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Part I. Introduction

Imagine an elderly couple recently transplanted into South Florida in search of retirement bliss. This couple decides to purchase a condominium unit in Miami from a development that is currently under construction. The unit, as is customary to many dwellings in hot climate, is being built with a central air conditioning system that cannot be separated from the realty without damaging the premises. After the unit is completed, the couple happily signs the sales agreement and moves in. However, the air conditioning unit never works properly due to the builder’s faulty installation of necessary connected equipment. The couple attempts several service calls without success for over a year. In search of a remedy, the couple eventually contacts the original builder, who informs them that the express one-year warranty on the air conditioning system has expired. Does the elderly couple still have a remedy at law against the original builder?

The answer is yes. In Florida there is an implied warranty of workmanlike quality in the building of residential property. The warranty allows the purchaser of residential property to sue the builder for latent defects due to poor workmanship. Now imagine that the elderly couple, one week after moving in the new condominium unit and before they discover the faulty air conditioning system, decides that Boca Raton is better suited to their retirement needs.

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1 The facts of this hypothetical are loosely based on Gable v. Silver, 258 So.2d 11, 12 (4th Fla. Dist. Ct. App. 1972) [hereinafter “Gable I”].
2 “Residential” property in this comment will encompass any real property that is not primarily used or primarily purchased for profit-producing purposes.
3 Gable I, 258 So.2d at 18.
Accordingly, they place the unit up for sale. Within one week, the unit catches the eye of a young couple fresh out of law school that is looking for their first home. The young couple visits the unit on a cool December day, taking stock of the number of bedrooms, bathrooms, and general amenities. The couple falls in love with the unit, sign a sales agreement within a week, and moves in within days. Now, imagine that the young couple experiences the same problem with the air conditioning system as did the elderly couple. The problem manifests itself at the same time and in the same manner. Furthermore, the young couple takes the exact steps to remedy the situation as the elderly couple, from the service calls to contacting the original builder. The builder gives the same negative answer to the young couple as he would have given to the older couple. Does the young couple still have a remedy at law against the original builder?

Surprisingly, the answer is no. Florida does not extend the implied warranty of workmanlike quality to subsequent purchasers of residential property. Furthermore, imagine that the property in question is not a condominium unit, but a retail space within a newly constructed commercial plaza. In the first instance, visualize the elderly couple opening a mom-and-pop shop. This is not the first investment that the couple has made, and in fact, the startup capital for the new business comes primarily from past, lucrative real estate investments in their former hometown. Soon after, the same problem surrounding an integrated air conditioning system occurs, and the couple takes the same unsuccessful steps to remedy the situation as if they had a residential unit. Now suppose that the retail space was opened by a young couple who thereafter opens a small boutique firm. This small firm is the first foray into business by the

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5 Gable I, 258 So.2d at 18 (“We ponder, but do not decide, what result would occur if more remote purchasers were involved.”); Strathmore Riverside Villas Condominium Ass’n, Inc. v. Paver Development Corp., 369 So.2d 971, 973 (2d Fla. Dist. Ct. App. 1979) (upholding a motion to strike a count of breach for implied warranty claimed by a subsequent purchaser of a condominium unit due to violations of a building code).
young couple, and in fact, the startup capital for the firm comes primarily from private loans (which compounds their already extensive collection of school loans). The young couple inspects the space in the same manner they would have inspected a condominium unit. Furthermore, the young couple experiences the same problem that the elderly couple would have experienced, and takes the same futile remedial steps. Astonishingly, under these set of facts, neither the elderly nor the young couple have a remedy at law against the original builder because, in Florida, the implied warranty of workmanlike quality does not apply to commercial\(^6\) property.\(^7\)

This Comment will seek to provide a statutory solution to the blatantly inequitable and illogical results portrayed above due to Florida’s limited application of the implied warranty of workmanlike quality. In order to understand how an amendment to Florida’s current statutory scheme can provide more equitable results, it is first necessary to understand the warranty as understood throughout the United States. Part II of this Comment will provide this background, as well as discuss the origins and generalities of the implied warranty as applied to residential property. Part II will also highlight the jurisdictional split regarding extension of the warranty to subsequent purchasers of residential property in order to shed some light into Florida’s specific policy considerations for not extending the warranty. Furthermore, Part II will discuss the virtually universal non-application of the warranty towards commercial property and its accompanying rationale, which Florida subscribes to. Part III will discuss Florida’s version of the warranty. It will beginning with a discussion on the origins of the warranty in Florida for residential buyers, and then move to its non-extension to subsequent purchasers, and its non-

\(^6\) “Commercial” property in this comment will encompass any real property that is primarily used or primarily purchased for profit-producing purposes.

\(^7\) Conklin v. Hurley, 428 So.2d 654, 655 (Fla. 1983).
application to purchasers of commercial property, while highlighting the fallacies in the reasoning for the non-extension and non-application. Part III will also bring to light how alternative theories of recovery for Florida property owners; which include a) the duty to disclose;\(^8\) b) negligent workmanship;\(^9\) and c) statutory causes of action under the Florida Minimum Building Codes Act (the “FMBC”);\(^10\) and the Condominium Act;\(^11\) are wholly inadequate substitutes for an extended implied warranty of workmanlike quality. This Comment will conclude by proposing a statutory solution to the problems facing Florida property owners. The solution will be a statutory scheme that will codify the current warranty in Florida, apply it to purchasers of commercial property, and then further extend it to subsequent purchasers of both residential and commercial property.

**Part II. The Implied Warranty of Workmanlike Quality**\(^12\)

A. Origins and Generalities of the Implied Warranty of Workmanlike Quality for Purchasers of Residential Property

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\(^8\) Johnson v. Davis, 480 So.2d 625, 629 (Fla. 1985).
\(^9\) See Casa Clara Condominium Ass'n, Inc. v. Charley Toppino and Sons, Inc., 620 So.2d 1244, 1247 (Fla. 1993).
\(^12\) This warranty has also been termed the implied warranty of workmanlike performance, implied warranty of workmanlike construction, and implied warranty of habitability. *See Poulson, supra* note 4, at 279 n.13 (first and third term); *see also* Wendy B. Davis, *Corrosion by Codification: The Deficiencies in the Statutory Versions of the Implied Warranty of Workmanlike Construction*, 39 CREIGHTON L. REV. 103, 104 (2005) [hereinafter Corrosion] (second term). However, it should be noted that the warranty of habitability is fundamentally different from the implied warranty of workmanlike quality. Timothy Davis, *The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework*, 72 NEB. L. REV. 981, 1013 (1993) [hereinafter Illusive]. Specifically, liability under the warranty of habitability hinges on the result of the work, e.g. a buyer’s house is no longer inhabitable, while liability under the implied warranty of workmanlike quality depends on the conduct of the builder, e.g. builder provided poor craftsmanship. *Id.* This distinction is critical because some defects might be actionable under one warranty, but not the other. Aronsohn v. Mandara, 484 A.2d 675 (N.J. 1984) (holding that a defective patio was violative of the implied warranty of workmanlike quality but not the warranty of habitability because “[h]abitability is synonymous with suitability for living purposes; … [a]nd the record [was] devoid of any evidence that the patio, only parts of which were damaged, constituted a vital living element in the home.”). Still, this comment will use certain court decisions and scholarly works that focused primarily on warranty of habitability, particularly in the context of commercial property, because the rationales for those decisions and works were broad enough to encompass the application of all implied warranties. Furthermore, court decisions and scholarly articles that focus on a seller’s duty to disclose defects in residential or commercial property will also be used for support in this comment, even though the seller in some of those decisions is not the builder of the property, because the court’s rationale is likewise broad enough to encompass the application of implied warranties.
Prior to the advent of implied warranties for personal and residential property, the common law doctrine of caveat emptor\textsuperscript{13} insulated manufacturers and builders from liability due to poor craftsmanship, and instead, placed the risk of loss on buyers and homeowners.\textsuperscript{14} The rationale behind the doctrine was that purchasers were protected by their own ability to discover defects in real and personal property.\textsuperscript{15} However, early in the twentieth century, caveat emptor as applied to personal property began to fade away as a result of mass manufacturing,\textsuperscript{16} which “created an inherent disparity in knowledge, control, [and] bargaining power between the seller and buyer[.]”\textsuperscript{17} Because purchasers were no longer able to discover such defects, the aforementioned rationale behind caveat emptor was completely undermined.\textsuperscript{18}

Nevertheless, it was not until after World War II that homeowners were blessed with similar protections as consumers.\textsuperscript{19} The catalyst was America’s first housing boom immediately after the War, which led to the inevitable paring of “hurried development … [and an] endless flood of litigation over shoddy construction ….”\textsuperscript{20} The conceptual hurdle of bringing implied warranties from the realm of personal property to real property was not difficult to surmount, as

\textsuperscript{13} Latin for ”let the buyer beware.” \textsc{Black’s Law Dictionary} 236 (8th ed. 2004).
\textsuperscript{14} See Poulson, \textit{supra} note 4, at 281–82.
\textsuperscript{16} See Poulson, \textit{supra} note 4, at 282 (explaining that caveat emptor began to erode away “after dramatic increases in supply and demand of consumer products”).
\textsuperscript{17} Powell & Mallor, \textit{supra} note 15, at 309–10.
\textsuperscript{18} Reed Dickerson, \textit{The ABC’s of Products Liability – With a Closer Look at Section 402A and the Code}, 36 \textsc{Tenn. L. Rev.} 439, 440 (1969) (explaining that the philosophy of consumer protection hinges on the changed economic background in the sale of goods, namely, from “a miscellany of sellers and buyers bargaining with each other in circumstances of relatively equal financial power and technical sophistication … [to] a relatively sophisticated and financially powerful seller dealing with a relatively unsophisticated and financially weak consumer respecting a complicated product whose capacities for inflicting injury are often hidden, all in the context of a highly complex system of merchandising and distribution.”).
\textsuperscript{19} Poulson, \textit{supra} note 4, at 282; Vanderschrier v. Aaron, 140 N.E.2d 819, 821 (Ohio Ct. App. 1957) (first jurisdiction to adopt the English rule stating that “upon the sale of a house in the course of erection, there is an implied warranty that the house will be finished in a workmanlike manner”).
\textsuperscript{20} Poulson, \textit{supra} note 4, at 282.
the mass production of homes greatly resembled the mass manufacture of goods in terms of market effect and changed consumer expectations. \(^{21}\) Furthermore, the application of implied warranties to residential property was supported by numerous policy considerations. Specifically, courts reasoned that: (1) the modern homeowner, like the modern consumer, no longer had the opportunity or skill to discover construction defects; \(^{22}\) (2) the implied warranties match the reasonable expectations of the parties regarding the quality of their purchases; \(^{23}\) (3) the builder is usually in a better position to bear the risk of loss; \(^{24}\) and (4) the application would encourage minimum standards of safety. \(^{25}\)

Today, virtually every jurisdiction recognizes some form of the warranty of workmanlike quality for residential property. \(^{26}\) In general, the warranty guarantees that the applicable property \(^{27}\) “will comply with … building code specifications and will serve the purpose for


\(^{22}\) Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88, 91 (Cal. 1974) (“purchaser does not usually possess the knowledge of the builder and is unable to fully examine a completed house and its components without disturbing the finished product. Further, unlike the purchaser of an older building, he has no opportunity to observe how the building has withstood the passage of time.”); Licciardi v. Pascarella, 476 A.2d 1273, 1276 (N.J. 1983) (“The prospective purchaser is forced to a large extent to rely upon the skill of the rebuilder as he is pretrained from making a thorough inspection of the completed house. Not only is there the expense of paying an expert to inspect, but there is the unfamiliarity of the purchaser with the construction of a building. In any event, such defects are often, as here, hidden from view, which renders inspection practically impossible.”).

\(^{23}\) Powell & Mallor, *supra* note 15, at 311 (explaining that (1) a buyer is usually bargaining for the structures in a land, and (2) the buyer attaches a certain value to those structures that are partly based on reasonable expectation of durability and quality). Furthermore, buyers seldom make express contracts concerning latent defects, so implied warranties are the best tools for guarding reasonable expectations. *Id.*

\(^{24}\) Schipper v. Levitt & Sons Inc., 207 A.2d 314, 326 (N.J. 1965) (“The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer’s skill and implied representation.”).


\(^{26}\) Poulson, *supra* note 4, at 283. *But see* Urban Development, Inc. v. Evergreen Bldg. Products, 59 P.3d 112, 117 (Wash. App. Div. 2002) (“Nothing in that case, or in any other Washington case, suggests that the warranty [of quality] is implicit in construction contracts. Contracting parties have their remedies for breach and can negotiate for warranties if they so choose. An action for implied warranty of workmanlike performance in construction contracts would be strikingly similar to a cause of action for negligent construction, which is not recognized in Washington.”)

\(^{27}\) At common law, the implied warranty of workmanlike quality could apply to all service contracts, not just building construction, so defects could be found in outbuildings and landscaping. *Corrosion, supra* note 12, at 110–13 (listing as applicable property, among others, the cement floor in a horse barn, construction of a modular home, a
which it was constructed.” Specifically, the warranty protects against defects in construction, whether patent or latent. However, the focus of the warranty is on latent defects because those defects, by definition, cannot be discovered through reasonable inspection or observation alone. The distinction is important because it is presumed that patent defects are accounted for in the purchase price of the property. To continue, damages recoverable under the warranty consist of either “[1] the difference between the value of the [property] as warranted or contracted for and its value as actually built, [or] (2) the cost of repairs required to bring the property into compliance with the warranty or contract.” The method that is used depends on the extent of the defects.

Uniformity of recognition notwithstanding, the implied warranty of workmanlike quality differs between jurisdictions in several respects. First, only a few jurisdictions have codified the implied warranty of workmanlike quality. Furthermore, many jurisdictions differ on how the warranty should be applied, namely, whether recovery should be based on tort theory, contract

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28 Poulson, supra note 4, at 279 n.13; see, e.g., Henggeler v. Jindra, 214 N.W.2d 925, 927 (Neb. 1974) (basement could not be used for its intended purpose because it consistently flooded after rains, damaging furniture and other stored equipment within).

29 See Poulson, supra note 4, at 279.

30 Latent or hidden defect is defined as a “imperfection that is not discoverable by reasonable inspection.” BLACK’S LAW DICTIONARY 450 (8th ed. 2004). By contrast, a patent or apparent defect is defined as “[a] defect that is apparent to a normally observant person, esp. a buyer on a reasonable inspection.” Id.


32 Corrosion, supra note 12, at 113.

33 Warfield v. Hicks, 370 S.E.2d 689, 695 (N.C. App. 1988).

34 Id.

35 Corrosion, supra note 12, at 108 (Indiana, Louisiana, Maryland, Minnesota, Mississippi, New Jersey, New York, and Virginia). It should be noted that the statutory implied warranty of workmanlike quality may differ in significant ways from its common law roots. See id. (comparing the defects covered, privity requirements, expiration of the warranty, waiver of the warranty, application to renovation as opposed to new homes, and application to commercial property). This comment will focus solely on the common law version of the warranty.
theory, or both. This distinction can have a significant impact on an original homeowner’s ability to recover under the warranty, specifically:

[By] determining whether to apply the tort statute of limitations, or … contract limitations period[;]… the availability of comparative negligence and indemnification defenses in assessing fault and damages[;]… the applicability of municipal immunities and the subject matter jurisdiction of tribunals[; and] … the nature of the damages recoverable.

Furthermore, as will be discussed below, the distinction can have an effect on what limitations a subsequent purchaser of residential property may have to recover under the warranty.

B. Extension of the Warranty of Workmanlike Quality to Subsequent Purchasers of Residential Property

A majority of states today have extended the warranty of workmanlike quality beyond the first purchaser of residential property to subsequent purchasers. The rationale behind the

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36 Compare La Sara Grain Co. v. First Nat. Bank of Mercedes, 673 S.W.2d 558, 565 (Tex. 1984) (“While express warranties are imposed by agreement of the parties to the contract … implied warranties are created by operation of law and are grounded more in tort than in contract.”); and Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1045 (Colo. 1983) (“Proof of a defect due to improper construction … is sufficient to establish liability in the builder-vendor [because implied warranties arise from a contractual relationship.] Negligence, however, requires that a builder or contractor be held to a standard of reasonable care ….”); with Scott v. Strickland, 691 P.2d 45, 50 (Kan. Ct. App. 1984) (“implied warranty of workmanlike performance has its theoretical roots in both contract and tort law since an allegation of a breach entails the contention of both a breach of implied contract and the charge of negligence or a failure to exercise reasonable care.”). To clarify, it has been suggested that the deciding factor concerning the applicable theory of recovery centers on whether, under the laws of the particular state, there is a duty to protect against personal and property harm. See Illusive, supra note 12, at 1030–31 (explaining that the absence of such a duty will most likely prevent recovery under a tort theory because of the economic loss rule).

37 Illusive, supra note 12, at 1021. For example, one Florida court reversed a trial court’s judgment against the engineer of a defective septic tank who had been held jointly and severally liable with the developer-seller of a duplex for the full amount of damages awarded the buyer of one of the duplex units. Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund, Ltd., 552 So.2d 228 (5th Fla. Dist. Ct. App. 1989). The court reasoned that, because the implied warranty of workmanlike quality follows a contract theory of recovery, and there was no privity of contract between the engineer the buyer, the engineer could not be held liable for more money damages than the engineer would have been liable to the developer-seller under their contract. Id. at 232. The court explained that the legal duties of the develop-seller and engineer, breach of which determines the amount of damages, are completely different. Id. The duty of the develop-seller is to “deliver a product reasonably suited for the purposes for which the product was intended (such as is involved in this case, the implied duty to deliver an adequate septic tank system),” while the duty of the engineer is “to perform such services in accordance with the standard of care used by similar professionals in the community under similar circumstances.” Id.

38 Poulson, supra note 4, at 290–91.
39 Id. at 284.
inclusion of subsequent purchasers centers around the logical application of the very purpose of
the warranty. Simply put, if “the purpose of [the] warranty is to protect innocent purchasers and
hold builders accountable for their work … any reasoning which would arbitrarily interpose a
first buyer as an obstruction to someone equally as deserving of recovery is incomprehensible.” 40
While this rationale should seem sufficient in itself, various courts have continued to justify the
warranty’s expansion based on additional policy concerns.41

First, “[c]ommon experience teaches that latent defects … will not manifest themselves
for a considerable period of time ....”42 In fact, this understanding is reflected in the significant
amount of time that a homeowner is afforded under most statues of limitations for suits involving
latent defects in real property.43 Furthermore, modern society has become increasingly mobile,
with houses being sold and resold within a relatively short period of time.44 To illustrate,
according to the 2000 U.S. Census, only 54.1% of homeowners have lived in their respective
homes for five years or more.45 Consequently, it is very likely that most latent defects in real
property will only manifest themselves after the property has been resold by the original

40 Id. at 284–85.
41 Id. at 285.
43 See Fla. Stat. § 95.11(3)(c) (2006) (within 4 years “from the time the [latent] defect is discovered or should have
been discovered with the exercise of due diligence[, but i]n any event, the action must be commenced within 10
10 years after “[a]ny latent deficiency in the design, specification, surveying, planning, supervision, or observation
of construction or construction of an improvement to, or survey of, real property.”); N.Y. C.P.L.R. § 213(2) (2004)
(within 6 years for “an action upon a contractual obligation or liability, express or implied, [not dealing with
goods.]”).
44 Lempke v. Dagenais, 547 A.2d 290, 295 (N.H. 1988) (original property sold to plaintiffs six months after
construction of garage in question).
45 U.S. Census Bureau State & County QuickFacts, http://quickfacts.census.gov/qfd/states/12000.html (last visited
July 25, 2008) [hereinafter “Census”]. The 2000 U.S. Census asked homeowners to answer “yes” or “no” to the
following question: “Did this person live in this house or apartment five years ago (on April 1, 1995)?” Id.
Therefore, if a subsequent buyer is not given the same protections as an original buyer, then the implied warranty of workmanlike quality becomes a nullity by definition.\(^\text{47}\)

Second, “like an initial buyer, the subsequent purchaser has little opportunity to inspect and little experience and knowledge about construction.”\(^\text{48}\) The modern day construction industry is technologically advanced, highly specialized, and plagued with complex building codes and specifications.\(^\text{49}\) As a result, virtually any purchaser must rely on the expertise of a builder.\(^\text{50}\) Thus, it is illogical to deny a subsequent purchaser the same rights as an original owner when both face the same complex market and reliability dilemma.\(^\text{51}\)

Third, extension of the implied warranty of workmanlike quality places no additional duty on the builder since “[t]he builder already owes a duty to construct the home in a workmanlike manner ....”\(^\text{52}\) In other words, the extension of the duty becomes remedial in nature in that it does not create a new duty, but rather works to enlarge an already existing one.\(^\text{53}\) Hence, at least in reference to existing implied guarantees and buyer expectations, the extension of the warranty will not create any more of a burden on the builder than he or she already bears.\(^\text{54}\)

Fourth, a failure to extend the implied warranty of workmanlike quality “might encourage sham first sales to insulate builders from liability.”\(^\text{55}\) As was stated above, the warranty has a dual purpose: (1) to protect innocent buyers and (2) hold builders accountable for

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\(^{46}\) Poulson, \textit{supra} note 4, at 285.

\(^{47}\) \textit{Id.}

\(^{48}\) \textit{Lempke}, 547 A.2d at 295.

\(^{49}\) Poulson, \textit{supra} note 4, at 285.

\(^{50}\) Moxley v. Laramie Builders, Inc., 600 P.2d 733, 735 (Wyo. 1979) (holding that subsequent purchasers had a cause of action to recover for faulty electric wiring within the walls of their home because “the average purchaser is without adequate knowledge or opportunity to make a meaningful inspection of the component parts of a residential structure.”); \textit{Terlinde}, 271 S.E.2d at 769 (explaining that builders encourage their buyer’s reliance by holding themselves out as experts).

\(^{51}\) Moxley, 600 P.2d at 735.

\(^{52}\) Keyes v. Guy Bailey Homes, Inc., 439 So.2d 670, 673 (Miss. 1983).

\(^{53}\) \textit{Id.}

\(^{54}\) \textit{See} Poulson, \textit{supra} note 4, at 286.

their work. Logically, these two prongs cannot be thought of as independent. A builder cannot be held accountable for the work that he does for a buyer who is not innocent. Therefore, by failing to extend the warranty to subsequent purchasers, some courts are implicitly holding that original buyers are the only persons capable of being innocent within the meaning of the warranty. Not only is this conclusion illogical, but it allows builders to escape accountability by conspiring with original owners to have the property resold. Consequently, the original owner becomes a builder’s scapegoat, as they are the only “obstruction to someone equally deserving of recovery.”

Finally, builders are in a better position to bear the risk of loss from latent defects. Builders are the “preferred risk bearers” in two important respects. In the first place, “by virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to know whether a house is suitable for habitation.” In addition, a builder can spread incurred losses across the housing market. By combining both factors, any adverse effects on the builder resulting from an extension of the implied warranty of workmanlike quality are virtually eliminated. In other words, while an extended warranty might expose a builder to more possible litigation, a builder can reduce the actual number of suits by simply making the necessary adjustments to their workmanship as guided by their superior knowledge. Furthermore, the potential for litigation would serve as the main motivation for those necessary adjustments.

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56 Poulson, supra note 4, at 284–85.
57 See Richards, 678 P.2d at 430.
58 Id.
60 Poulson, supra note 4, at 286.
61 George, 313 S.E.2d at 923.
62 Id.
C. Limitations on the Implied Warranty of Workmanlike Quality

The implied warranty of workmanlike quality is not without limits. To begin with, most courts require that the defect manifest itself after a reasonable time in order to be actionable.\(^6^3\) Moreover, by the very definition of latent defects, a duty is placed on the buyer of a home to conduct a reasonable inspection of the premises.\(^6^4\) Finally, “the builder-vendor can demonstrate that the defects are not attributable to him, that they are the result of age or ordinary wear and tear, or that previous owners have made substantial changes.”\(^6^5\) Overall, the main policy behind all these limitations is to “not force the builder-vendor to ‘act as an insurer for subsequent vendees.’”\(^6^6\)

D. Non-Application of the Implied Warranty of Workmanlike Quality in Commercial Property

Few courts\(^6^7\) and legislatures\(^6^8\) have applied any warranty of quality to commercial property. The divergence of opinion centers on whether a court believes that *caveat emptor* is

\(^{63}\) For an understanding of what could constitute a reasonable time, compare *Terlinde*, 271 S.E.2d at 769, where cracks on the walls of a three year old home due to a poor foundation were held actionable because latent defects, by definition, do not manifest themselves for a considerable amount of time; with *Reichelt v. Urban Inv. and Development Co.*, 577 F. Supp. 971, 975 (N.D. Ill. 1984), where structural defects on a 14 year old home would not have been considered manifested within a reasonable time but for the time being tolled because the defendants sought to fraudulently conceal the defects.

\(^{64}\) Richards, 678 P.2d at 430. Courts have not specified what is a reasonable inspection, but their holdings suggest that a homeowner is not expected to conduct any more of a cursory examination of the premises than a reasonable purchaser of real estate would. See, e.g., *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314, 325 (N.J. 1965) (“[homeowner] has no architect or other professional adviser of his own [sic], he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial …”).

\(^{65}\) Id. (quoting Richards v. Powercraft Homes, Inc., 678 P.2d 449, 452 (Ariz. Ct. App., 1983)).

\(^{66}\) Id. (quoting Richards v. Powercraft Homes, Inc., 678 P.2d 449, 452 (Ariz. Ct. App., 1983)).


\(^{68}\) Kathleen McNamara Tomcho, *Commercial Real Estate Buyer Beware: Seller’s May Have the Right to Remain Silent*, 70 S. CAL. L. REV. 1571, 1590 n.102 (1997) (Listing Alaska, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Mississippi, Nebraska, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Virginia, and Wisconsin as states that have codified yet limited mandatory disclosures by a seller of residential property only).
sufficient in itself to ensure against latent defects and protect a buyer of commercial property.\textsuperscript{69} Consequently, this inquiry will largely depend on how a court characterizes the commercial buyer and whether such characterizations fit within the rationale of caveat emptor.\textsuperscript{70}

As was mentioned above, the rationale behind \textit{caveat emptor} was that purchasers were protected by their own ability to discover defects in their property.\textsuperscript{71} However, increased production of residential property decreased a buyer’s ability to protect themselves because they no longer equaled builders in knowledge or bargaining power.\textsuperscript{72} Thus, risk allocation became a better tool to protect against latent defects in residential property than \textit{caveat emptor}. Accordingly, courts choosing \textit{not} to apply the implied warranty of workmanlike quality in the commercial sphere have characterized buyers of commercial property as more sophisticated, knowledgeable, and better equipped to bargain against defects in property than buyers of residential property.\textsuperscript{73}

Conversely, those courts that have applied the warranty in the commercial sphere express concern about creating a default assumption that buyers of commercial property are necessarily

\textsuperscript{69} Powell & Mallor, \textit{supra} note 15, at 321.
\textsuperscript{70} \textit{Id.} at 311.
\textsuperscript{71} \textit{Id.} at 308.
\textsuperscript{72} \textit{Id.} at 309—10.
\textsuperscript{73} Hopkins, 427 N.E.2d at 1339 ("The person to whom the warranty runs … is the relatively unsophisticated buyer, making a large investment, in a structure to be used by him as a residence. The motivations upon those seeking income-producing property, as well as the pressures upon them, are considerably different …."); Hays, 655 S.W.2d at 160—61 ("[T]he purchaser of an apartment house is not a naive home buyer, but an investor in a commercial enterprise …. he could and should have required written assurances as to such hidden conditions as a condition to the purchase of the property …."); Powell & Mallor, \textit{supra} note 15, at 309—10 ("[Buyers of commercial property are believed to] have the means and the leisure to inspect the property fully, the sophistication to recognize the existence of a defective condition, the bargaining power to negotiate a favorable express warranty term, and, if all of the above fail, the capital to absorb a loss that would be ruinous to ordinary homebuyers."). This has been the case even where buyers were relatively new investors in commercial property. \textit{See Frickel,} 725 P.2d at 425 (holding that the implied warranty of habitability did not apply for first time investors in an apartment complex because even though "the plaintiffs were relatively inexperienced as investors in commercial property[, they] could and should have protected themselves in the contract negotiations ….").
better able to protect themselves in real estate transactions than buyers of residential property.\textsuperscript{74}

A buyer’s bargaining power can depend on many factors, including the “purchaser’s reason for purchasing the commercial property, the market for the property, and the characteristics of the individual purchaser.”\textsuperscript{75} Furthermore, the same rationales that first prompted the evolution of implied warranties in residential property have equal force when applied to commercial property.\textsuperscript{76}

First, the buyer of commercial property, just like the buyer of residential property, must rely on the skill and expertise of the builder.\textsuperscript{77} This is especially true if the purchaser of commercial property is relatively new to the commercial world.\textsuperscript{78} However, even if a purchaser of commercial property is an experienced business person, they are less likely to hire independent experts to evaluate latent defects because (a) the reasonable expectations of a party to such a transaction are usually high,\textsuperscript{79} and (b) defects may exist within the component parts of a structure making it impossible to detect without destroying the property itself.\textsuperscript{80} Furthermore, it is impractical to suggest that experts hired by a buyer \textit{at the time of purchase} could effectively discover latent defects since such defects, by definition, tend to manifest themselves a

\textsuperscript{74} Hodgson v. Chin, 403 A.2d 942, 945 (N.J. Super. A.D. 1979) (applying the implied warranty of habitability and workmanlike quality to the purchase of a commercial building consisting of two small stores on the first floor and two apartments on the second floor because the buyers were “small business persons who were obviously buying in reasonable reliance on the building being reasonably fit for the intended use,” but reserving judgment to whether the warranty should apply to “substantial buyers of large commercial buildings”).

\textsuperscript{75} Powell & Mallor, \textit{supra} note 15, at 332.

\textsuperscript{76} Hodgson, 403 A.2d at 945 (explaining that the extension of implied warranties from residential property to commercial property is a logical extension). In fact, one of the earliest cases to enunciate the application of implied warranties, made no distinction in its \textit{dicta} between residential and commercial property, but instead focused on the necessary reliance of the buyer on the builder of a completed structure because the buyer cannot inspect the component parts of the property without destroying the same. \textit{See Pollard}, 525 P.2d at 91.

\textsuperscript{77} Powell & Mallor, \textit{supra} note 15, at 331.

\textsuperscript{78} Hodgson, 403 A.2d at 945.

\textsuperscript{79} Powell & Mallor, \textit{supra} note 15, at 331.

\textsuperscript{80} Pollard, 525 P.2d at 91.
considerable time after purchase.\textsuperscript{81} In short, the builder remains in the best position, in either the context of residential or commercial property, to know and protect against latent defects because of his superior knowledge of the works and materials that went into the structure.\textsuperscript{82}

Second, buyers of commercial property have the same reasonable expectations as buyers of residential property that their purchases will be free of latent defects and are reasonably fit for the expected purpose.\textsuperscript{83} In fact, as mentioned above, those expectations may be higher than a purchaser of residential property because of the professional nature of such transactions.\textsuperscript{84}

Third, the builder of commercial property is the superior risk bearer, just like the builder of residential property.\textsuperscript{85} This similarity, however, hinges not on mere economics, but rather on a basic tenet of fairness. From a purely economic standpoint, the buyer of commercial property can effectively distribute the cost of defects through its customers, tenants, or clients.\textsuperscript{86} This would be true regardless of the size of the buyer’s business, though certainly to different degrees. However, to impose such a requirement on the buyer would be to punish the innocent party, e.g. the one that did not create the defect, by placing him at a “competitive disadvantage in the marketplace.”\textsuperscript{87} For a small business person, such as our fictional couples in the introduction, this economic disadvantage could prove disastrous. However, even if the buyer is as

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\textsuperscript{81} Tusch Enterprises v. Coffin, 740 P.2d 1022, 1032 (Idaho 1987). In this sense, the expertise of the buyer and his ability to hire experts will only be relevant in deciding whether the buyer should have known of a defect at the time of purchase. \textit{Id.} at 1032 n.6.
\textsuperscript{82} Powell & Mallor, \textit{supra} note 15, at 332.
\textsuperscript{83} \textit{Tusch}, 740 P.2d at 1031 (“It is of no matter \textit{who} ultimately inhabits the home after purchase, be it the buyer, a relative or lessee. The implied warranty is that the \textit{structure} will be fit for habitation, and resolution of the question whether the buyer has received that which he bargained for does not depend upon the status of the buyer or ultimate user; it depends upon the quality of the dwelling delivered and the expectations of the parties.”) (emphasis in original).
\textsuperscript{84} Powell & Mallor, \textit{supra} note 15, at 331.
\textsuperscript{85} \textit{Id.} at 332.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
sophisticated as the seller, and thereby able to spread the costs of defects while still maintaining a profit, it is still inequitable to arbitrarily favor the culpable party.\(^8^8\)

Fourth, as in residential property, the application of an implied warranty of workmanlike quality would encourage a high standard of workmanship in the building of commercial structures.\(^8^9\) Minimum standards of safety resulting from the possible dangers that latent defects pose to persons and property are just as important in commercial property then residential property.\(^9^0\) In truth, they may be more important in certain commercial property, such as tenancies and consumer stores, due to the high volume of people that could inhabit or visit the premises.\(^9^1\)

### Part III. The Implied Warranty of Workmanlike Quality in Florida

A. Origin and Generalities of the Implied Warranty of Workmanlike Quality in Florida

The implied warranty of workmanlike quality was first recognized by the Fourth District Court of Appeals in \textit{Gable v. Silver} (\textit{Gable I}).\(^9^2\) In the landmark case, homeowners had purchased a condominium unit from the builder and developer of twin condominiums.\(^9^3\) The developer subcontracted the building of an air conditioning system installed.\(^9^4\) In order to properly complete the installation, it was necessary to build water supply wells.\(^9^5\) Due to improper drilling of the wells, the air conditioning unit never worked properly.\(^9^6\) The owners

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\(^{8^8}\) Id.  
\(^{8^9}\) Id.  
\(^{9^0}\) Powell & Mallor, \textit{supra} note 15, at 333.  
\(^{9^1}\) Id.  
\(^{9^2}\) Gable v. Silver, 264 So.2d 418 (Fla. 1972), \textit{adopting opinion of Gable I}, 258 So.2d 11.  
\(^{9^3}\) \textit{Gable I}, 258 So.2d at 12.  
\(^{9^4}\) The court found that the air conditioning unit was an integral part of the realty because it could not be removed without damaging the structure of the building. \textit{Id.} at 14.  
\(^{9^5}\) \textit{Id.} at 12.  
\(^{9^6}\) \textit{Id.}
brought an action against the developer for the cost to repair the defective air conditioning system after the one year express warranty had already expired.\(^9^7\)

At the time of the court’s decision, only fourteen states had adopted some sort of implied warranty towards residential property.\(^9^8\) However, recognizing the inherent problems with the traditional approach of applying the doctrine of *caveat emptor*, the court opted for the minority view and adopted the implied warranty of workmanlike quality towards the purchase of real estate.\(^9^9\) Several policy considerations were discussed by the court. Specifically, the court reasoned that:

> The purchase of a home is not an everyday [sic] transaction for the average family, and in many instances is the most important transaction of a lifetime. To apply the rule of caveat emptor … in favor of a builder who is daily engaged in the business of building and selling houses, is manifestly a denial of justice ….\(^1^0^0\)

In addition to this *manifest injustice* consideration, the court also acknowledged that, practically, implied warranties would discourage shoddy workmanship.\(^1^0^1\) Furthermore, the court continued to rationalize their holding by agreeing with the then Texas Supreme Court, which reasoned that the ordinary buyer of a home is not in a position to ascertain latent defects and thereby protect themselves against them.\(^1^0^2\) Finally, the court recognized that it was wholly inequitable and

\(^9^7\) *Id.*

\(^9^8\) *Id.* at 14—16 (Idaho, South Dakota, Texas, Arkansas, Hawaii, the District of Columbia, Colorado, Connecticut, Indiana, Kentucky, Michigan, South Carolina, Vermont, and Washington). However, only three states that had at the time considered the problem at bar had declined to extend implied warranties to realty. *Id.* at 14.

\(^9^9\) *Gable I*, 258 So.2d at 14.

\(^1^0^0\) *Id.* at 15 (quoting Bethlahmy v. Bechtel, 415 P.2d 698, 710 (Idaho 1966)).

\(^1^0^1\) *Id.* (quoting Waggoner v. Midwestern Development, 154 N.W.2d 803, 808 (S.D. 1967) (“It would be much better if this enlightened approach [implied warranties] were generally adopted with respect to the sale of new houses for it would tend to discourage much of the sloppy work and jerry-building that has become perceptible over the years.”); Humber v. Morton, 426 S.W.2d 554, 561 (Tex. 1968) (“[*Caveat emptor*] does a disservice not only to the ordinary prudent purchaser but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work”)).

\(^1^0^2\) *Id.* (citing *Humber*, 426 S.W.2d at 561 (“Obviously, the ordinary purchaser is not in a position to ascertain when there is a defect in a chimney flue, or vent of a heating apparatus, or whether the plumbing work covered by a concrete slab foundation is faulty.”)).
illogical to deny the purchaser of realty the same warranties that a purchaser of personal property enjoyed when realty was generally much more expensive than goods.  

Concerning the application of the implied warranty of workmanlike quality in Florida, the warranty has been upheld on a theory of contracts (ex contractu) rather than torts (ex delicto).  Consequently, a person suing under the warranty can recover “the cost to repair [the defect] which substantially gives the owner that to which he is entitled either under an express or implied contract.” Furthermore, according to Gable I, the warranty applies even in the presence of an express warranty. The reason is because Gable I adopted a definition of disclaimer that went beyond a mere statement of an express warranty to an “express repudiation or renunciation of any alternative form of warranty.”

However, the implied warranty of workmanlike quality in Florida, as in other jurisdictions, is not without limitations. To start, the warranty does not cover latent defects that

103 Id. at 16 (quoting Wawak v. Stewart, 449 S.W.2d 922, 923 (Ark. 1970) (“One who bought a chattel as simple as a walking stick or a kitchen mop was entitled to get his money back if the article was not of merchantable quality. But the purchaser of a $50,000 home ordinarily had no remedy even if the foundation proved to be so defective that the structure collapsed into a heap of rubble.”)).

104 Lochrane, 552 So.2d at 230 (using the Latin terms).

105 Id. at 231.

106 Gable I, 258 So.2d at 14 (“We believe that the express warranty present in this cause in no way precluded, or is inconsistent with, the imposition of an implied warranty of fitness and merchantability.”).


At such time as a Certificate of Occupancy has been issued by the City of West Palm Beach with respect to the building constructed on the premises, and when the Seller has caused the building to be furnished and equipped with the items described and set forth on Exhibit 2, the Seller's obligations to the Purchaser and to the condominium association shall, except as hereinafter provided, cease and come to an end. It is understood and agreed that the Seller shall, for a period of one year from the date of the Certificate of Occupancy, continue to remain responsible to the Purchaser and the Condominium Association for the correction of all defective work occasioned and resulting from the use of defective materials and/or poor workmanship in the construction of the building. The Seller agrees that to the extent that the same are transferable it will transfer to the Condominium Association for its benefit and the benefit of the Purchaser all warranties which may be furnished by such contractors and material suppliers.

Id. The court held that the quoted warranty above contained no express repudiation, and in fact, was labeled as “ACCEPTANCE OF PROJECT AND WARRANTIES.” Id. (emphasis added).
the purchaser of a home had a reasonable opportunity to detect and did not do so.\footnote{Putnam v. Roudebush, 352 So.2d 908, 909 (2d Fla. Dist. Ct. App. 1977) (“A defense to implied warranty, at least in the products liability area, has been that the party asserting the implied warranty had a reasonable opportunity to discover the defect and did not do so. If we are to extend implied warranties to condominiums, it seems logical to allow the condominium developer/seller the same defenses that we allow the manufacturer/seller in the products liability field.”).} Furthermore, there are several limitations on the coverage of defects within the warranty. For example, defective fixtures in a home are covered under the warranty, but only if there is an intention to make the fixture a permanent part of the property, or the fixture cannot be removed without damaging the premises.\footnote{See Gable I, 258 So.2d at 14 (faulty air conditioning unit); see also Lochrane, 552 So.2d at 230 (faulty sewage disposal system).}

B. Non-Extension of the Implied Warranty of Workmanlike Quality to Subsequent Purchasers of Residential Property

The implied warranty of workmanlike quality, as enunciated by \textit{Gable I}, was particularly narrow.\footnote{Id.} The court expressly limited its decision to the first purchasers of new homes and condominiums, leaving the question open as to whether more remote purchasers would be able to recover under the implied warranty.\footnote{Id.} Nevertheless, the court did express in dicta that while there may be a need to limit the warranty, any “artificial [sic] limits of either time or remoteness to the original purchaser” were questionable.\footnote{Id.}

For the next eight years, Florida lower courts applied the narrow holding of \textit{Gable I} without expressly addressing the unanswered question of subsequent purchasers.\footnote{See Burger v. Hector, 278 So.2d 636, 636 (1st Fla. Dist. Ct. App. 1973) (builder of new home not liable original homeowners under implied warranty of suitability because the builder constructed the house according to the plans and specifications selected by plaintiffs with good workmanship and materials on real property selected by plaintiffs); Forte Towers South, Inc. v. Hill York Sales Corp., 312 So.2d 512, 513 (3d Fla. Dist. Ct. App. 1975) (subcontractor hired by builder/owner of a condominium building liable under implied warranty of quality for defective air conditioning unit); Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So.2d 463, 468 (4th Fla. Dist. Ct. App. 1975) (remanding a suit by a condominium association against a condominium developer for improper design and construction because the complaint did not indicate whether the association was a unit owner,}
Second District Court of Appeals answered the question in the negative. In that case, a non-profit organization controlled by condominium unit owners, who themselves had purchased the units from previous owners, sued the developer of the of the condominium alleging breach of the implied warranty of workmanlike quality in failing to comply with building and zoning requirements for the city of Sarasota. At the time of the court’s decision, three states had refused to extend the warranty to subsequent purchasers of residential property. The court mentioned in particular the reasoning of the Mississippi Supreme Court in Oliver v. City Builders, Inc., which expressed concern over subjecting a builder of a dwelling to strict liability in torts. In Oliver, the subsequent purchasers sued the original builder of their homes when, six months after purchase, cracks developed in the walls and floor of the home because of poor workmanship. The court refused to extend any implied warranties to the subsequent purchasers for several reasons. Foremost, the court reasoned that extending the warranty would subject the builder to limitless liability since workmanship could encompass virtually every facet of construction, from building materials to actual services rendered, regardless of remoteness.

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114 Strathmore, 369 So.2d at 973. The Third District Court of Appeals had already held that failure to comply with regulations of a government body could constitute a breach of the implied warranty of workmanlike quality. David v. B & J Holding Corp., 349 So.2d 676, 678 (3d Fla. Dist. Ct. App. 1977) (developer/builder liable to owner of condominium unit for implied warranty of fitness and merchantability for failing to construct party walls in accordance with specifications); Putnam, 352 So.2d at 909 (trustee/developers of condominium unit not liable to condominium unit owners under implied warranty of fitness and merchantability because excessive noise from air conditioning system fell far short of establishing breach of implied warranty).

115 H. B. Bolas Enterprises, Inc. v. Zarlengo, 400 P.2d 447, 448 (Colo. 1965) (cracked basement floor property built by a construction company for defendants, who then resold the property to the plaintiffs); Oliver v. City Builders, Inc., 303 So.2d 466, 466 (Miss. 1974) (cracks on the walls and floors of a house built by the appellees, sold to a third party, and then resold to the appellants); Barnes v. Mac Brown & Co., Inc., 342 N.E.2d 619, 620 (Ind. 1976) (cracks in basement wall in a residential home built by the appellees for a third party, and then resold to the appellants).

116 Strathmore, 369 So.2d at 972—73 (citing Oliver, 303 So.2d at 468).

117 Oliver, 303 So.2d at 465.
between the builder and the current owner.\textsuperscript{119} Furthermore, the court reasoned that an extension of the warranty could lead to illogical results because it could allow subsequent purchasers to recover under defects that the original purchasers could no longer sue.\textsuperscript{120} Such would be the case if the buyer and seller mutually assented to waive any defects in the property.\textsuperscript{121} The court never pointed to any facts consistent with a waiver by the original owner in the instant case, but merely posed such a waiver as a hypothetical.\textsuperscript{122}

The court’s reasoning, as adopted by the Second District, has several fallacies. To begin, the concern over limitless liability for the builder is without merit. Construction defects in Florida are divided into three categories: defective building materials, faulty workmanship, and defective design.\textsuperscript{123} Depending on the extent of a construction project, a contractor or builder would only be liable for those areas of construction in which he is an expert, e.g. workmanship.\textsuperscript{124} Normally, only suppliers are liable for defective building materials, and only engineers, architects or designers are liable for defective design.\textsuperscript{125} For instance, picture a builder who undertakes to construct homes in Florida. The builder erects numerous homes, all in a workmanlike manner. However, unbeknownst to the builder, some of the home’s roofs have been built with latently defective wood, which was provided by one of the builder’s suppliers. Furthermore, nearly all roofs’ design does not conform to the builder’s specifications. Both defects make the roofs incredible unstable. In both cases, the builder would not be liable for the

\begin{itemize}
\item \textsuperscript{119} Id. at 468 (emphasis added).
\item \textsuperscript{120} Id. (“It would be strange indeed if, when the original purchaser conveyed the property to another, that his vendee could resort to the builder for damages for deficiencies in workmanship or materials which the original purchaser from the builder had accepted.”).
\item \textsuperscript{121} Id.
\item \textsuperscript{122} In fact, the original owner was never made a party in this litigation. Id. at 465.
\item \textsuperscript{123} Hugh H. McConnell, \textit{Diminished Capacity – Owner’s Ability to Sue for Construction Defects in Florida}, 71 Fl.A.B.J. 64, 64 (1997) [hereinafter \textit{Diminished Capacity}].
\item \textsuperscript{124} Id. at 66.
\item \textsuperscript{125} Id. at 66, 67.
\end{itemize}
defective building materials or the defective design, but the supplier and designer might be.  

In the first instance, the purchaser might be able to seek relief from the supplier directly since the supplier is considered a merchant who gives Uniform Commercial Code (“UCC”) warranties. By contrast, the builder provides services.  

In the second instance, however, the owner would most likely not be able seek relief from the designer unless the owner was in privity with the designer. A designer is not considered to warrant his or her work in the same manner that a supplier warrants his product under the UCC. Also, an owner not in privity with the designer may not sue under a claim of “professional negligence” because such a claim, despite its misnomer, is not founded in tort but in contract. Still, this lack of recovery is inconsequential to the focus of this argument, namely, that exposing the builder to liability beyond the immediate privity of the first purchaser of residential property will not lead to limitless liability.

Additionally, the acceptance as waiver argument is not only illogical on its face, but incognizable under Florida’s understanding of the implied warranty of workmanlike quality. There is no rational basis to claim that a waiver of defects by one purchaser of property should have any legal effect on the subsequent purchaser. It may be true that “circumstances may be such between the original purchaser and the builder, that the former may be estopped to complain of the quality, type, class or kind of construction or material, or as to the strength,

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126 See id. at 65. Of course, if the builder should have known that the wood was defective, then his using of it would constitute a breach of the implied warranty of workmanlike quality. See id. at 66 (“[contractors] are held to an ordinary standard of care in selecting and inspecting materials incorporated into their work.”) (emphasis added).
127 Id. at 65. Florida amended its version of the UCC to allow warranties to run from the supplier to third parties. Fla. Stat. § 672.318 (1997).
128 Diminished Capacity, supra note 123, at 66.
129 See id. at 67 (1997) (explaining that even though purchasers in privity with a designer might easily sue upon deviations in the agreed upon design, most owners do not contract directly with a designer).
131 Diminished Capacity, supra note 123, at 67—68. Furthermore, even if the owner sued the designer under negligence, his or her claim would probably be barred thanks to the economic loss rule. Id. at 68.
durability and appearance of the structure,” but the subsequent purchaser is surrounded by different circumstances. Furthermore, even if the acceptance as waiver argument is accepted, one Florida court has noted that Strathmore involved a patent or readily visible defect, rather than a latent defect. The distinction is critical because, in accordance to Oliver’s rationale, an original purchaser would not be able to accept, and thereby waive, a defect that has yet to manifest itself. It is exactly those types of defects, the ones that don’t manifest themselves for some time, which the implied warranty of workmanlike quality is meant to protect against. Furthermore, Oliver places a tremendous weight on the original purchaser’s ability to protect his or her self through the express contract with the builder. To the court’s understanding, there is “little room for concluding that a warranty or guaranty, not expressed in the deed, logically may be implied nevertheless, even in the case of first purchasers of a new house from the builder.” As noted above, however, Florida has allowed for such a conclusion in holding that the implied warranty of workmanlike quality applies even in the presence of an express warranty.

C. Non-Application of the Implied Warranty of Workmanlike Quality to Purchasers of Commercial Property

In Conklin v. Hurley, the Florida Supreme Court was certified the question: “Do implied warranties of fitness and merchantability extend to first purchasers of residential real estate for improvements to the land other than construction of a home and other improvements immediately supporting the residence thereon, such as water wells and septic tanks?” In other

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132 Oliver, 303 So.2d at 468.
134 See Oliver, 303 So.2d at 469.
135 Poulson, supra note 4, at 283 n.44.
136 See Oliver, 303 So.2d at 469.
137 Id.
138 Gable I, 258 So.2d at 14 (“We believe that the express warranty present in this cause in no way precluded, or is inconsistent with, the imposition of an implied warranty of fitness and merchantability.”).
139 Conklin, 428 So.2d at 655 (emphasis added).
words, the court was asked whether the implied warranty of workmanlike quality should be applied to purchasers of commercial property. Unfortunately, the court held no.\footnote{Id.}

In that case, the appellants had purchased vacant waterfront lots from a subdivision developer.\footnote{Id.} The managing partner of the developer hired a seawall construction company, also managed by him, to build seawalls abutting the properties.\footnote{Id.} The lots were purchased by the appellants after the seawalls were built.\footnote{Id.} Unfortunately, during a particular heavy bout of rain, the seawalls collapsed.\footnote{Id.} The court found that the appellants bought the lots primarily for residential investment purposed.\footnote{Id.}

At the time of the court’s decision, the number of states recognizing an implied warranty of workmanlike quality in the sale of residential home had swelled from fourteen to thirty-three.\footnote{Id.} The court examined the existing case law, including \textit{Gable I}, and concluded that the main reason why \textit{caveat emptor} had eroded in the context of residential property was “inability of the ordinarily prudent homebuyer to detect flaws in the construction of modern houses and the chattel-like quality of such mass-produced houses.”\footnote{Id. at 658.} The court then proceeded to distinguish the case at bar from \textit{Gable I} in two ways. Firstly, the court reasoned that because the appellants had purchased an empty parking lot with a seawall, as opposed to a finished dwelling, they could be expected to undertake a more diligent effort in examining the premises then a homeowner.\footnote{Id. at 658.}

\begin{footnotesize}
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  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id. at 658.}
  \item \footnote{Id. at 656 n.2 (citing cases from Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, Wyoming, and Hawaii)}
  \item \footnote{Id. at 658.}
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Secondly, while the court recognized that investors in property, just like homeowners, have reasonable expectations of their purchases and must rely in the expertise of the builder, the similarities are not sufficient to extend the warranty.\textsuperscript{149} This conclusion was founded on a blanket characterization of the purchaser of commercial property: a person who, “as a class,” enjoys a stronger bargaining position, is more knowledgeable of the property he or she purchases, and will be relatively unaffected economically by defects.\textsuperscript{150}

The court’s rationale itself is riddled with defects, which are expertly expounded upon by Justice Adkins in his dissenting opinion.\textsuperscript{151} Justice Adkins first highlights the majority’s misplaced focus on the empty lot itself, and its differentiation from a finished dwelling, without taking into account the abutting seawall.\textsuperscript{152} He argues that a seawall is as integral to waterfront property as a proper foundation is to a basement, which is especially true in Florida due to the popularity of waterfront property.\textsuperscript{153} As such, the majority’s focus on the empty lot not only failed to take into account the reasonable expectations of the parties, but the substantial expense and expertise that goes into the building of a proper seawall.\textsuperscript{154}

More important, however, is Justice Adkins’s concern over the majority’s characterization of the typical investor.\textsuperscript{155} He asks:

How do we define an investor?-by [sic] the amount of capital he has invested, or the number of acres, or how often he makes a purchase? Would it be fair to say that any buyer making a purchase of real property for the purpose of an investment has a “relatively stronger position at the bargaining table with developers than do homebuyers as a class”?\textsuperscript{156}

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\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} See Conklin, 428 So.2d at 659—61 (Adkins, J., dissenting).
\textsuperscript{152} Id. (Adkins, J., dissenting).
\textsuperscript{153} Id. at 661 (Adkins, J., dissenting).
\textsuperscript{154} Id. (Adkins, J., dissenting).
\textsuperscript{155} Id. at 660 (Adkins, J., dissenting).
\textsuperscript{156} Id. (Adkins, J., dissenting) (quoting the majority opinion).
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To illustrate the problem, once again imagine the fictional couples portrayed in the Introduction to this Comment. On the one hand, the elderly couple can be described as experienced and knowledgeable investors, having gained enough capital from prior real estate transactions to open up their own business. On the other hand, the young couple fresh out of law school, without further facts, cannot be fairly portrayed as experienced or knowledgeable investors. However, under the majority’s holding, both the elderly couple and the young couple would have no recourse under the implied warranty of workmanlike quality. Both couples would be characterized as having a superior bargaining position when they purchased the retail space because they could choose to “invest [their] excess capital elsewhere.”

Likewise, both couples would not be expected to suffer greatly from any defects in property, but to take those loses as foreseeable business risks. Both of these arguments might ring true for the elderly couple, but there is no logical or equitable ground for subjecting the young couple to these blanket holdings. Indeed, such a holding would be inequitable even if applied to an experienced investor because a) the innocent party would be forced to bear the risk of loss, and b) a foreseeable business risk does not necessarily involve a risk that builder will not perform their job in a workmanlike manner. Furthermore, it would be seem more reasonable to apply these

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157 Conklin, 428 So.2d at 659 (emphasis added).
158 See id. (“A serious defect in a home may render a family or individual financially destitute. The investor, on the other hand, risks financial setback, but not necessarily catastrophe if the land he purchases proves to be less fit for its intended purpose than expected.”).
159 In fact, these arguments very much reflected the reality of the appellant Conklin, who purchased the lot in question for $28,000, sold it for $31,500, and was claiming $6,500 damages based upon an asking price of $37,000 to $39,000 for similar lots in the area at the time he sold. Id.
160 In accordance to Florida law, it would be more appropriate conclude that the only business risk concerning defects in construction belong to the builder. LaMarche v. Shelby Mut. Ins. Co., 390 So.2d 325, 326 (Fla. 1980). In LaMarche, the Florida Supreme Court held that there was no comprehensive liability coverage for the insured (a contractor) over work not performed in a workmanlike manner, even with the presence of a provision stating that the enumerated exclusions did not apply to a warranty of fitness or quality. Id. The court made a distinction between defects in construction, which are not covered, and damage caused by those defects, which is the essence Commercial General Liability Insurance Policies. Id. In essence, the court held that work not perform in a workmanlike manner was a “business risk” assumed by the contractor. Id. (“When a craftsman applies stucco to an
arguments to a great number of purchasers of residential property in Florida, many of whom
expect to resell their property in a short amount of time in order to realize considerable profit.\textsuperscript{161}

D. Inadequacy of Other Theory of Recovery for Purchasers of Residential and
Commercial Property

1. Recovery under Negligent Workmanship and the Problem of the
Economic Loss Rule

Purchasers of both residential and commercial property, regardless of privity, can
hypothetically, sue a builder for poor workmanship under a theory of negligence. However, the
economic loss rule poses an almost insurmountable barrier to recovery.\textsuperscript{162} The economic loss
rule “prohibits tort recovery when a product damages itself, causing economic loss, but does not
cause personal injury or damage to any property other than itself.”\textsuperscript{163} The rule is fairly
straightforward to apply when a standalone product is defective, but significant problems arise
when 1) the defective product is assembled with other products, or 2) when the defect lies with a
service and not a product.\textsuperscript{164}

The economic loss rule was first adopted by Florida in products liability cases.\textsuperscript{165} The
first analytical issue under the economic loss rule arose in American Universal Ins. Group v.
General Motors Corp., where a defective replacement oil pump in a boat seized during operation

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\begin{enumerate}
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\item See Florida Power & Light, 510 So. 2d at 900 (defective steam generators).
\end{enumerate}
\end{footnotesize}
and caused injury to the boat engine itself. The insurer of the boat operator sued the oil pump manufacturer under theories of negligence and strict liability, claiming that the engine was “other property” within the meaning of the economic loss rule. The First District Court of Appeals rejected the claim, holding that the engine was not “other property” because the engine itself was the object of the bargain between the boat owner and manufacture, and the pump was an integral part of the engine.

The same rationale was extended to the purchase of finished dwellings and buildings in Florida by Casa Clara Condominium Ass’n, Inc. v. Charley Toppino and Sons, Inc.. In Casa Clara, a concrete supplier provided defective concrete to numerous home and condominium construction projects. The eventual owners of the completed homes and units sued the supplier under negligence, strict liability, and warranty theories after the concrete began to crack and peel away.

Plaintiffs first argued that an exception to the economic loss rule should be made for the purchase of homes because a home is often the most important investment in a person’s life. The court rejected the argument, reasoning that a barrier to tort recovery was appropriate when the homeowners could seek recovery under implied warranties and statutory remedies. The statutory remedy discussed by the court is provided by the FMBC, which will be discussed below. This rationale, however, is partially flawed because, in reality, there were no facts in the case to indicate that any of the implied warranties would be have been viable for the plaintiffs. In other words, There were no facts to indicate that the cracking concrete made the condominium units or homes uninhabitable (warranty of habitability), that the concrete supplier knew that some of their concrete had a high salt content (duty to disclose), or that the homeowners had directly contracted with the concrete suppliers for his service (implied warranty of workmanlike quality). See id. at 1245.
court explained that such warranties and remedies were sufficient to safeguard the economic expectations of the parties, and tort law should not be used to undermine contractual allocation of risks.\footnote{Id. at 1247 n.7.} Furthermore, the court feared that allowing tort recovery for economic loss would “down” contract law in a sea of tort.\footnote{Id. at 1247.}

Nevertheless, the plaintiffs contended that even if the economic loss rule applied to the sale of homes, the individual components of a home should be considered “other property.”\footnote{Casa Clara, 620 So.2d at 1247.} The court again rejected the plaintiff’s position, reasoning that the home itself is the object of the transaction, not its component parts.\footnote{Id. at 1247.} Simply stated, the court defined “other property” by what the buyer buys, and not what the seller sells, so identifying the product in a real estate transaction is as simple looking at the deed or the contract of sale.\footnote{Id. (emphasis added).} The court figured that a typical buyer does not have an interest in what makes up their homes, and are more than happy to just buy a finished product from the builder.\footnote{The “Other Property” Problem, supra note 162, at 88.}

Real estate transactions, however, become more difficult to classify within the economic loss rule when a negligent builder is involved. As stated above, the builder provides services, not goods.\footnote{Casa Clara, 620 So.2d at 1247.} There is an inherent contradiction in analyzing where the “other product” lies within a service transaction.\footnote{The “Other Property” Problem, supra note 162, at 66.} The Florida Supreme Court reached this question in Comptech Intern., Inc. v. Milam Commerce Park, Ltd., where it continued to focus on the object of the contract in determining what “other property” is.\footnote{Id. at 88.} In that case, Comptech contracted with their

\footnote{See Comptech Intern., Inc. v. Milam Commerce Park, Ltd., 753 So.2d 1219, 1226 (Fla. 1999).}
lessor, Milan, to renovate a leased warehouse that stored Comptech’s computers. The Florida Supreme Court held that the computers were “other property” within the economic loss rule because the object of the renovation contract was the warehouse itself, and the computers were not an integral part of the warehouse.

The cases above illustrate how restricted a cause of action for negligent workmanship can be, and why it does not serve as an effective substitute for an extended implied warranty of workmanlike quality. To illustrate, picture once again the hypothetical home builder and his wood supplier. Imagine that due to both defective wood provided by the supplier, and negligent construction by the builder, the roof partially collapses causing stress fractures on the walls of the home. The economic loss rule would prevent any homeowner from suing either the supplier or the builder under a negligence theory because the object of the transaction is the sale of a home, and the roof is an integral part of the home. Thus, short of the roof falling on the homeowner’s internal furnishing, or their own heads, would there be no recovery under negligence.

2. Recovery under Johnson v. Davis: Duty to Disclose

The inadequacy of the duty to disclose as an effective substitute to an extended implied warranty of workmanlike quality is best understood when viewed in light of the background in

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183 Id.
184 Id.
185 Id. at 1226—27 (citing Casa Clara, 620 So.2d at 1247) (emphasis added).
186 See supra pp. 22—23.
187 See Casa Clara, 620 So.2d at 1247 (“homeowners [buy] finished products-dwellings-not the individual components of those dwellings.”) (emphasis added).
188 See id. (“We also disagree with the homeowners that the mere possibility that the exploding concrete will cause physical injury is sufficient reason to abrogate the economic loss rule. This argument goes completely against the principle that injury must occur before a negligence action exists”).
189 Johnson, 480 So.2d at 629.
which the duty was created. As abovementioned, six years before *Johnson*, the Florida Supreme Court in *Strathmore* refused to extend the implied warranty of workmanlike quality to subsequent purchasers of residential property.\(^\text{190}\) Three years later, in *Conklin*, the Court also refused to apply the warranty to purchasers of commercial property.\(^\text{191}\) Again, the majority decision in *Conklin* greatly troubled Justice Adkins, who wrote in the minority.\(^\text{192}\) The end result was that subsequent purchasers of residential property, and purchasers of commercial property, were still governed by the doctrine of caveat emptor. *Johnson*, however, whose majority was written by Justice Adkins, attempted to change this reality.

In *Johnson*, defendant homeowners contracted for the sale of their home with the plaintiff subsequent purchasers.\(^\text{193}\) The contract for sale contained a provision stating that the buyer had the right to obtain a report guarantying that the roof was watertight and that the seller would pay for any repairs.\(^\text{194}\) The homeowners knew that the roof had a defect, but did inform the buyers prior to their second deposit payment.\(^\text{195}\) These facts troubled the court, which feared that sellers were hiding behind the doctrine of caveat emptor and taking advantage of many a buyer’s ignorance.\(^\text{196}\) Consequently, the court established a new duty to sellers of “all forms of real property, new and used[,]” to disclose facts he or she knows will materially affect the value of the property, and which are not readily observable or known to the buyer.\(^\text{197}\) Thus, at least from the moment of the *Johnson* decision, subsequent purchases of real property were given a new

\(^{190}\) *See supra* p. 21.  
\(^{191}\) *See supra* pp. 25—26.  
\(^{192}\) *See supra* pp. 26—27.  
\(^{193}\) *Johnson*, 480 So.2d at 626.  
\(^{194}\) *Id.*  
\(^{195}\) *Id.*  
\(^{196}\) *Id.* at 629.  
\(^{197}\) *Id.*
theory of relief to recover for latent defects.\textsuperscript{198} Later, however, this statement was qualified as not applying to sellers of commercial property.\textsuperscript{199}

Conceptually, both the duty to disclose and the implied warranty of workmanlike quality are nearly identical. For example, the duty to disclose attaches before the formation of a contract to sell a home.\textsuperscript{200} Similarly, although not expressly stated by the courts, the implied warranty of workmanlike quality can also be considered to attach before contract formation, even if a house is yet to be built, since parties to a contract expect that the house is or will be built in a workmanlike manner. Thus, both the duty and the warranty begin running parallel to each other right before the executory period of a contract. Furthermore, the duty and the warranty both continue running past the executory period since neither merge into the deed.\textsuperscript{201} However, just like the warranty, if during the executory period the buyer gains actual or constructive knowledge of any facts that would materially affect the value of the property, the buyer is estopped from suing under the duty.\textsuperscript{202}

Nevertheless, the duty to disclose and the implied warranty of workmanlike quality are not the same, and in their difference lay the duty’s weakness. The crucial divergence between

\textsuperscript{198} It should be noted that the duty to disclose can, hypothetically, cover both latent and patent defects. Indeed, the duty can attach to facts that are not defects at all, so long as they materially affect the value of the property. See id. at 629 (using example of roach and termite infestation). However, as is the case with the implied warranty of workmanlike quality, the duty to disclose focuses on latent defects since such defects, by definition, would not be known to buyers.

\textsuperscript{199} Futura Realty v. Lone Star Bldg. Centers (Eastern), Inc., 578 So.2d 363, 364—65 (3d Fla. Dist. Ct. App. 1991). In Futura, the corporate owner of a parcel of land sued the precedent owner / seller for failure to disclose certain pollution problems on the property. Id. at 364. The owner argued that the seller had a duty to disclose, relying on the language of Johnson, namely, that the “duty [to disclose] is equally applicable to all forms of real property, new and used.” Id. The Third District Court of Appeals, however, interpreted the language to apply solely to residential property. Id. The court reasoned that the failure of Johnson to expressly extend the duty to commercial property could not abrogate the long standing doctrine of caveat emptor, especially when all the cases cited by Johnson did not involve commercial property. Id.

\textsuperscript{200} See Solorzano v. First Union Mortg. Corp., 896 So.2d 847, 849—50 (4th Fla. Dist. Ct. App. 2005) (explaining that an “as is” clause in a contract does not waive the duty to disclose because the duty attaches before contract formation).


\textsuperscript{202} See supra p. 24.
the duty and the warranty appears after a home is resold to subsequent purchasers. At that moment, the *benefit* of the warranty does not run to the subsequent purchaser, but the benefit of the duty does. Accordingly, a subsequent purchaser may recover for a latent defect if it manifests itself during the original owner’s possession of the property, and the owner does not disclose it.\(^{203}\) In this sense, the duty to disclose is broader than the implied warranty of workmanlike quality. Furthermore, the extended benefit is not hampered by the economic loss rule because an action under the duty to disclose has been interpreted as been classified as fraud in the inducement, which is safe from the rule.\(^{204}\)

Nonetheless, the fatal flaw in the duty to disclose is that the *burden* of the duty does not continue to run from builder, but *starts anew* in the original owners because they are now the sellers.\(^{205}\) Consequently, the new remedy afforded to subsequent purchasers of residential property comes at the expense of the original owners. This is problematic because the party ultimately responsible for the latent defects, the builder, still does not have to answer for his workmanship.\(^{206}\) This divergence also illustrates how the duty to disclose provides a smaller

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\(^{203}\) *See Johnson*, 480 So.2d at 629.

\(^{204}\) *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238, 1240 (Fla. 1996). The court explained that although the loss in fraud in the inducement claims are generally economic, there is an interest in protecting “society's need for true factual statements [...], primarily [in] commercial or business relationships.” *Id.*

\(^{205}\) *Wallis v. South Fla. Sav. Bank*, 574 So.2d 1108, 1110 (2d Fla. Dist. Ct. App. 1990) (Altenbernd, J., concurring) (explaining that the duty to disclose does not apply to third parties not in privity with the buyers) (emphasis added). In *Wallis*, homeowners had purchased a home from a residential development with an option to buy two bayfront lots across the street. *Id.* The developer was a partnership between Allegheny Oaks of Florida, Inc. (“Allegheny”), and a corporation controlled by Rodney Propps (“Propps”). *Id.* Allegheny became aware of improprieties by his partner, Propps, and exercised a buy-out clause in their contract. *Id.* Propps received a substantial loan from South Florida Savings Bank (“South”), but he still needed more money to buy Allegheny’s share. *Id.* Propps received another loan from Park Bank (“Park”), but only after the homeowners agreed to be guarantors in exchange for a favorable rate when their exercise their option. *Id.* Unfortunately, South’s loan was never honored because it exceeded lawful lending limits. *Id.* Thereafter, the development entered foreclosure, and the homeowners lost their option to buy. *Id.* The homeowners sued Allegheny alleging that they had an duty to disclose Propps’s improprieties because it materially affected the value of the bayfront lots. *Id.* The Second District Court of Appeals affirmed the dismissal of the nondisclosure claim because there is no contractual relationship or privity between Allegheny and the homeowners concerning the guarantorship. *Id.*

\(^{206}\) It could be argued that this result is not necessarily unjust. First, although the original homeowner is liable to the subsequent purchasers for defects, the original owner could, theoretically, indemnify himself through the builder
umbrella of protection concerning defects than an extended warranty of workmanlike quality could. As stated above, latent defects might not manifest themselves for a considerable period of time.\textsuperscript{207} So, if the warranty of workmanlike quality were extended, a subsequent purchaser can recover for a defect under the warranty as long as the defect manifests itself within a reasonable period of time.\textsuperscript{208} Conversely, under the duty, a subsequent purchaser may only recover for a defect if it manifests itself during the original owner’s possession of the property.\textsuperscript{209} As shown by the 2000 U.S. Census, the original owner’s possession is becoming a shrinking window, as a large percentage of original owners in Florida (48.9\%) are reselling their homes within a relatively short period of time (5 years).\textsuperscript{210} As a result, a significant number of latent defects may manifest themselves beyond the opportune window, making the duty to disclose a virtual nullity as applied to them.

3. Recovery under Statutory Causes of Action

\begin{itemize}
\item i. The FMBC
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The FMBC creates a private cause of action for persons damaged due to violations of a building code.\textsuperscript{211} Section 553.84 states that:

\begin{quote}
\textit{Any person or party}, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building
\end{quote}

\begin{flushright}
\textsuperscript{207} Terlinde, 271 S.E.2d at 769.
\textsuperscript{208} Id.
\textsuperscript{209} See Johnson, 480 So.2d at 629.
\textsuperscript{210} Census, supra note 45.
\textsuperscript{211} § 553.84.
\end{flushright}
Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation.\textsuperscript{212}

On its face, the broad language of the statute does not require privity for a purchaser of residential or commercial property to sue anyone responsible for a building code violation. Hence, the FMBC claim is broader than the implied warranty of workmanlike quality as applied in Florida.

However, there are restrictions within the statute that also makes it an inadequate substitute for an extended warranty of workmanlike quality. To illustrate, section 553.84 requires that “if there is no personal injury or damage to property other than the property that is the subject of the permits, plans, and inspections, this section does not apply unless the person or party knew or should have known that the violation existed.”\textsuperscript{213} The requirement of injury to property not the subject of the applicable building code is significantly less restrictive then the economic loss rule, and in fact, the Florida Supreme Court has held that the economic loss rule does not subsume this statutory cause of action.\textsuperscript{214} However, the restriction could still bar a claim that would otherwise be cognizable under the implied warranty of workmanlike quality, as recently shown in \textit{McGuire v. Ryland Group, Inc.}.\textsuperscript{215} In \textit{McGuire}, the plaintiff contracted to purchase a home in Orlando, Florida, to be constructed by the defendant.\textsuperscript{216} While visiting the construction site, plaintiff noticed several gaps in the concrete that surrounded the windows, and that the finish on the exterior walls was thin and uneven.\textsuperscript{217} Plaintiff attempted to rescind the contract, but decided to go through with the sale for fear that her security deposit would not be

\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.} (emphasis added).
\textsuperscript{214} \textit{Comptech}, 753 So.2d at 1223.
\textsuperscript{215} See \textit{McGuire v. Ryland Group, Inc.}, 497 F. Supp.2d 1347, 1351—54 (Fla. Cir. Ct. 2007).
\textsuperscript{216} \textit{Id.} at 1348—49.
\textsuperscript{217} \textit{Id.} at 1349.
After plaintiff moved into the residence, the Orlando area was hit by several hurricanes, which caused significant leakage in the house. Following several unsuccessful reconciliation attempts between the plaintiff and defendant, plaintiff brought suit claiming, among other things, breach of implied warranties and violation of the FMBC. The FMBC claim was premised on the thickness of the exterior finish, which was made from a material similar to stucco. The defendant filed a motion for summary judgment as to all claims.

The court dismissed the motion as to the implied warranty claim, even in the face of general disclaimers within the contract for sale. Conversely, the court granted the motion concerning the FMBC claim because 1) plaintiff did not allege injury to person or personal property, and 2) plaintiff could not prove that defendant knew or should have known that a building code violation existed since there was no thickness standard for the material used on the exterior walls. This holding is instructive in two ways. Firstly, it illustrates how the scope of defects covered under the FMBC can be narrower than under the implied warranty of workmanlike quality. Secondly, it shows how, if such was the case in McGuire, a subsequent purchaser of residential property or a purchaser of commercial property would have virtually no

\footnotesize

218 Id.
219 Id.
220 The court specifically refers to the warranty of habitability, but also uses the general “fitness and merchantability” terms as announced in Gable. Id. at 1351 (quoting Gable I, 258 So.2d. at 14).
221 McGuire, 497 F. Supp.2d at 1350.
222 Id. at 1354. The material was Textured Cementitious Finish, which like stucco is made from Portland cement based plaster. Id.
223 Id. at 1350.
224 Id. at 1352. The general disclaimer stated: **BUILDER MAKES NO HOUSING MERCHANT IMPLIED WARRANTY OR ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THE AGREEMENT OF SALE OR THE WARRANTED HOME, AND ALL SUCH WARRANTIES ARE EXCLUDED, EXCEPT AS EXPRESSLY PROVIDED IN THIS LIMITED WARRANTY. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACE OF THIS LIMITED WARRANTY.**
225 Id. (emphasis in original). The court held that the disclaimer was not clear or specific as to which items were excluded, and thus unenforceable. Id.
effective remedy at all since the implied warranty of workmanlike quality would also be unavailable to them.

Furthermore, assuming _arguendo_ that the defects in _McGuire_ were covered by the FMBC, if the defendant in that case was a general contractor and the exterior finish was actually applied by an independent subcontractor, a serious question arises as to whether the defendant actually _committed_ the violation as understood in section 553.84. The question has not been decided by Florida courts, and the answer could very easily swing from the positive to the negative. Still, whatever the answer, that uncertainty, coupled with the restrictions mentioned above, makes it clear that the FMBC claim is no replacement for an extended implied warranty of workmanlike quality.

ii. The Condominium Act.

Under section 718.203, purchasers of condominiums are granted an “implied warranty of fitness and merchantability for the purposes or uses intended” (“subsection one warranty”), and an “implied warranties of fitness as to the work performed or materials supplied” (“subsection two warranty”). The subsection one warranty runs from the developer to each.

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226 § 553.84 (emphasis added).
227 For example, the Third District Court of Appeals held that section 553.84 did not create a duty of supervision on the owner of a restaurant where an independent contractor had improperly vented an exhaust fan that nearly poisoned several patrons. Sierra v. Allied Stores Corp., 538 So.2d 943, 945 (3d Fla. Dist. Ct. App. 1989). Thus, it could be argued that a contractor also has no duty of supervision over a subcontractor who actually performs work in violation of the FMBC. However, one commentator has suggested that when a contractor obtains the permit for a construction job, a duty of supervising all of the work performed under the permit arises even if the work is delegated to a subcontractor. _Diminished Capacity, supra_ note 123, at 64.
228 “Condominium” under Chapter 718 is defined as “form of ownership of real property created pursuant to this chapter, which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.” Fla. Stat. § 718.103(11) (2008). Condominiums under Chapter 718 are created through the recording of a deed specifically identifying the conveyed property as a “condominium.” Fla. Stat. § 718.104(2)(b) (2002).
229 § 718.203(1).
230 § 718.203(2).
231 “Developer” under Chapter 718 is defined as:
condominium unit purchasers, while the subsection two warranty runs from the contractor, and all subcontractors and suppliers, to the developer and to the purchaser. The subsection one warranty is considered a codification of *Gable I*. Unlike *Gable I*, however, the benefit of the Condominium Act warranties continues to run from the original owners to the subsequent purchaser, regardless of privity. Therefore, at least on its face, the Condominium Act seems to give a broader remedy than the implied warranty of workmanlike quality.

Yet, as in the FMBC, it is the placement of the burden of the Condominium Act warranties, along with other limitations, that makes those warranties an inadequate substitute for an extended implied warranty of workmanlike quality. As aforementioned, the burden of the subsection one warranty lies on the developer, while the builder bears a narrower burden to “conform with the generally accepted standards of workmanship … specified in the contract.” The difference is best illustrated in *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, where condominium owners sued the developer of a condominium due to a defective air-conditioning system. The developer in turn sought indemnity from the contractor that installed the air-

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[A] person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include an owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy, nor does it include a cooperative association which creates a condominium by conversion of an existing residential cooperative after control of the association has been transferred to the unit owners if, following the conversion, the unit owners will be the same persons who were unit owners of the cooperative and no units are offered for sale or lease to the public as part of the plan of conversion. A state, county, or municipal entity is not a developer for any purposes under this act when it is acting as a lessor and not otherwise named as a developer in the association.

§ 718.103(18).
232 § 718.203(1).
233 § 718.203(2).
235 § 718.203(5) (“The warranties provided by this section shall inure to the benefit of each owner and his or her successor owners and to the benefit of the developer.”).
236 Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So.2d 911, 914 (Fla. 1995).
237 *Id.* at 913.
conditioning system. The court held that, in accordance with the Condominium Act, the contractor could only be held liable if the air-conditioning system did not perform up to the requirement specified in the contract with the developer, but not if the system was simply unfit for cooling the condominiums. In short, the Condominium Act offers the narrowest of extensions for the implied warranty of workmanlike quality: a warranty of fitness from the developer of a condominium to a subsequent purchaser of a condominium unit. Such an extension, though, bares no help to subsequent purchasers of residential property not qualifying as a condominium, or every purchaser of commercial property.

Conclusion

As the precedent discussion has stressed, Florida courts have proven wholly impotent in fully protecting the rights of Florida property owners. The same odd pattern has risen again and again. At first, Florida courts seem to provide broad protection to property owners without regard to arbitrary limits. These landmark decisions, however, are later qualified and severely limited. The Florida legislature has also suffered from the same incapacity, as its statutory causes of action are utterly inadequate to give an effective remedy at law for subsequent purchasers of residential property and all purchasers of commercial property.

Therefore, the most viable solution to these problems is an extended implied warranty of workmanlike quality that applies to subsequent purchasers of both residential and commercial

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238 Id.
239 Id. at 914.
240 See Gable I, 258 So.2d at 18 (stating in dicta that while there may be a need to limit the warranty, any “artifical [sic] limits of either time or remoteness to the original purchaser” were questionable); see also Johnson, 480 So.2d at 629 (establishing a duty to disclose in “all forms of real property, new and used.”).
241 See Strathmore, 369 So.2d at 973 (refusing to extend the implied warranty of workmanlike quality to subsequent purchasers of residential property); Conklin, 428 So.2d at 655 (refusing to apply the implied warranty of workmanlike quality to purchasers of commercial property); Wallis, 574 So.2d at 1110 (refusing to extend the duty to disclose to third parties not in privity with the buyers) (Altenbernd, J., concurring); Futura, 578 So.2d at 364—65 (refusing to apply the duty to disclose to sellers of commercial property).
Moreover, the most effective efficient means of achieving this extension is through a proper statutory scheme. However, in drafting this new statutory implied warranty of workmanlike quality, it is important to take into account the aforesaid lessons learned from the Florida courts and legislature. To begin, the Condominium Act provides a very good starting point for the focus of the statutory warranty. Like the Condominium Act, the statutory warranty should seek to codify the implied warranty of workmanlike quality as enunciated in *Gable I*.\(^{242}\) Codifying *Gable I* avoids the need to redefine the implied warranty of workmanlike quality, which could bring about a necessity to enumerate which defects are actionable. Having enumerated defects in an implied warranty can have some drawbacks, such as preventing the statute from being retroactive\(^{243}\) due to a lack of notice by the builders. However, unlike the Condominium Act, the statutory warranty should expressly state that the burden runs not only from the developer to the purchaser of property, but also from the contractor, or builder, and his subcontractors, to the purchaser. This change not only broadens the duty of the builder from its narrow inception in the subsection two warranty of the Condominium Act,\(^{244}\) but also avoids the possible causation problem that could develop under the FMBC when a developer delegates his work.\(^{245}\)

\(^{242}\) See § 718.203(1).
\(^{243}\) Retroactivity in a statutory implied warranty of workmanlike quality is important because it would prevent the injustice of denying an effective remedy to certain property owners who had the misfortune of purchasing their property before the effective date of the statute. Furthermore, it would also be wise to include within the statute some sort of notice and pre-litigation requirement. In other words, before the purchaser can bring a suit against the builder under the statute, he or she must give notice to the builder of the defects which could bring about the suit and provide the builder with defined amount of time in which to fix the problem. In short, the requirement would serve the same purpose as the executory period in a contract for sale of a home. The requirement is a good idea because it could reduce the volume of litigation under the statute.
\(^{244}\) See supra p. 41.
\(^{245}\) See supra p. 39.
To continue, as in the Condominium Act, the implied warranty of workmanlike quality should state that its benefit “inure[s] to … each owner and his or her successor owners.” This would cause the benefit of the warranty to run from the original purchaser to subsequent purchasers, just as in the duty to disclose. However, unlike in the duty to disclose, since the statute would have already expressly stated that the burden of the warranty runs from the builder to the purchaser, the burden will not start anew but continue to run as well, even when there is no privity between the subsequent purchaser and the builder. Furthermore, purchaser within the statute should be defined as a purchaser of any property, regardless of whether the said property is primarily used for profit-producing purposes or not. In other words, the statutory warranty would encompass both residential and commercial property.

In short, the state of the implied warranty of workmanlike quality in Florida is a sad one. A warranty with tremendous potential to redress the ailments of many a Florida property owner has been reduced to a shadow of itself through the refusal of Florida courts and legislature to expand its borders. Caveat emptor still dominates too many property transactions in Florida, as it has as far back as there has been property in Florida. However, we now live in a time where change is a popular notion, and likewise, change should also be the catchword of the Florida legislature.

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246 § 718.203(5).
247 See supra p. 35.