanguneat*, but again shifted to the term "habitability." Apparently, the court intends for the terms to be used interchangeably; the court should clarify its position and define the terms.

However, the major problems with the *Elden* decision stem from the implication that there is "no reason" not to extend the ability to sue to subsequent purchasers. There have been numerous reasons stated by courts and commentators<sup>97</sup> for not extending warranties to both

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95. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633, 633 (1965).

96. See *supra* note 8.

97. *E.g.*, *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922, 931 (1970) (dissenting and concurring opinion) (imposition of liability on builder to first purchaser of new home should be left to legislature; merely because caveat emptor doctrine is timeworn does not necessarily mean it is obsolete); *Barnes v. Mac Brown & Co.*, 264 Ind. 227, 342 N.E.2d 619 (1976) (dissenting opinion) (extension to second purchaser violates principle of bargain and sale; determination of damages would be difficult because defendant builder did not participate in bargaining between plaintiff and his immediate seller); *Oliver v. City Builders, Inc.*, 303 So. 2d 466 (Miss. 1974) (potential problems which could develop if first purchaser accepted "as is" but subsequent purchaser did not; general policy of protecting freedom of contract, since buyer can always insist on certain

subsequent *and* first purchasers. Perhaps the most basic, however, was exposed in the majority and dissenting opinions of the Arkansas decision extending implied warranties to new homes, *Wawak v. Stewart*.<sup>98</sup> Justice Fogelman, joined by Chief Justice Harris in a concurring and dissenting opinion, suggested that perhaps the court was imprudent in imposing the warranties without legislative guidelines defining the extent and application of such warranties.<sup>99</sup> Justice Byrd, dissenting, noted that warranties governing personal property are guided by the Uniform Sales Act and Uniform Commercial Code, which were earnestly considered prior to enactment.<sup>100</sup> The majority, however, believed that a "judicial decision may focus legislative attention upon the problems" of the building industry.<sup>101</sup> Likening its decision to the landmark *MacPherson* doctrine, the majority noted that the argument against courts attempting to legislate undoubtedly was made against the New York court's holding, but "the doctrine of the *MacPherson* case is now accepted as commonplace throughout the nation."<sup>102</sup>

The debate is a "chicken-and-egg" argument, but it was not even broached by the *Elden* court. Is there, indeed, no reason not to extend warranty protection to subsequent homebuyers just as they were extended to non-privity purchasers of goods? Sales of goods are governed by the Commercial Code. What guidelines will govern those of home sales? At the same time, however, should purchasers of defective property be forced to wait until legislators decide to buck the building industry and impose mandatory protection against poor construction? Unfortunately, these questions were not resolved in *Elden*. Too many important areas remain vague: Which types of defects are actionable, how disclaimers in the first sale of a home affect subsequent purchasers, whether a subsequent purchaser must give the builder-vendor a chance to remedy a defect before bringing suit, parties to whom implied war-

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guarantees being placed in the deed); *Brown v. Fowler*, — S.D. —, 279 N.W.2d 907, 910 (1979) (allowing a subsequent purchaser to sue on a negligence theory, but denying extension of implied warranty for fear of losing limitations on liability provided by privity, fear of making a builder a virtual insurer of a home, and general reluctance to allow recovery for mere economic loss to a remote purchaser); *The Case Against Strict Liability Protection*, *supra* note 10, at 106-08 (rising cost of housing has caused buyers' expectations to go far higher than the actual quality of what their money can buy; courts should not cater to homebuyers; builders in no better position to absorb loss for a defect than homeowners).

98. 247 Ark. 1093, 449 S.W.2d 922 (1970) (two justices dissenting and concurring; one justice dissenting).

99. *Id.* at —, 449 S.W.2d at 932.

100. *Id.* at —, 449 S.W.2d at 932-33.

101. *Id.* at —, 449 S.W.2d at 926.

102. *Id.* at —, 449 S.W.2d at 925.

warranty actions are available, and when a cause of action for breach of warranty accrues.

A. *Type of Defect to Which Warranty Applies and Applicable Standard of Care in Construction*

Of the five reported cases which have allowed subsequent purchasers to sue their home's builder-vendor, only one—*Elden v. Simmons*—does not explicitly say, even in general terms, what kinds of defects are actionable.<sup>103</sup> The other cases, as well as many decisions which have not extended warranty protection beyond first purchasers, hold builder-vendors liable only for latent defects not discoverable through reasonable inspection and not discovered until after purchase. Neither *Elden* nor *Jeanguneat* expressly states this limitation, but it does appear in *Jones* as part of the plaintiff's allegations.<sup>104</sup> Because both *Elden* and *Jeanguneat* are based on *Jones*, and because the Eldens also alleged a latent defect in their complaint,<sup>105</sup> it appears probable that only latent defects are actionable in Oklahoma under a theory of implied warranty.

Various private or statutorily imposed warranty programs have used a different approach, classifying defects by type and applying different express lengths of time during which a purchaser may recover.<sup>106</sup> Depending upon the program or statute, however, these warranties seem almost as variable as the types of defects imaginable: Some give coverage for only a year, while one will extend coverage for up to ten years for a major construction defect.<sup>107</sup> Asking the judicial system to

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103. See *Blagg v. Fred Hunt Co.*, — Ark. —, 612 S.W.2d 321, 322 (1981) (claim that strong odor and fumes from formaldehyde in carpet pad installed by builder-vendor stated cause of action on theory of breach of implied warranty due to latent defect); *Barnes v. Mac Brown & Co.*, 264 Ind. 227, —, 342 N.E.2d 619, 620-21 (1976) (claim of leak in basement and large crack around three basement walls which appeared within months after subsequent purchasers took possession stated cause of action against builder-vendor for latent defect); *Terlinde v. Neely*, S.C. —, 271 S.E.2d 768, 768-70 (1980) (reversing summary judgment for builder-vendor and remanding for trial on subsequent purchaser's claim of settling foundation, which caused cracks in sheetrock walls of home, sinkage of floor from interior walls, cracking of brick veneer on exterior of house, and separation of pillars beneath the house from supporting beams of the floor due to latent defect); *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 734-36 (Wyo. 1979) (cause of action stated on subsequent purchasers' claim that electrical wiring in home did not meet state standards due to latent defect).

104. 381 P.2d at 159.

105. Brief of Appellant, at 4; see *supra* note 18.

106. See warranty programs, regulations and statutes *supra* note 87.

107. See CONN. GEN. STAT. §§ 47-116 to -120 (1978) (warranties express and implied terminate one year after delivery of deed to purchaser or one year after purchaser takes possession, whichever occurs first. If not complete at time of deed delivery, warranty extends for one year

delineate defects as the warranty programs have would be unrealistic. Retaining the requirement that defects be latent, however, places enough restriction on the builder to keep him alert to potential problems, but not constantly on guard against irresponsible purchasers who failed to perform a reasonable inspection of their home before purchase. There is need to protect against shoddy construction work, but given the high price of houses today, prospective purchasers should be responsible enough to see what they may, or may not, be getting for their money.

A related problem is whether defects in renovation or repair work on a home are actionable on an implied warranty theory by remote or immediate purchasers where the work was performed by a professional builder or contracted for by a professional vendor of such property. There appears to be no Oklahoma case on point. *Cox v. Curnutt*<sup>108</sup> allowed an implied warranty action against a general contractor for unworkmanlike performance by his subcontractor in repairing plaintiff's driveway. However, plaintiffs were barred from suing the subcontractor because they lacked contractual privity with him.<sup>109</sup> In *Lowe v. Francis Construction Co.*<sup>110</sup> the plaintiffs were permitted to sue a subcontractor with whom they lacked privity on a negligence theory where the damage to plaintiffs' home as a result of the alleged negligence was devastating and tortious in nature.<sup>111</sup> Although *Elden*, while dispensing with the privity requirement, appears to apply only to suits between a builder-vendor and the subsequent purchaser of a new, completed home, there is no reason why a similar rationale could not be applied to any professional builder or vendor who makes additions or improvements to an older home. The *Uniform Land Transactions Act*<sup>112</sup> provides for such warranties, as does a statutorily imposed warranty

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after completion date or possession); The Home Owners Warranty Corp. offers a 10-year warranty against major construction defects. See warranty program description at *supra* note 87.

108. 271 P.2d 342 (Okla. 1954). See *supra* note 31 and accompanying text.

109. 271 P.2d at 344.

110. 361 P.2d 849 (Okla. 1961). See *supra* notes 70-77 and accompanying text.

111. 361 P.2d at 850.

112. UNIFORM LAND TRANSACTIONS ACT § 2-309(b) (1975):

A seller, other than a lessor, in the business of selling real estate impliedly warrants that the real estate is suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him and completed no earlier than two years before the date the contract to convey is made will be: (1) free from defective materials; and (2) constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

Section 2-312(b) of the act provides that all warranties of quality are conveyed with transfer of title.

program in Minnesota.<sup>113</sup> Additionally, the *Old Albany Estates* holding as to suits against manufacturers by vertical, nonprivity plaintiffs might be used to support recovery for goods, installed by a repairman, which later turned out to be defective.

B. *Disclaimers and the Requirement of Notice of Defects to a Builder-Vendor*

Although Oklahoma law recognizes the validity of implied warranty disclaimers in the sale of goods,<sup>114</sup> *Elden* did not directly address express disclaimers of implied warranties of construction quality. However, *Jones* and *Jeanguneat* each included the phrase, "in the absence of an agreement to the contrary," in their holdings. Thus, it appears that implied warranties of construction can be disclaimed or modified in a home's original contract for sale. Problems could arise, however, if a subsequent purchaser is not aware of disclaimers in the first sale of the home. In a 1980 case the Oklahoma Supreme Court faced a situation analogous to one in which the first purchaser of a home takes the property with expressly limited warranty coverage, but a second purchaser does not. In *Perry v. Lawson Ford Tractor Co.*,<sup>115</sup> the purchaser of a used combine sued the manufacturer and dealer for fraud, misrepresentation, and breach of warranty due to defects in the tractor. The dealer claimed that a booklet containing express disclaimers of all implied warranties had been placed inside the combine. The purchaser claimed the booklet had several pages torn out, apparently including those containing the disclaimers. Plaintiff recovered at trial, but the Supreme Court reversed and remanded because the trial judge failed to instruct the jury that if they found the plaintiff was aware of the warranty disclaimers, the disclaimers would be valid. If the plaintiff was not aware of the disclaimers, however, they would be invalid due to the requirement of an express agreement to exclude or modify implied warranties. Basing the validity of disclaimers on the reasonable awareness of the plaintiff appears to be a model answer for the problem of disclaimers and subsequent purchasers of homes. A subsequent purchaser might not have access to his immediate seller's con-

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113. See MINN. STAT. ANN. § 327A.01(11) (1981) ("owner" defined as "any person who owns residential building on which home improvement work is performed, and includes any subsequent owner . . . of the building"); MINN. STAT. ANN. § 327A.02(3) (1981) (providing for implied statutory warranties of quality in a home improvement contractor's work).

114. See OKLA. STAT. tit. 12A, § 2-316 (1971).

115. 613 P.2d 458 (1980). For a discussion of sales of goods and the problem of disclaimers, see Comment, *Used Goods and Merchantability*, 13 TULSA L.J. 627, 638-40 (1978).



tract for sale, and imposing a duty on *all* sellers to disclose disclaimers seems a harsh solution. Yet, a subsequent purchaser without notice of disclaimers would rely as heavily on a builder's expertise as if there were no disclaimers. Requiring that disclaimers be recorded, either in or along with a home's title, seems a more equitable and feasible solution. This method is suggested by the *Uniform Land Transactions Act*, which imposes a duty on professional vendors to assure a subsequent purchaser's notice of disclaimer in the original sale of a home.<sup>116</sup>

Oklahoma also requires that a purchaser of goods notify a commercial seller of breach of an implied warranty within a reasonable time, or the breach is not actionable.<sup>117</sup> Although *Elden, Jeanguneat, Jones* and *Old Albany* did not discuss the requirement of notice of defect to a seller or remote seller, the plaintiffs in each case alleged that they gave notice to the builder-vendor or manufacturer prior to filing suit. At least two other states have held expressly that notice of a construction defect be given to the builder-vendor within a reasonable time of discovery, and that the builder-vendor be given a chance to remedy the defect before recovery on an implied warranty theory is allowed.<sup>118</sup> It seems unfair not to require that the builder be given notice and an opportunity to repair defective work or replace materials, unless the situation is so obviously hopeless that notice would be unnecessary or ineffective.<sup>119</sup> If this issue is brought before the Oklahoma Supreme Court, it is hoped that a subsequent purchaser will be required to notify the builder-vendor of defects and to give the builder a reasonable opportunity to repair before a suit is allowed. As noted earlier, the burden should be on a builder-vendor to show that a subsequent purchaser had notice of warranty disclaimers before the builder-vendor is permitted to use disclaimers as a defense to a breach of warranty claim.

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116. UNIFORM LAND TRANSACTIONS ACT § 2-312(c), comment 3 (1975). Section 2-312(c) provides that disclaimers of warranties of quality do not affect "successors in interest" who had no reason to know of the disclaimers when title was conveyed, but that reason to know exists if the disclaimer appears in the deed or other recorded document granting the property. Comment 3 states that a seller who is in the business of selling real estate is required to be sure that subsequent purchasers are aware of warranty disclaimers. *Id.*

117. OKLA. STAT. tit. 12A, § 2-607 (1971).

118. *E.g.*, *Wawak v. Stewart*, 247 Ark. 1093, —, 449 S.W.2d 922, 927 (1970) (buyer has duty to notify builder and work toward mitigation of damages); *Pollard v. Saxe & Yolles Devel. Co.*, 12 Cal. 3d 374, 380, 525 P.2d 88, 92, 115 Cal. Rptr. 648, 652 (1974) (buyer denied recovery due to failure to notify builder-vendor until four years after discovery of defect).

119. *See, e.g.*, *Orto v. Jackson*, — Ind. App. —, 413 N.E.2d 273, 276 (1980) (purchaser's failure to give builders notice of certain defects was not necessary to recovery on those defects after builder had clearly shown his intent not to remedy any more defects).

### C. *Parties to the Action*

It appears unlikely that a vendor who was not in the business of building and selling homes could be held liable to a subsequent purchaser on an implied warranty theory. This view is supported by the Oklahoma appeals court's refusal to allow the Eldens to sue their immediate sellers, the Simmonses.<sup>120</sup> In addition, the Oklahoma Supreme Court was careful to say in both *Old Albany Estates* and *Elden* that a purchaser in the "chain of distribution" could bring suit against the *manufacturer* of goods (or a home) for alleged breach of warranty. The court also carefully drew the analogy of builder-vendor Riggs to a manufacturer. A 1980 Indiana case, *Vetor v. Shockey*,<sup>121</sup> also supports this limitation. The Indiana court reasoned that a non-builder vendor of a home is in about the same bargaining position as a subsequent purchaser and stated:

While the public interest may well be served by placing repair or replacement costs of a new home on the responsible vendor-builder who created the defect and is in a better economic position to bear the cost than the purchaser, these policy considerations are inapplicable where the house is an older one and the seller is not its builder.<sup>122</sup>

Thus, the range of potential defendants in suits seems fairly well-defined: Those who are in the business of building and selling homes hold themselves out as competent to do the work and impliedly warrant what they sell. The range of potential plaintiffs, however, is not as clear. The policy espoused in *Elden* and *Old Albany Estates* to avoid a series of lawsuits, coupled with the glaring lack of a strong policy statement otherwise, indicates that a subsequent purchaser of commercial property also should be able to sue for latent defects that become manifest after he takes possession.<sup>123</sup> However, it appears doubtful that such a cause of action would be allowed for buildings used for purely commercial purposes, due to the consistent conjunction of a warranty of workmanlike construction with a warranty of habitability throughout *Jones*, *Jeanguneat*, and *Elden*. The Oklahoma court apparently intends for warranty extension beyond transfer of title to apply only to workmanlike construction upon living quarters. Whether the

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120. 631 P.2d at 741.

121. — Ind. App. —, 414 N.E.2d 575 (1981).

122. *Id.* at —, 414 N.E.2d at 577.

123. A New Jersey court allowed such recovery by the first purchaser of two shops which housed apartment dwellers upstairs. *Hodgson v. Chin*, 168 N.J. Super. 549, 403 A.2d 942 (1979).

implied warranty would be denied to commercial, rental apartment construction, however, is not clear.

Other problems in this area involve plaintiffs whose builder-vendor cannot be found and plaintiffs living in reconditioned apartments which have been converted into condominiums. It currently appears that the subsequent purchaser of a home which is not insured under a private warranty program in Oklahoma may be without recourse if he cannot find his builder-vendor when a defect appears. Other states have taken different approaches to this problem. In New Jersey, for example, all builders are required to register with the state, and a prerequisite to registration approval is membership in a state-sponsored warranty program, or a private, state-approved program backed by insurance or bonds.<sup>124</sup> California's judiciary tried a different approach several years ago, when it imposed tort liability on the financiers of a speculative, residential tract development, in favor of the home purchasers, after the builder-vendor of the homes disappeared.<sup>125</sup> Of the two approaches, the former attacks the problem more directly. A statutory mandate for builders to insure their work would keep the builders free from further government interferences, motivate them to perform well to avoid higher insurance rates, and protect home purchasers from non-recoverable loss at the same time.

Purchasers of apartments which have been converted into condominiums also may have problems applying *Elden* to their situation if a defect arises. If the converted complex is a very old apartment building, certainly no warranty from the original builder-vendor would remain attached. Yet, commercial developers of the complexes often claim to have done extensive renovation work on such buildings, and lure buyers with low interest rates and the promise of desirable amenities. What sort of burden would it place on the purchaser to hold him to a reasonable inspection of the premises if the complex he is considering has 100,000 square feet of space and 250 units, each with its own roof, outside stairways, etc., known as common elements, for which the purchaser shares financial responsibility? A solution to this problem is not indicated in *Elden* or its predecessors. However, if *Elden* is used to

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124. N.J. STAT. ANN. §§ 463B-1 to -12 (West Supp. 1978-79). See also, Timpone, *Home Owner Warranties in New Jersey*, 3 SETON HALL LEGIS. J. 203, 222-23 (1978).

125. *Connor v. Great Western Savings & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968). However, the California Legislature may have invalidated this decision in a statute passed the year following the decision. See Rintala, *The Supreme Court of California 1968-69—Foreword: "Status" Concepts in the Law of Torts*, 58 CALIF. L. REV. 80, 119, nn.133 & 166 (1970).

impose implied warranties to renovation work, it seems reasonable to hold the developer of converted condominiums liable for all latent defects in his work, as well as for defects in the property of which the developer had notice when he purchased, if he fails to expressly disclaim implied warranties as to those specific defects.

D. *Duration of the Implied Warranties and Applicable Statute of Limitations*

The duration of implied warranties is perhaps the most troubling of the areas of the law remaining vague after the *Elden* decision. The *Elden* court held that implied warranties last for a reasonable period of time. The matter of whether a warranty was in effect when the defect was discovered is to be determined by a jury. Finally, the court applied the five year statute of limitations associated with actions on a written contract.<sup>126</sup> The implication is that an action for breach will be maintainable for five years from the time the breach is discovered (or reasonably should have been discovered). A jury would then determine if the warranty was still in effect. However, Oklahoma's Commercial Code expressly provides that a cause of action for breach of warranty in a contract for sale of goods accrues at the time of delivery unless the warranty is explicitly prospective in nature.<sup>127</sup> Because the court has applied section 2-725 to materials used in home construction,<sup>128</sup> the door is open for arguing that delivery will determine the time of breach of the implied warranty where defective materials are involved. Thus, it is not clear what the *Elden* court meant when it said a jury will determine whether the warranties were still in effect "at the time of the breach."<sup>129</sup> This area must be clarified to avoid endless confusion in future cases.

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126. OKLA. STAT. tit. 12, § 95 (1971). Causes of action sounding in tort to recover damages arising from design, planning, or construction of improvements to real property are governed by OKLA. STAT. tit. 12, § 109 (Supp. 1980). The section flatly provides that no tort actions for design or construction defects or injury to person or property caused by the defects may be brought more than ten years after substantial completion of the improvement.

127. OKLA. STAT. tit. 12A, § 2-725 (1971), provides in pertinent part:

(1) An action for breach of any contract for sale must be commenced within five years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

128. See *infra* note 131.

129. 631 P.2d at 741.

Several courts have adopted the rule that where a latent defect is involved, the statute begins running at the time of discovery.<sup>130</sup> Oklahoma may follow a similar rule, but it is still uncertain.<sup>131</sup> If the cause of action is considered to accrue at the time of delivery to the first purchaser, many cases of latent defects in home construction may be without remedy. The implication from the standard of reasonable duration in *Elden* is that different parts of a home may be warranted for different time periods, and an unbending time limit on claims for alleged defects is inconsistent with the traditional flexibility of a reasonableness approach. It is hoped that the Oklahoma court intends to permit claims for five years after a defect is discovered, or reasonably should have been discovered.

## VI. CONCLUSION

With the decision in *Elden v. Simmons* Oklahoma joined a growing minority of states who have acknowledged the right of a subsequent purchaser of a home to attempt to recover from the builder-vendor for defects in the structure. Some have hailed similar decisions in other states as one more step toward solving problems of shoddy construction and unknowing, detrimental reliance by purchasers on unethical builders' work. Criticism of such decisions has focused primarily on fear that builders will become virtual insurers of the homes they build, fear that subsequent purchasers will use the judicial system as a crutch to avoid the free enterprise principle of freedom of contract, and fear that because there are no pre-set guidelines to follow, as there are with sales

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130. *E.g.*, *Weeks v. Slavik Builders, Inc.*, 384 Mich. 257, —, 181 N.W.2d 271, 271 (1970); *DeMatteo v. White*, 336 A.2d 355, 359 (Pa. Super. 1975). *See Comment, Liability of the Builder-Vendor . . . Where Does It End?*, *supra* note 10, at 599-604.

131. *See Hepp Bros., Inc. v. Evans*, 420 P.2d 477 (Okla. 1966), where the court stated in the third syllabus: "If a warranty relates to a future event, before which the defect cannot be discovered with reasonable diligence, the warranty is prospective in character and the applicable period of limitations runs from the time of that event." In *Hepp* Hepp Brothers had installed tile in the Evans' new home in August, 1960. In August, 1963, the Evans filed suit alleging breach of warranty because the tiles had started coming loose a year earlier. Defendants claimed the action was barred by a three-year limitation on actions for contracts not in writing. The trial court, without addressing the issue of whether the contract was written, allowed the claim. The supreme court affirmed, holding that the action was not barred because the cause of action accrued upon discovery, due to the prospective nature of the warranty. *See also Sampson Const. Co. v. Farmers Cooperative Elevator Co.*, 382 F.2d 645 (10th Cir. 1967), where the court of appeals interpreted Oklahoma's limitation statute as allowing the cause of action to accrue upon discovery, when the warranty is prospective in nature.

The cases suggest that implied warranties of workmanlike construction and habitability would be construed as prospective in nature, and therefore not breached until discovery.

of goods, the judiciary is creating a confusing and vague doctrine in an area that should be governed by state legislatures.

From the *Elden* opinion, alone, it is difficult to judge the validity of these arguments when applied to Oklahoma. Looking at the decision in light of prior policies and restrictions, and other courts' interpretations of similar decisions, it appears that such criticism is unwarranted. Only latent defects appear to be actionable, and these will be judged by a standard of reasonable construction. Disclaimers of certain warranties also appear to remain effective, as long as a subsequent purchaser has knowledge of such disclaimers. Notice to the builder and an opportunity to repair an alleged defect has been required by several other states, including California, and there is no reason to expect otherwise in Oklahoma. It appears unlikely that a right to sue on the warranties will be extended beyond the class of residential homebuyers who were plaintiffs in the *Jones*, *Jeanguneat*, and *Elden* opinions. The actual duration of the warranty is somewhat uncertain, due to ambiguous language used by the *Elden* court as to the time when a breach is deemed to have occurred and the applicable statute of limitations. However, application of a breach on discovery rule, coupled with the standard of reasonableness as to the continued effectiveness of an implied warranty, appears to be the court's implication. Admittedly, these summations can only be drawn from appearances from Oklahoma's prior law and other state court interpretations. The *Elden* decision, itself, is much too vague to offer such conclusions. Perhaps future opinions concerning construction warranties will be more concrete.

*Emily Duensing*