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"Caceci Is Dead, Long Live Caceci": Article 36-B Warranties on the Sale of New Homes

Anthony W. Cummings

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"*CACECI* IS DEAD, LONG LIVE *CACECI*": ARTICLE 36-B WARRANTIES ON THE SALE OF NEW HOMES[1]

A Codification of New York State Decisional Law Illustrated By *Caceci v. DiCanio Construction Corporation*[2]

*Anthony W. Cummings**

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I. INTRODUCTION

Chapter 709, New York State Laws of 1988,[3] effective March

1. N.Y. GEN. BUS. LAW §§ 777 to 777-b (McKinney Supp. 1991).
2. 72 N.Y.2d 52, 526 N.E.2d 266, 530 N.Y.S.2d 771 (1988).

* J.D. 1988, Hofstra University School of Law; B.S. 1985, Hofstra University. Officer, Suffolk Academy of Law. The author, a former Editor-in-Chief of the *Hofstra Property Law Journal* and a member of the New York and District of Columbia bar, currently practices general litigation in Hauppauge, New York.

3. N.Y. GEN. BUS. LAW § 777 to 777-b (McKinney Supp. 1991).

1, 1989, codifies a trend in New York State decisional law dating back at least to the late 1950's and early 1960's.[4] The recent and seminal case of *Caceci v. DiCanio Construction Corporation*,[5] decided by the highest court in the State of New York, the Court of Appeals,[6] illustrates quite clearly, the underlying rationale of the new statute.[7]

The court in *Caceci* held in no uncertain terms that "[a]s a building block in our common law judicial process the court now recognizes a 'Housing Merchant' warranty, imposing by legal implication a contractual liability on a homebuilder for skillful performance and quality of a newly constructed home. . . ."[8] This implied warranty is now a statutory one, thus placing New York in an exclusive class of states affording their purchasers of new homes and residents statutory protection.[9]

Whether the statute was intended to be applied in a manner to preempt and supplant the common law implied warranty set forth in *Caceci* and its bretheren is of great importance to both purchasers

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4. *See, e.g.*, Lutz v. Bayberry Huntington, Inc., 148 N.Y.S.2d 762 (N.Y. Sup. Ct. 1956)(court acknowledged purchaser's cause of action under the theory that there was an implied term in the agreement to construct the house in a good and skillful manner); Staff v. Lido Dunes, Inc., 47 Misc. 2d 322, 262 N.Y.S.2d 544 (N.Y. Sup. Ct. 1965)(Meyer, J., dictum)(court noted national trend that there should be an impled warranty of quality with respect to a house to be or in the process of being constructed).

5. 72 N.Y.2d 52, 526 N.E.2d 266, 530 N.Y.S.2d 771 (1988).

6. Under the New York State court system, the trial court of general jurisdiction is the supreme court. Appeals from the supreme court are taken to one of four departments of the appellate division, generally depending upon geographical location. The court of appeals is the highest court in New York State. N.Y. JUD. LAW arts. 3-5 (McKinney 1983); *see also* N.Y. CIV. PRAC. L. & R. arts. 56-57 (McKinney 1978).

7. Historically, New York courts held that implied warranties of habitability and workmanlike construction existed only in contracts of sale executed before construction was complete. *Compare* Lange v. Blake, 58 A.D.2d 1034, 397 N.Y.S.2d 290 (4th Dep't 1977) *and* Harmon Nat. Real Estate Corp. v. Egan, 137 Misc. 297, 241 N.Y.S. 708 (N.Y. Sup. Ct. 1930) *and* Lewy v. Clark Avenue, Inc., 128 Misc. 16, 217 N.Y.S. 185 (2d Dep't 1926) *with* Dolezel v. Fialkoff, 2 A.D.2d 642, 151 N.Y.S.2d 734 (3d Dep't 1956) *and* Centrella v. Holland Constr. Corp., 82 Misc. 2d 537, 370 N.Y.S.2d 832 (N.Y. Dist. Ct. 1975) *and* Lutz v. Bayberry Huntington, Inc. 148 N.Y.S.2d 762 (N.Y. Sup. Ct. 1956). *See also* Bearman, *Caveat Emptor in Sales of Realty-Recent Assaults upon the Rule*, 14 VAND. L. REV. 541 (1960-61)(criticizing the notion that the rules that apply to purchasers of houses near completion should be different than rules that apply to purchases of new houses).

8. 72 N.Y.2d at 55, 526 N.E.2d at 266, 530 N.Y.S.2d at 771.

9. States with statutory warranties on new homes include Connecticut, Louisiana, Maryland, Minnesota, New Jersey and Virginia; *see* CONN. GEN. STAT. ANN. §§ 47-116 to 121 (West 1986); LA. REV. STAT. ANN. §§ 3141 to 3150 (West 1991); MD. REAL PROP. CODE ANN. §§ 10-201 to 205 (1988 & Supp. 1990); MINN. STAT. §§ 327A.01 to .08 (1981 & Supp. 1991); N.J. STAT. ANN. ch. 46:3B (West 1989); VA. CODE ANN. § 55-70.1 (1986 & Supp. 1990).

and builder-vendors. However, this question has yet to be addressed by decisional law.[10] In any event, whether the statute sets forth the minimum[11] or the maximum standards for warranties, it will have long-term effects on construction costs in the residential home industry in New York State. An equally important question is whether the new statute will encourage competition in that industry or simply drive up costs. Despite its flaws, if this statute is even-handedly applied, it will benefit both purchasers and builder-vendors, while preserving and protecting common sense expectations in the residential home industry.

II. STATUTORY WARRANTIES ON NEW HOMES

Statutory warranties on new homes are neither a new nor novel approach when dealing with issues that arise regarding their risk-allocation.[12] As noted by learned commentators in conjunction with

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10. *See infra* note 49 for a discussion of statutory interpretation regarding common law preemption.

11. *Compare* N.Y. GEN. BUS. LAW § 777-b (McKinney Supp. 1991)(ambiguous phrasing makes it unclear as to whether it sets a minimum or a maximum standard) *with* LA. REV. STAT. ANN. § 3144(c)(West 1991)(clearly indicates minimum required warranties).

12. The basic question from a social or public policy determination standpoint, is which party ought to bear the risk or loss (limited here to financial loss including cost of repair, completion, or diminution in value) associated with defects resulting from defective workmanship in homebuilding.

> It is often asserted that where two parties stand in a bargaining relationship with each other it does not matter which one is initially charged with accident losses arising out of that relationship because the market will allocate the losses in the best way possible regardless of initial allocations.

CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 162 (1970). However, the reality of the homebuilding industry is that the purchaser typically is unsuited to examine and inspect or otherwise insure against defects in homebuilding. *See, e.g., infra* note 36. Accordingly, in these unequal bargaining situations,

> [t]he state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult second order decisions. These decisions go to the manner in which entitlements are protected . . . . In any given dispute, for example, the state must decide not only which side wins but also the kind of protection to grant.

Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

After society has made its entitlement choices and policy determinations, it has to enforce its decisions. A minimum of state intervention is always necessary. As applied to the issues discussed in this article:

> An entitlement [a home free of material defects] is protected by a property rule [Article 36-B] to the extent that someone [a builder-vendor] who wishes to remove the entitlement [subject to public policy limitations] from its holder [a purchaser] must buy it from him in a voluntary transaction [statutory warranty limitation and/or exclusion] in which the value of the entitlement is agreed upon by the seller.

a project concerning a statutory approach to implied warranties:

> If the law were to respond solely to the teachings of positive economics, it would usually place the risk of loss in a private transaction or occurrence on the party who can avoid or assume the risk at the least net cost. The law would include within the cost calculation not only direct expenses of preventing or rectifying the loss, but indirect transaction costs such as those involved in gathering and disseminating information to all persons who may need it. In effect, the risk would normally be placed on the party who would incur the least cost in obtaining and assimilating the relevant information about its nature and magnitude. The law would also engender, within cost-benefit limitations, what might be called an "informed-risk market place" which would enable parties with adequate information about potential or realized risks to reallocate the risks as their respective economic interests might dictate.
>
> On the other hand, if the law were to respond solely to common perceptions of fairness or justice, it would protect the weaker party when a loss arises from a private transaction or occurrence, unless the weaker party caused the loss through some fault of his own. In any event, "fair" and "just" systems of law would not rely on such blanket loss-allocating rules as caveat emptor without introducing notions related to relative bargaining power and fault.[13]

Those commentators believe that both approaches, the "efficiency-oriented" and the "fairness-oriented," can be reconciled through a unified, balanced statutory scheme.

However, for centuries, the general rule under New York law,[14] as well as under the law in most jurisdictions in the United States, is that the sale of real property is governed by the doctrine of caveat emptor.[15] Although this doctrine has been discarded with respect to the sale of personal property through the enactment of codified pro-

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Id.

13. *Francis Lewis Law Center Project [:] A Statutory Approach to Implied Warranties on New Residential Construction*, 36 WASH. & LEE L. REV. 1075 (1979).

14. "The buyer has the duty to satisfy himself as to the quality of his bargain pursuant to the doctrine of caveat emptor, which in New York State still applies to real estate transactions." London v. Courduff, 141 A.D.2d 803, 803, 529 N.Y.S.2d 874, 875 (2d Dep't 1988), *appeal denied*, 73 N.Y.2d 809, 534 N.E.2d 332, 537 N.Y.S.2d 494 (1988). *Accord* Coffin v. City of Brooklyn, 116 N.Y. 159, 22 N.E. 227 (1889); Traktman v. City of New York, 241 N.Y. 221, 149 N.E. 838 (1925).

15. Translated literally, this Latin phrase means "let the buyer beware." *See* Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); *see also* Annotation, *Liability of Builder-Vendor or Other Vendor of New Dwelling For Loss, Injury or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3d 383 (1969 & Supp. 1990)(discussing liability of builder-vendor for loss occasioned by defective condition of dwelling after sale).

tections,[16] the maxim of caveat emptor has long-barred remedies against builders except to the extent express warranties were made.[17] As an attempt to reconcile the inequity of the doctrine of caveat emptor in real property transactions, the courts of twenty-five states have created implied warranties of varying degrees.[18] However, the doctrine of caveat emptor is so pervasive, that some states have expressly rejected implied warranties.[19]

Several state legislatures have recognized this trend in decisional law, by enacting housing warranty statutes that provide protection for both purchasers and builder-vendors of new homes.[20] New York has joined those ranks by implementing housing warranties of its own.[21] Statutory schemes that provide purchasers of new homes protection, uniformly set forth for both initial, and often subsequent purchasers of new homes, allow a cause of action against the builder if certain statutorily defined warranties are breached. However, the schemes differ significantly in what protections are afforded. As discussed herein, the impetus behind the enactment of New York's statutory warranty scheme and the inherent weaknesses and problems associated with its drafting suggests that although a step in the right direction, the schemes of New York and other states inevitably fall short of achieving their ultimate purpose. Nevertheless, a balanced and even-handed application of the law which is consistent with the intent of the legislature will adequately protect purchasers and builder-vendors.

III. THE IMPORT OF *CACECI V. DICANIO CONSTRUCTION CORPORATION*

The courts of New York State have endlessly struggled with claims based on breach of contract and breach of implied warranty theories between the purchaser and builder-vendor of a house.[22]

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16. U.C.C. §§ 2-314 to 315 (1989); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966).

17. *See* sources cited *supra* note 16.

18. For a listing of these jurisdictions, see *infra* note 44.

19. Collier v. Sinkoe, 135 Ga. App. 732, 218 S.E.2d 910 (1975); Elizabeth Gamble Deaconess Home Ass'n v. Turner Constr. Co., 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984).

20. CONN. GEN. STAT. ANN. §§ 47-116 to 120 (West 1986); LA. REV. STAT. ANN. §§ 3141 to 3150 (West 1991); MD. REAL PROP. CODE ANN. §§ 10-201 to 205 (1988 & Supp. 1990); MINN. STAT. §§ 327A.01 to .07 (1981 & Supp. 1991); N.J. STAT. ANN. ch. 46:3B (West 1989); VA. CODE ANN. § 55-70.1 (1990).

21. N.Y. GEN. BUS. LAW § 777 to 777(b) (McKinney Supp. 1991).

22. *Compare* Lutz v. Bayberry Huntington, Inc., 148 N.Y.S.2d 762 (N.Y. Sup. Ct.

Clearly, unlike a breach of contract claim, a claim based on breach of implied warranties can only arise at closing of title when the builder-vendor has conveyed a house which suffered from material defects.[23] Under either theory, after much litigation the law remains unsettled as to what is covered by the implied warranty, what constitutes a 'material defect' and how statute of limitations questions are resolved. Moreover, applicability of the ancient caveat emptor doctrine, the merger doctrine[24] and disclaimers further increased the volume of litigation and the uncertainty for purchasers and builder-vendors alike in the homebuilding industry.

The New York State Court of Appeals in *Caceci* took the opportunity to harmonize the legal inconsistency in the application of the caveat emptor doctrine in order to soften its harsh effect, while attempting to preserve common sense notions of fair play in the homebuilding industry.

A. *Factual Background and Procedural History of Caceci*

On November 29, 1976, plaintiffs entered into a contract with defendant for the sale and conveyance of a parcel of land located in Suffolk County, New York on which a one-family ranch home was to be constructed by the defendant for $55,000.[25] A one year express warranty from title closing was offered by the defendant to the plaintiff with respect to plumbing, heating, electrical work, and also for the workmanship.[26] Remedies, however, were limited to the repair of any defect or the replacement of any defective part. It was further agreed that none of the terms of the contract for sale, except those specifically made to survive title closing, were to survive the title closing.[27]

1956) (there are implied warranties) *with* Eastman v. Britton, 175 A.D. 476, 162 N.Y.S. 587 (4th Dep't 1916) (there are no implied warranties).

23. Pitcherello v. Moray Homes, Ltd., 150 A.D.2d 860, 540 N.Y.S.2d 387 (3d Dep't 1989).

24. *Compare* Snyder v. Potter, 134 A.D.2d 664, 665, 521 N.Y.S.2d 175, 176 (3d Dep't 1987)("[the][merger] doctrine provides that prior agreements merge in the deed and are not admissible to vary the terms of the written instrument") *and* N.Y. REAL PROP. LAW § 251 (McKinney 1989) *with* CONN. GEN. STAT. ANN. § 47-118(d) (West 1986); MD. REAL PROP. CODE ANN. 10-203(d) (1988 & Supp. 1990); VA. CODE ANN. § 55-70.1(c) (1986 & Supp. 1990)(the statutes of these states explicitly vitiate the traditional effect of merger of the contract of sale into the deed in the sale of new homes).

25. 72 N.Y.2d at 55, 526 N.E.2d at 266, 530 N.Y.S.2d at 771.

26. A standard warranty throughout the homebuilding industry.

27. The standard merger clause employed throughout the homebuilding industry provides that written terms may not be varied by prior written or oral agreements because all such agreements have been merged into the written document such as the deed. Thus, only

On October 14, 1977, the plaintiffs and the defendant closed title. Four years later, in December, 1981, plaintiffs noticed a dip in the kitchen floor. The condition was brought to the defendant's attention and an attempt to repair the house was made.[28] The attempt did not solve the problem and the floor began to dip again. In November of 1982, the defendant made another attempt to repair the house.[29] The plaintiffs subsequently hired a firm experienced in structural and concrete repair[30] to do test boring and an analysis of soil sample.[31] The results proved that the sinking foundation was due to the placement of the house upon topsoil composed of deteriorating tree trunks, wood, and other biodegradable materials.[32]

In May 1983, plaintiffs commenced an action alleging, among other things, breach of implied warranty of workmanlike construction.[33] The trial court found for plaintiffs and awarded them damages in the amount of $57,466. These damages represented the reasonable cost of correcting the defendant's improper performance. While plaintiff's award was upheld on appeal, it was done solely on the implied warranty theory.[34] The court of appeals also affirmed, holding that as a matter of law, there is an implied term in the express contract between the builder-vendor and the purchaser of a new home that the house to be constructed will be completed in a

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those expressly provided for items survive the closing. *See* N.Y. REAL PROP. LAW § 251 (McKinney 1989).

28. 72 N.Y.2d at 55, 526 N.E.2d at 267, 530 N.Y.S.2d at 772.

29. The repairs took seven months inasmuch as the slab foundation had to be torn up and a new one poured. The DiCanio Construction Corporation had previously tried to repair the house by jacking part of it up, and adding material. *Defect-Free Guaranteed*, Newsday, July 9, 1988, § 3, at 1.

30. This is accomplished through mechanical and structural inspection by professional engineers before contract defects and deficiencies can be disclosed, thereby protecting the buyer and ultimately resulting in protection for all parties involved in the proposed purchase/sale. This latter process includes an inspection and examination of the building regarding its structural, electrical and mechanical systems and/or subsystems for proper integrity or capacity including the diagnosis and analysis of problems with the building and/or design of the building. Additionally, these professionals can recommend remedial actions. *See generally* Opinion, New York State Board for Engineering and Land Surveyering, Jan. 20, 1989.

31. 72 N.Y.2d at 56, 526 N.E.2d at 267, 530 N.Y.S.2d at 772. Test boring and soil sampling are means through which engineers are able to ascertain the capacity or ability of a particular site to withhold structures placed upon it; the building density of the soil increases when the soil is compacted. The bulk density of soil and its ability to withhold structures is directly proportional to the components of the site, with biodegradable items eventually decaying and causing movement within the soil.

32. 72 N.Y.2d at 55, 526 N.E.2d at 267, 530 N.Y.S.2d at 772.

33. *Id.*

34. Caceci v. DiCanio Constr. Corp., 132 A.D.2d 591, 592, 517 N.Y.S.2d 753, 754 (2d Dep't 1987).

skillful manner, free from material defects.[35] The court went on to indicate that, contrary to the views of the lower courts, the builder-vendor's knowledge of the defect is not decisive under the implied contractual warranty with respect to latent defects.[36] Moreover, the court maintained that the contract's standard merger clause is of no legal effect in these circumstances.[37] The court distinguished Real Property Law section 251 as expressly limited to deeds of conveyance and, therefore, of no applicability to contracts for the construction and sale of new homes.[38]

B. *Caceci Court Analysis and Rationale*

In *Caceci,* the New York State Court of Appeals acknowledged that the traditional judicially-created doctrine of caveat emptor was an outgrowth of the 19th Century philosophy of laissez-faire.[39] In

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35. 72 N.Y.2d at 56, 526 N.E.2d at 267, 530 N.Y.S.2d at 772.

36. Latent defects are those hidden or concealed, not able to be discovered by reasonable and customary inspection. Patent defects, however, are those plainly visible or which can be discovered by such an inspection as would be made in the exercise of ordinary care.

A key distinction is that patent defects are more properly subject to an argument of waiver. *Compare* Christensen v. R.D. Sell Constr. Co., 774 S.W.2d 535, 538 (Mo. 1988)(which held "[t]he structural quality of a house, by its nature, is nearly impossible to determine by inspection after the house is built, since most of the important elements of its construction are hidden from view. The ordinary 'consumer' can determine little about the soundness of the construction. . ." (quoting Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 799 (Mo. 1972)(en banc))) *with* Ward v. Russell, 32 Ark. App. 86, 796 S.W.2d 588 (1990)(waiver was merely a question of fact for the jury to decide, and did not acknowledge that the ordinary consumer was at a disadvantage when inspecting a house).

Furthermore, the law permits the enforcement of the contractual merger clause as to patent defects because the purchaser can protect his interest by either demanding a specific written agreement covering the defect or by refusing to close until it has been corrected. Milstein v. Incorporated Village of Port Jefferson, 154 A.D.2d 442, 546 N.Y.S.2d 18 (2d Dep't 1989).

37. The court's well-reasoned rationale was that "[to] hold [otherwise], in a case such as this, that the closing itself, the very act which triggers the claim, also serves to extinguish it, is self-contradictory, illusory and against public policy." 72 N.Y.2d at 56, 526 N.E.2d at 267, 530 N.Y.S.2d at 772.

38. N.Y. REAL PROP. LAW § 251 (McKinney 1989)(which stated that a covenant is not implied in a conveyance of real property whether the conveyance contains any special covenant or not). This statute is consistent with the maxim of caveat emptor. *See, e.g., supra* note 24.

39. 72 N.Y.2d at 58, 526 N.E.2d at 267, 530 N.Y.S.2d 773. In its essence, "let the buyer beware." This maxim essentially summarizes the Old English rule that a purchaser must examine, judge and test for himself or herself the quality and nature of any item to be purchased.

The maxim implied a well-established rule that the purchaser buys at his or her own risk, except as to those express warranties or those warranties implied by law.

The doctrine of caveat emptor was, for centuries, the well-settled rule governing sales. For a more extensive analysis of the doctrine, see Annotation, *Liability of Builder-Vendor of New Dwelling For Loss, Injury, or Damage Occasioned by Defective Condition,* 25 A.L.R.3d 383

essence, the traditional position was that a buyer deserved whatever he or she got if he or she relied on his or her own inspection of the merchandise and did not extract an express warranty from the seller. In acknowledging the frequent inability of the typical purchaser to negotiate at an even footing with the typical builder-vendor,[40] the court noted that the doctrine had essentially outlived its utility.[41] Additionally, the court took this opportunity to harmonize the legal inconsistency between the application of the caveat emptor doctrine to personal property[42] and to real property, which thereby softened the harsh effect of the doctrine.[43]

The court further distanced itself from the rigid notions of caveat emptor by holding that "nonliability is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. Therefore, [this rule of nonliability] should be discarded."[44] The court also held "[i]f, instead, adherence to pre-

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(1969 & Supp. 1990); Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

40. The court stated:

> The justification in cases which have relaxed the doctrine of caveat emptor with respect to homes contracted for sale prior to construction is that the two parties involved in the purchase of such a home generally do not bargain as equals in relation to potential latent defects from faulty performance.

72 N.Y.2d at 59, 526 N.E.2d at 269, 530 N.Y.S.2d at 774.

41. 72 N.Y.2d at 60, 526 N.E.2d at 270, 530 N.Y.S.2d at 775.

42. 72 N.Y.2d at 57, 526 N.E.2d at 268, 530 N.Y.S.2d at 773 (citing U.C.C. §§2-314 to 315 (1991))("[a]s the industrial revolution roared into the era of mass produced goods, the law governing the sale of personal property started to relax the rigid results of the caveat emptor rule, culminating in the recognition of an implied warranty of merchantability").

43. The court went on to note:

> Since law usually reflects society's conflicts and developments, it started to catch up to the changes in home building and purchasing practices by bringing fresh and sharp scrutiny to the doctrine of caveat emptor in these circumstances. One commentator even pointed to the irony of a system of law which offer[ed] greater protection to the purchaser of a seventy-nine cent dog leash than it [did] to the purchaser of a 40,000-dollar house (quotation marks in original omitted).

72 N.Y.2d at 60, 526 N.E.2d at 270, 530 N.Y.S.2d at 775 (citing Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965); Roberts, *The Case of the Unwary House Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 935 (1967); Bearman, *Caveat Emptor in Sales of Realty-Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961)).

44. 72 N.Y.2d at 60, 526 N.E.2d at 270, 530 N.Y.S.2d at 775. The court also noted that over twenty-five states now recognize some form of an implied warranty of habitability or skillful construction in connection with the sale of homes:

> *See* Cochran v. Keeton, 287 Ala. 439, 252 So. 2d 313 (1971); Richards v. Powercraft Homes, 139 Ariz. 242, 678 P.2d 427 (1984); Coney v. Stewart, 263 Ark. 148, 562 S.W.2d 619 (1978); Pollard v. Saxe & Yollees Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 15 Cal. Rptr. 648 (1974); Cosmopolitan Homes v. Weller, 663 P.2d 1041

cedent offers not justice but unfairness, not certainty but doubt and confusion, it loses its right to survive and no principle constrains us to follow it."[45] Moreover, the court, in affirming the order, held quite specifically:

> Here, the implication that [a] builder must construct a house free from material defects and in a skillful manner is wholly consistent with the express terms of the contract and with the reasonable expectations of the purchasers. Common sense dictates that the purchasers were entitled to expect, without necessarily expressly stating the obvious in this contract, that the house being purchased was to be a habitable place. The law ought to fulfill that common-sense [sic] expectation.[46]

IV. "*CACECI* IS DEAD, LONG LIVE *CACECI*"

Caceci's holding, analysis and rationale are incorporated into General Business Law, section 777(b),[47] which has created the Housing Implied Warranty.[48] Whether the statutory warranty will be interpreted to preempt and supplant the common law protection is unclear.[49] However, it is clear that the new statute imposes an af-

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(Colo. 1983); Greentree Condominium Ass'n v. RSP Corp., 36 Conn. Supp. 160, 415 A.2d 248 (1980); Gable v. Silver, 264 So. 2d 418 (Fla. 1972); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Park v. Sohn, 89 Ill. 2d 453, 60 Ill. Dec. 609, 433 N.E.2d 651 (1982); Theis v. Heuer, 264 Ind. 1, 280 N.E.2d 300 (1972); Kirk v. Ridgway, 373 N.W.2d 491 (Iowa 1985); Gosselin v. Better Homes Inc., 256 A.2d 629 (Me. 1969); Weeks v. Slavick Builders., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); Allison v. Home Sav. Ass'n, 643 S.W.2d 847 (Mo. App. 1982); Chandler v. Madsen, 197 Mont. 234, 642 P.2d 1028 (1982); Norton v. Burleaud, 115 N.H. 435, 342 A.2d 629 (1975); McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283 (1979); Earls v. Link, Inc., 38 N.C. App. 204, 247 S.E.2d 617 (1978); Yepsen v. Burgess, 269 Or. 635, 525 P.2d 1019 (1974); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Rutlegde v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Sedlmajer v. Jones, 275 N.W.2d 631 (S.D. 1979); Hollen v. Leadership Homes, 502 S.W.2d 837 (Tex. Civ. App. 1973); Bolkum v. Staab, 133 Vt. 467, 346 A.2d 210 (1975); Kloe v. Gockel, 97 Wash. 2d 567, 554 P.2d 1349 (1976); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975).

45. 72 N.Y.2d at 60-61, 526 N.E.2d at 270, 530 N.Y.S.2d at 775.

46. *Id.*

47. Effective March 1, 1989.

48. N.Y. GEN. BUS. LAW § 777(b) (McKinney Supp. 1991).

49. Contrary to the belief of some, *Caceci* alone did not propel the legislature to enact this legislation. The legislature had considered such legislation for over 21 years. To these thinkers, the new statute was designed to limit *Caceci*. Suffolk Academy of Law Continuing Legal Education Real Estate Seminar (Nov. 30, 1990)(program materials available from the Suffolk Academy of Law). However, traditionally in New York:

> The process of construction necessarily presupposes doubt, obscurity, or ambiguity,

firmative duty upon purchasers to inspect their new homes. Likewise, it is clear that the statute imposes a legal obligation upon builder-vendors to construct new homes in a skillful manner, free of material defects.

The statute broadly defines key terms such as the dwellings[50] and also those transferrers[51] subject to the act's coverage. However, substantial litigation may arise in the near future regarding out-of-state properties marketed in New York State, renovated homes,[52] nonresidential property converted to residential use;[53] and mixed use property.[54] While these aforementioned groups are not expressly in-

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and consequently, where a statute is framed in language so plain as to make an explanation superfluous, one will not be attempted. where, however a construction of a statute is required, it may be reached by reasoning from extraneous connected circumstances, laws, or writings, bearing on the same or a connected matter, or by seeking and applying the probable aim and purpose of the provision.

N.Y. STAT. § 71 (McKinney 1971).

Additionally, a review of similar laws in other states and opinions is appropriate. *See, e.g.*, N.Y. STAT. § 262 (McKinney 1974) ("If a sister state or foreign country has [a] similar statute, the construction placed on it by its courts may be deemed of assistance in interpreting the domestic law"); *see also* Schuster v. City of New York, 5 N.Y.2d 75, 85, 154 N.E.2d 534, 540, 180 N.Y.S.2d 265, 273 (1958)(citation omitted)("[t]he affirmative statute is merely declaratory and does not repeal the common law relating to the subject; on the contrary, the two rules coexist"). The principle of *Schuster* suggests that the statutory remedy is merely cumulative of the common law remedy and the party involved may resort to either at his election. *Contra* Vento v. Honeybee Homes, 141 Misc. 2d 997, 535 N.Y.S.2d 344 (N.Y. Civ. Ct. 1988); Broughton v. Dona, 101 A.D.2d 897, 475 N.Y.S.2d 595 (3d Dep't 1984). *See generally* Burns Jackson Miller Summit & Spitzer v. Linder, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983)(the existence of statutory protection does not preclude common law remedies).

50. Dwellings are defined as:

'New home' or 'home' means any single family house or for-sale unit in a multi-unit residential structure of five stories or less in which title to the individual units is transferred to owners under a condominium or cooperative regime. Such terms do not include dwellings constructed solely for lease, mobile homes as defined in section seven hundred twenty-one of this chapter, or any house or unit in which the builder has resided or leased continuously for three years or more following the date of completion of construction, as evidenced by a certificate of occupancy.

N.Y. GEN. BUS. LAW § 777(5) (McKinney Supp. 1991).

51. *Id.* at § 777(1) (" 'Builder' means any person, corporation, partnership or other entity contracting with an owner for the construction or sale of a new home.").

52. Relevant factors will likely include the extent and nature of any renovations done, as well as the length of any occupancy periods before such renovations. *Compare* City of Philadelphia v. Page, 363 F. Supp. 148 (E.D. Pa. 1973)(the distinction between new and used housing should not be determinative of the existence of an implied warranty of habitability) *with* Miles v. Love, 1 Kan. App. 2d 630, 633, 573 P.2d 622, 625 (1977)("where a basically used home has been newly improved by additions and where defects existed prior to additions and are not he result of additions, the doctrine of implied warranty of fitness does not apply, but rather the doctrine of caveat emptor prevails.").

53. Including hotels, single room occupancy buildings, and rent control properties.

54. Properties with stores on the ground level and residential properties on the above-

cluded in the Act's definition of a new home or of builder, the spirit of the legislation would suggest that a consumer is to be afforded the greatest protection without overreaching.[55]

Builder-vendors may attempt to employ loopholes in order to avoid liability under the new statute.[56] Accordingly, builder-vendors may argue that terms defined by the statute, such as 'new home' and 'builder-vendor' are to be afforded a plain meaning[57] and therefore, be narrowly construed. Moreover, builder-vendors may seek to reorganize themselves and their transactions in order to avoid the parameters of the statute. Examples of such machinations include selling only leasehold interests,[58] reselling to unrelated real estate professionals,[59] as well as the traditional and widely-used thinly capitalized corporate structure.[60] In order to protect themselves from these practices, purchasers may extract personal and express guarantees, conduct background checks, obtain all-risk homeowners insurance policies and performance bonds, and make installment payments a condition of the contract.

By its definitions alone, the new statute sets the stage for much future litigation. Many of the questions raised by the statute will be addressed by the courts in an attempt to reconcile *Caceci* with the statute. This is so because the statute is of course not retroactive, and *Caceci*, at a minimum, will be controlling in causes of action

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ground level floors.

55. *See generally* N.Y. GEN. BUS. LAW § 777 to 777b (McKinney Supp. 1991) *and infra* notes 57 & 63 and accompanying text.

56. *See infra* p. 66. The evidentiary burden of proving that a builder-vendor intended from the outset to avoid the new statute's coverage may be insurmountable.

57. For a discussion on interpreting the plain meaning of statutes, see Rho v. Ambach, 74 N.Y.2d 318, 321-22, 546 N.E.2d 188, 189-90, 546 N.Y.S.2d 1005, 1006-07 (1989); Doctor's Council v. New York City Employee's Retirement Sys., 71 N.Y.2d 669, 674-75, 525 N.E.2d 454, 457, 529 N.Y.S.2d 732, 735 (1988); Alonzo M. v. New York City Dep't of Probation, 72 N.Y.2d 662, 665-66, 532 N.E.2d 1254, 1256-57, 536 N.Y.S.2d 26, 28-29 (1988).

58. Agreements can be drafted whereby leaseholds are extended until the statutory six year period has expired and then, and only then, will options to buy be subject to exercise.

59. Unrelated agents and brokers that purchase homes fee simple, then subsequently sell the properties to buyers are technically within the statute's definition of 'builder.' However, if these entities are shell corporations set up to shield the builder, the essential purpose of the new statute may be frustrated. *See* Griffiths, *New Life for the Agency Theory: Commissioner v. Bollinger, 108 S.Ct. 1173 (1988)*, 17 FLA. ST. U.L. REV. 127, 128 (1989)(a general discussion of shell corporations).

60. The problem presented by shell corporations is more apparent by the recent astronomical increase in United States Bankruptcy Court petition filings. *See, e.g.*, Gross, *The Debtor As Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 NOTRE DAME L. REV. 165, 205 n. 277 (1990).

accruing from May, 1983 to March 1, 1989. It is quite conceivable that builder-vendors will interpose the new statute as an affirmative defense. Accordingly, developments presented in the courts' treatment of *Caceci* and the new statute will ultimately determine whether or not the new statute is exclusive.

A. *Protection Afforded Under the Housing Merchant Implied Warranty*

The Housing Merchant Implied Warranty (the ACT) provides significant protection for purchasers.[61] For example, 'Owner' is defined broadly to include successor-in-title during the unexpired portions of the applicable warranty period.[62] The ACT, however, should not only be seen as an act that protects purchasers. Through its terms, the ACT provides repose for builder-vendors.[63] If the ACT is held to be the exclusive remedy as suggested by some, the failure to identify statutory defects within the specified time periods will preclude legal recourse.

The statutory time periods of coverage include a one-year general warranty period against defects resulting from a failure to have been constructed in a skillful manner;[64] a two-year warranty period against defects in the plumbing, electrical, heating, cooling and ventilation systems resulting from a failure of the builder to have installed such systems in a skillful manner;[65] and a six-year warranty

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61. N.Y. GEN. BUS. LAW § 777(a)(1) to 777(a)(6) (McKinney Supp. 1991).

62. *Id.* at § 777(6).

63. Some jurisdictions have distinguished statutes of limitations and statutes of repose. *See* Reynolds v. Porter, 760 P.2d 816, 820 (Okla. 1988)("[t]he time prescribed by a statute of repose runs from a specific negligent act or event regardless of when the harm or damage occurs. A limitation period runs from the time the elements of a cause of action arise."). Most modern limitations and statutes of repose are similar because they provide repose for the defendant. In general, these statutes are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh. *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965)("[s]uch statutes promote justice by preventing suprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded and witnesses have disappeared."(quotation marks in original omitted)(citing Order of R.R. Telegraphers v. R.R. Express Agency, Inc., 321 U.S. 342, 348-49 (1943))). However, builder statutes of repose are not above constitutional challenge. *See* St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 782 P.2d 915, 923 (Okla. 1989) for a listing of cases addressing the constitutionality of repose statutes.

64. N.Y. GEN. BUS. LAW § 777-a(1)(a) (McKinney Supp. 1991)("one year from and after the warranty date the home will be free from defects due to a failure to have been constructed in a skillful manner. . .").

65. *Id.* at § 777-a(1)(b) ("two years from and after the warranty date the plumbing, electrical, heating, cooling and ventilation systems of the home will be free from defects due to

period against material defects.[66] The statutory time period for which an action can be brought is one year from the end of the warranty period or four years from the beginning, whichever is longer.[67] This additional time allows purchasers to initiate an action outside of the limits of the warranty period.

In the area of the statute of limitations, whether *Caceci* has been effectively preempted will be especially significant. As illustrated in *Vento v. Honeybee Homes Inc.*,[68] case law can potentially provide for vast protection beyond that set forth in the ACT.

In *Vento*, the plaintiffs contracted with defendant in 1981 to build a new one-family home in Staten Island, New York.[69] After title closed on April 21, 1982, plaintiffs claimed to be continuously disturbed by a leaking roof. More than six years after the closing of title, plaintiffs commenced action on August 1, 1988.[70]

Defendant in *Vento*, relying on *Caceci*, moved to dismiss the plaintiffs' action on the ground that it was time-barred. In dismissing the defendant's motion, noting that the breach of contract theory was rejected by the *Caceci* court,[71] the *Vento* court held:

> This court therefore assumes that the statute of limitations for the implied housing merchant warranty is more than four years and it is this Court's profound belief the warranty is for a period equal to what a reasonable expectation would be that a house constructed in a workmanlike manner would be free of material defects. This Court therefore finds that the statute of limitations for a defective roof is over six years as one could reasonably expect that a well-made roof should last over six years.[72]

The *Vento* court went on to acknowledge the statutory Implied Housing Merchant Warranty and its six-year statute of limitations but stated "however, that law does not become effective until March 1, 1989, and is not applicable to contracts of sale for new homes entered into before the effective date."[73]

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a failure by the builder to have installed such systems in a skillful manner . . .").

66. *Id.* at § 777-a(1)(c) ("six years from and after the warranty date the home will be free from material defects . . .").

67. *Id.* at §§ 777(a)(4)(b), 777(8).

68. 141 Misc. 2d 997, 535 N.Y.S.2d 344 (N.Y. Civ. Ct. 1988).

69. 141 Misc. 2d at 998, 535 N.Y.S.2d at 345.

70. *Id.*

71. *Id.* ("*Caceci* was not upheld on a breach of contract theory, in fact that theory was specifically rejected. . .[by] [t]he Court of Appeals. . ."(citation omitted)).

72. 141 Misc. 2d at 998, 535 N.Y.S.2d at 345.

73. 141 Misc. 2d at 999, 535 N.Y.S.2d at 345.

This all suggests that the *Vento* court viewed the new ACT's statute of limitations as a maximum in protection, setting forth an outer limit in the time within which to bring actions when applicable. Accordingly, whether other courts construe the ACT as an outer limit on the respective time periods covered by statutory warranties will be significant.[74]

Not only does the ACT attempt to delineate covered matters,[75] but it also seemingly imposes a precondition to legal recourse. A written notice of a warranty claim is made a condition precedent to the commencement of any warranty action.[76] The written notice must be received by the builder-vendor no later than thirty days after the expiration of the applicable warranty period in order to afford the builder-vendor a reasonable opportunity to inspect, test and repair the alleged defect.[77] This mandatory language used by the legislature in this provision, suggests that failure to comply with this provision will serve to bar claims thereunder.[78]

Additionally, the ACT provides that where a builder-vendor "makes repairs in response to a warranty claim. . . an action with respect to such claim may be commenced within one year after the last date on which such repairs were performed."[79] This language[80]

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74. Clearly, concepts of statutory construction will be extremely important in determining how the ACT will be applied. *See supra* note 11 and sources and cases cited *supra* notes 49 & 57.

75. The number of matters that this statute covers is not infinite. It is conceivable that plaintiffs, when seeking recourse against builder-vendors, will focus on two clauses of the statute in order to broaden the statute's scope. N.Y. GEN. BUS. LAW § 777(3) (McKinney Supp. 1991)('constructed in a skillful manner' may be held to the standards of the locally accepted building practices, thereby allowing plaintiffs greater latitude when alleging that such standards were violated); § 777-a(6) (the list of implied warranties that may arise from this statute are not exhaustive and that other warranties may arise out of these transactions).

76. *Id.* § 777-a(4)(a).

77. *Id.*

78. *See* New Home Constr. Corp. v. O'Neill, 373 S.W.2d 798 (Tex. Civ. App. 1963). In this case, the court dealt with a warranty that required the purchaser to give the vendor written notice within one year of instances of failure to conform to plans. However, when this particular purchaser made a written complaint to the builder-vendor, the complaint only listed defects in workmanship and materials. Although timely, the purchaser could not recover on the claim of breach of warranty by the bulder because the writing failed to go into the specifics that the warranty required. *Id.; cf.* MINN. STAT. ANN. § 327A.03(a)(1981 & Supp. 1991)(excluding loss or damage not reported in writing within six months after the vendee-owner discovered or should have discovered the loss or damage); LA. REV. STAT. ANN. § 3145 (West 1991)(requiring notice by registered or certified mail). Clearly a specific notice requirement is a mechanism that will protect bulder-vendors. The fact that New York has a written notice requirement, *see supra* text accompanying note 76, is evidence that the Act will probably be construed to limit *Caceci* in the future.

79. N.Y. GEN. BUS. LAW § 777-a(4)(b) (McKinney Supp. 1991).

suggests that the attempted repair either extends or cuts off any statutory time remaining in bringing a warranty claim. Whether this section is to be interpreted in this manner will prove to be very important to both purchasers, who will want a broad statute of limitations, and builder-vendors, who will want to limit it.

Just as the *Caceci* court placed great emphasis on a common sense expectation, so too, it would seem, has the legislature as is manifested in its drafting of the ACT. The ACT defines terms such as "constructed in a skillful manner,"[81] "material defect,"[82] and "plumbing, electrical, heating, cooling and ventilation systems."[83] By defining these terms, the ACT takes some of the uncertainty out of what is or is not covered by an implied warranty in the sale of a new home. In doing so, it attempts to preserve common sense notions of fair play in this sort of transaction by defining the rules of the game or at least specifying starting points for the general items of significant concern for both purchasers and vendors.

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80. The provision is a specific one, following more general provisions. Under general rules of statutory construction, specific provisions govern over general ones, making this a limitation. However, the phrase at the beginning of the provisions reads "In addition to the foregoing, . . ." N.Y. GEN. BUS. LAW § 777-a(4)(b) (McKinney Supp. 1991); *see also* N.Y. STAT. §§ 93, 238 (McKinney 1971); cases cited *supra* note 57.

81. The definition states that:

> 'Constructed in a skillful manner' means that workmanship and materials meet or exceed the specific standards of the applicable building code. When the applicable building code does not provide a relevant specific standard, such term means that workmanship and materials meet or exceed the standards of locally accepted building practice.

N.Y. GEN. BUS. LAW § 777(3) (McKinney Supp. 1991).

82. The definition states that:

> 'Material defect' means actual physical damage to the following load-bearing portions of the home caused by failure of such load-bearing portions which affects their load-bearing functions to the extent that the home becomes unsafe, unsanitary or otherwise unlivable: foundation systems and footing, beams, girders, lintels, columns, walls and partitions, floor systems, and roof framing systems.

Id. § 777(4).

83. The definition states that:

> 'Plumbing, electrical, heating, cooling and ventilation systems' shall mean:
>
> (a) in the case of plumbing systems: gas supply lines and fittings; water supply, waste and vent pipes and their fittings; septic tanks and their drain fields; water, gas and sewer service piping, and their extensions to the tie-in of a public utility connection, or on-site well and sewage disposal system;
>
> (b) in the case of electrical systems: all wiring, electrical boxes, switches, outlets and connections up to the public utility connection; and
>
> (c) in the case of heating, cooling and ventilation systems: all duct work, steam, water and refrigerant lines, registers, connectors, radiation elements and dampers.

Id. § 777(7).

B. *Exclusions or Modifications of the Housing Merchant Implied Warranty*

Through the ACT, builder-vendors are given an opportunity to create specified, enforceable limited warranties. When limiting a warranty, a builder-vendor, among other things, must ensure that this limitation is in clear and conspicuous terms, and that the purchaser-vendor has been given a reasonable opportunity, prior to the execution of the contract or agreement, to examine the writing that contains the limitation.[84] Since the ACT requires detailed, step-by-step procedures for processing claims under the limited warranty, this additional burden may curtail the use of exclusions or limitations. To specify that which will be done in the event of a claim may prove cumbersome and problematic administratively, and deter some purchasers from seeking relief.[85]

The scope and enforceability of limitations, exclusions or releases is likely to be challenged. As a general rule, the scope of a release, exclusion or modification depends on the intentions of the parties as determined by the language employed, if clear.[86] However, there is a strong public policy against having language limiting warranties that is hidden in mere boilerplate provisions of a contract.[87]

In *Glasser v. American Homes of Clifton Park Division of American Homes, Inc.*,[88] where a purchase contract by its terms stated that all express and implied warranties regarding the unit

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84. *Id.* at § 777(b). Since no specific time period is provided, the issue of what is a sufficient time period may prove to be resolved in future litigation.

A similar issue has been presented in determining a "reasonable" time in the purchaser-vendor relationship regarding the real estate conveyance closing. *See also* Sohayegh v. Oberlander, 155 A.D.2d 436, 438, 547 N.Y.S.2d 98, 100 (2d Dep't 1989)("[w]hat constitutes a reasonable time depends on the facts and circumstances of the particular case." (citing Ballen v. Potter, 251 N.Y. 224, 167 N.E. 424 (1929))). Perhaps when presented with the question for purposes of Article 36-B the courts will taken a similar approach.

85. Suffolk Academy of Law Continuing Legal Education Real Estate Seminar (Nov. 30, 1989)(program materials available through the Suffolk Academy of Law); *see also infra* text accompanying notes 110-13.

86. Tremblay v. Theiss, 152 A.D.2d 793, 794, 543 N.Y.S.2d 573, 574 (3d Dep't 1989)("[t]he scope of a release depends on the intentions of the parties as determined by the language employed if clear."(citing Wells v. Shearson-Lehman/American Express 72 N.Y.2d 11, 526 N.E.2d 8, 530, N.Y.S.2d 517 (1988))).

87. A wealth of caselaw has held that boilerplate contract language was, in itself, insufficient to disclaim the implied warranty of habitability in favor of purchasers of newly constructed homes. *See, e.g.*, Crawford v. Whittaker Constr., Inc., 772 S.W.2d 819 (Mo. Ct. App. 1989); Glasser v. American Homes of Clifton Park Division of American Homes, Inc., 144 A.D.2d 890, 535 N.Y.S.2d 208 (3d Dep't 1987); *see also* N.Y. GEN. BUS. LAW § 724 (McKinney 1990).

88. 144 A.D.2d 890, 535 N.Y.S.2d 208 (3d Dep't 1987).

purchased were waived, the court held such a provision violates public policy and is therefore void on its face.[89] Moreover, the court in *Tremblay v. Theiss*[90] held that contracts which exculpate a party from the consequences of his own negligence will be subject to close judicial scrunity and "unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts."[91]

The ACT also provides that in order for an exclusion or modification to meet the statute's requirements, the housing merchant's implied warranty must be conspicuously mentioned. An example of language sufficient to exclude all of the implied warranties is provided: "[t]here are no warranties which extend beyond the face hereof."[92] Language that deviates from the preceeding example will likely be questioned in future litigation.

Additional issues that probably will be litigated in the future include whether specific proposed limits on remedies will be enforceable and whether that enforcement will be deemed lawful.[93] However, on the issue of compulsory arbitration, the ACT has clearly stated that such a clause will not be enforced. Moreover, purchasers cannot be required to pay any fee for participation in nonbinding arbitration or mediation.[94]

Clearly, attempts by builder-vendors to disclaim or limit the duties to meet or exceed applicable building code provisions, or locally accepted practice, or to ensure that the new home is habitable, will

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89. 144 A.D.2d at 891, 535 N.Y.S.2d at 209.

90. 152 A.D.2d 793, 543 N.Y.S.2d 573 (3d Dep't 1989).

91. *Compare* N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 1989)(agreements exempting owners and contractors from liability for negligence or that hold them harmless for their intentional torts are void in certain cases as against public policy) *with* Auburn Stell Co. v. Westinghouse Elec. Corp., 268 A.D.2d 939, 551 N.Y.S.2d 101 (4th Dep't 1990) (it is valid for parties to limit consequential damages in their contracts and that such a provision is not an agreement that is covered within the meaning of N.Y. GEN. OBLIG. LAW § 5-322.1); Cahill v. Regan, 5 N.Y.2d 292, 157 N.E.2d 505, 184 N.Y.S.2d 348 (1959) (authority to avoid the consequences of a general release).

92. N.Y. GEN. BUS. LAW § 777-b(3)(c) (McKinney Supp. 1991).

93. The ACT dictates that the measure of damages shall be the reasonable cost of repair or replacement not to exceed the replacement cost exclusive of the value of the land. N.Y. GEN. BUS. LAW § 777-a(4)(b) (McKinney Supp. 1991). This is a built-in ceiling on recovery, except where the decrease in value of the home due to the defect is determined to be a more equitable measure of the damages.

94. N.Y. GEN. BUS. LAW § 777-b(4)(h) (McKinney 1991)(the legislature expressly prohibited mandatory binding arbitration but did not do so expressly for binding mediation, which in the latter case appears to be an inadvertent omission); *see* N.Y. STAT. § 97 (McKinney 1971).

be deemed by courts as void as against public policy.[95] Similarly, the courts will surely void unconscionable provisions or those that defeat the essential purpose of the legislature in creating the ACT.

V. A Comparative Analysis and Interpretation of New Home Warranty Statutes

The New York statute, as does similar legislation from its sister states,[96] creates remedies for breaches of statutorily defined warranties.[97] However, the exact manner in which each statute creates and administers these warranties differs. A comparison of the new home warranty statutes of New York and those of other states will highlight the inherent weaknesses, drafting problems, and strengths that lie in each.

In the area of remedies, the ACT provides that consequential or incidental damages and any other express limitations of liability will be allowed as long as the language is "conspicuously expressed on the first page of the warranty"[98] and does not violate public policy.[99] In Louisiana, the comparable act, known as the New Home Warranty Act states that "[t]his chapter provides the exclusive remedies, warranties, and prescriptive periods as between builder and owner relative to home construction and no other provisions of law relative to warranties and redhibitory vices and defects shall apply."[100] New

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95. The ACT states that:

> [a]ny exception exclusion or standard which does not meet or exceed a relevent specific standard of the applicable building code, or in the absence of such relevent standard a locally accepted building practice, shall be void as contrary to public policy and shall be deemed to establish the applicable building code or standard or locally accepted building practice as the warranty standard. . .

N.Y. GEN. BUS. LAW § 777-b(4)(e)(i) (McKinney Supp. 1991).

96. *See* CONN. GEN. STAT. ANN. §§ 47-116 to -120 (West 1986); LA. REV. STAT. ANN. §§ 3141 to 3150 (West 1991); MD. REAL PROP. CODE ANN. §§ 10-201 to 205 (1988 & Supp. 1990); MINN. STAT. § 3274.01 to .07 (1988 & 1991); N.J. STAT. ANN. § 46:3B (West 1989); VA. CODE ANN. § 55-70.1 (1986 & Supp. 1990).

97. N.Y. GEN. BUS. LAW § 777-b (McKinney Supp. 1991); *see also* CONN. GEN. STAT. ANN. § 47-118(c) (West 1986); MD. REAL PROP. CODE ANN. § 10-203(c) (1988 & Supp. 1990) (where the statutes also provide for an implied warranty of fitness for a particular purpose).

98. N.Y. GEN. BUS. LAW § 777-b(4)(i) (McKinney Supp. 1991).

99. *Id.* at § 777-b(4)(e)(i)-(ii); *see also supra* notes 87-91 and accompanying text.

100. LA. REV. STAT. ANN. § 3150; *see also* Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952). Prior to the enactment of the New Home Warranty Act, Louisiana had adopted the French common law doctrine of redhibition. This doctrine obligated a seller to warrant the thing sold. In the context of housing, this doctrine provided a buyer with a redhibitory action against builder-vendors to void the sale or reduce the purchase price. *See* LA. CIV. CODE ANN. arts. 2520-2548 (West 1952).

Jersey's law states that the provisions of the home warranty statute do not affect other rights and remedies available to the owner, except to the extent that initiation of procedures to enforce a remedy shall constitute an election that will bar other remedies.[101] The Connecticut and Minnesota statutes also provide that the warranties provided in the statute are designed to supplement others created or implied in law.[102] New York, Minnesota, and Virginia allow for the waiver, modification or exclusion of the statutory warranties.[103] In these three states, the legislatures appear to have given builder-vendors more of an opportunity to limit their liability by being able to draft contracts that would render the statutory protection virtually useless. The statutes of Connecticut, Louisiana, and Maryland, however, prohibit such modifications or limitations.[104] Curiously, the New Jersey statute, which provides broad protection to purchasers, is silent on the issue of modifying or limiting its statutory warranty.[105]

Another revealing comparison is the manner in which how each of these statutes defines the terms 'builder' or 'vendor.' In Virginia, Minnesota, and Louisiana, statutes refer to builder-vendors as those who contract or are in the business of erecting or creating an improvement on real estate.[106] However, these definitions do not include those businesses or persons that the property may be granted to for resale. Without including such middlemen in their definition of who is covered by the statute, these states have created a large and historically effective loophole. Builder-vendors can escape liability by conveying or selling the property to middlemen, who would in turn sell the homes to purchasers. However, purchasers have no recourse against such middlemen who were not actually in the construction business. Connecticut, Maryland, New York, and New Jersey have avoided this loophole by stating that a 'vendor' includes any person to whom a completed improvement has been granted to for resale in the course of his/her business.[107] The definition of "constructed in a

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101. N.J. STAT. ANN. § 46:3b-9 (West 1989 & Supp. 1991); *see also* Haberman v. West Saddle Dev. Corp., 236 N.J. Super. 542, 566 A.2d 552 (1989).

102. *See* CONN. GEN. STAT. ANN. § 47-120 (West 1986); MINN. STAT. ANN. § 327A.06 (West 1981 & Supp. 1991).

103. *See* N.Y. GEN. BUS. LAW § 777-b (McKinney Supp. 1991); MINN. STAT. ANN. § 327A.04 (West 1981 & Supp. 1991); VA. CODE ANN. § 55-70.1(c) (1986 & Supp. 1990).

104. *See* CONN. GEN. STAT. ANN. § 47-118(d) (West 1986); LA. REV. STAT. ANN. § 3144(c) (West 1991); MD. REAL PROP. CODE ANN. § 10-203(d) (1988 & Supp 1990).

105. *See generally* N.J. STAT. ANN. § 46:3b-2(e) (West 1989).

106. *See* LA. REV. STAT. ANN. § 9:3143(1) (West 1991); MINN. STAT. ANN. § 327A.01(10) (West 1981 & Supp. 1991); VA. CODE ANN. § 55-70.1 (1986 & Supp. 1990).

107. *See* CONN. GEN. STAT. ANN. §47-119 (West 1986); MD. REAL PROP. CODE ANN. §

skillful manner"[108] will probably prompt much litigation because the standards that the builder-vendors are to be held to are highly variable. In the ACT:

> Constructed in a skillful manner means that workmanship and materials met or exceed the specific standards of the applicable building code. When the applicable building code does not provide a relevent specific standard, such term means that workmanship and materials meet or exceed the standards of locally accepted building practices.[109]

With the applicable building standards varying from locale to locale in New York State, litigation will probably arise regarding whether a particular construction method or the use of certain materials will be deemed an actionable deviation from the controlling building standard. Jurisdictions that permit such varying standards include Connecticut, Louisiana, Maryland, Minnesota, and Virginia.[110] The danger of this practice is that the state legislature will not be able to implement a uniform building standard which best protects its citizens. Purchasers seeking recourse may be facing a myriad of complex local building codes that they will have to sift through in order to pursue a cause of action. Courts may be distracted by the question of which standards apply, instead of determining if the builder-vendor used the proper amount of skill in constructing the home or improvement. Moreover, such provisions seem to accept at face value the fact that 'locally accepted building standards' are prudent. Nothing in the statute provides that these 'locally accepted building standards' meet any minimum safety or professional requirements.[111]

It is only the New Jersey statute that specifically restricts the definition of building standards to those approved by a single governmental agent, to be uniformly applied within the state.[112] Additionally, New Jersey provides uniformity by having an administrative

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10-201(e) (1988 & Supp. 1990); N.Y. GEN. BUS. LAW §777(1) (McKinney Supp. 1991); N.J. STAT. ANN. 46:3B-2(e) (West 1989).

108. *See supra* note 81.

109. N.Y. GEN. BUS. LAW § 777(3) (McKinney Supp. 1991).

110. CONN. GEN. STAT. ANN. § 47-118(a) (West 1986); LA. REV. STAT. ANN. § 3143(2) (West 1991); MD. REAL PROP. CODE ANN. § 10-203(a) (1988 & Supp 1990); MINN. STAT. § 327A.01(5), A.02(1)(a) (West 1981 & Supp. 1991); VA. CODE ANN. § 55.70.1(B) (1986 & Supp. 1990).

111. *See generally* N.Y. GEN. BUS. LAW § 777 to 777b (McKinney Supp. 1991).

112. N.J. STAT. ANN. § 46:3B-2(b), B-3(a)(West 1989)(the Commissioner of the Department of Community Affairs sets the applicable building standards).

body determine what will be considered an 'actionable deviation' from the acceptable building standard.[113] New Jersey has also attempted to deal with the problem of shell corporations. Under the New Jersey scheme, a new warranty security fund that is funded by contributions from participating builders has been established. This fund effectively avoids the problems purchasers face when seeking recourse against a builder-vendor who has hidden behind a financially deficient shell corporation.[114] The purpose of the fund is to provide enough money to pay claims by owners against builders participating in the fund for defects in new homes covered by the new home warranty.[115] Similarly, the Louisiana legislature in identifying a need to promote commerce by "providing clear, concise, and mandatory warranties for purchasers and occupants of new homes" recognizes the utility of insurance to protect homeowners from breaches of statutorily imposed warranties.[116]

Moreover, it is only the New Jersey scheme which provides significant policing of the homebuilding industry through its Commissioner of Community Affairs. The Commissioner conducts investigations and holds hearings regarding complaints, and has powers include denying, suspending or revoking certificates of registration.[117]

New Jersey is the leading innovator in the area of home warranties. However, New Jersey's scheme is also one that involves a great deal of government regulation and government monitoring of standards. As with most government attempts to regulate private industry, such regulation may be inefficient and costly to builder-vendors who will probably want to operate free from public interference.

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113. N.J. STAT. ANN. § 46:3-B(3)(a)(West 1989)(the Commissioner of the Department of Community Affairs promulgates the "standards for construction and quality for the structural elements and components of a new home with an indication where appropriate, of what degree of noncompliance with such standards, constitutes a defect."); *see also infra* note 114.

114. N.J. STAT. ANN. § 46:3B-5, 3B-7 (West 1989)(builders are prohibited from engaging in the business of constructing new homes unless those builders are registered with the Department of Community Affairs and are participating in the new home warranty security fund or an approved alternative warranty security program.); *see also* N.J. STAT. ANN. § 46:3B-12 (West 1989)(which provides that penalties can be imposed on builders who fail to register). For further insight into the problems posed by shell corporations, see source cited *supra* note 60.

115. N.J. STAT. ANN. § 46:3B-7(a) (West 1989).

116. LA. REV. STAT. ANN. § 3141 (West 1991). However, the Louisiana statute, unlike the New Jersey statute, does not make insurance a requirement. LA. REV. STAT. ANN. § 3147 (West 1991). In jurisdictions where insurance is not mandatory, the insurance option can be an important marketing tool for builders.

117. N.J. STAT. ANN. § 46:3B-6(a) (West 1989).

An intense government regulatory scheme may lead to an increase in costs for the homebuilding industry that may be detrimental to both purchasers and bulder-vendors. In addition, there is always the danger with over-ambitious or elaborate schemes that they will have little chance of effective operation if adopted.[118]

VI. CONCLUSION

To some, New York's statutory warranty on new homes will help to clarify acceptable standards of construction, while prompting competition among builders who will offer attractive construction contract and warranty terms.[119] To others, the new statute is just a paper tiger that fails to substantially delineate useful definitions and will ultimately increase housing costs.[120] Nevertheless, in view of the fact that the average home buyer needs protection in the new home construction risk-allocation process,[121] and in light of decisional law such as *Caceci*, it seems clear that the New York State Legislature intended consumers to be afforded meaningful protection when purchasing a home. This desire to aid consumers is demonstrated by the very particular and specific requisites of the new statute in section 777(b)[122] which allows for exclusion and modification of the housing merchant implied warranty. However, as problems in the implementation of this statute arise, and the New York State Legis-

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118. *See generally* UNIF. LAND TRANSACTIONS ACT §§ 1-101 TO 4-404, 13 U.L.A. (WEST 1986).

119. Builder-vendors may expressly offer extended warranties which are very comprehensive as well as purchase all-risk insurance and provide performance bonds for the benefit of the purchaser. *See generally* Robbins, *The Legal Dimensions Of Private Incarceration*, 38 AM. U.L. REV. 531, 647-48 (1989)(discussion of performance bonds).

120. The argument is that builders are not subject to penalties and they are not required to obtain insurance to back up their warranties as set forth in the New Jersey scheme. To these commentators all-risk insurance policies, covering defects beyond the applicable statutory warranty periods or beyond express limitations are inevitable. Once on the market, the cost of these policies will ultimately rest with purchasers. *See also* cases cited *infra* note 121 (for a discussion of all-risk insurance agreements).

121. Generally, all-risk homeowner insurance excludes coverage for damage that was the result of latent defects. *E.g.*, Derenzo v. State Farm Mutual Insurance Co., 141 Misc. 2d 456, 533 N.Y.S.2d 195 (N.Y. Sup. Ct. 1988)(cracks in floors and walls were construction defects that were considered to be latent defects, and therefore, the homeowner's all-risk insurance policy did not cover the damage). *But see* Mattis v. State Farm Fire and Cas. Co., 118 Ill. App. 3d 612, 73 Ill. Dec. 907, 454 N.E.2d 1156 (Ill. App. Ct. 1983)(damage from defects that were proximately caused by an inadequate or improper design on the part of the contractor were covered under the all-risk insurance agreement). The terms and conditions of these policies can be adjusted to meet the needs of purchasers and builder-vendors alike. However, this will create additional costs in home building.

122. N.Y. GEN. BUS. LAW § 777(b)(1) to (b)(5) (McKinney Supp. 1991).

lature considers revising the ACT, it should consider the experiences of its sister states, particularly the costs and benefits of government intervention in the home-building industry.

It is likely that the courts of the State of New York will interpret the statute broadly, but also reasonably, in furtherance of the true intention of the State Legislature. Although many questions remain open, such an interpretation would adhere to the spirit of the legislation and would preserve common sense notions of fair play in the home buying process without overly burdening purchasers and builder-vendors.