THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
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Feature Article

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Another Chink in the Armor: The Illinois Supreme Court's *Sienna Court* Decision Narrows the Applicability of Breach of Implied Warranty of Habitability Claims

The Illinois Supreme Court has limited the scope of the implied warranty of habitability twice within the past three years. In *Fattah v. Bim*, 2016 IL 119365, the Court found that the implied warranty of habitability does not revive if it was properly waived by the first purchaser of a house. More recently, in *Sienna Court Condominium Association v. Champion Aluminum Corporation*, 2018 IL 122022, the Court has now overruled the once-dominant theory under *Minton v. The Richards Group of Chicago*, 116 Ill. App. 3d 852 (1st Dist. 1983) against subcontractors in situations in which the developer was insolvent.[1]

The implied warranty of habitability protects the initial purchaser of a new house or condo against latent defects that would render the house not reasonably fit for its intended use. *Petersen v. Hubschman Construction Co.*, 76 Ill. 2d 31, 41 (1979). The implied warranty is "a creature of public policy" that arises from the contract of sale between the homebuyer and the builder-vendor. *Petersen*, 76 Ill. 2d at 43. Courts recognize it as an "implied covenant" by the builder-vendor that the home is reasonably fit for use as a residence. *Id.* at 40. The Illinois Supreme Court has extended the scope of the implied warranty to include subsequent purchasers who purchase the home within a reasonable time after the original purchase. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 185 (1982).

The Illinois Supreme Court recently clarified the scope of the implied warranty of habitability in its *Sienna Court* decision. 2018 IL 122022. The Court specifically held that a homebuyer could not pursue a claim for breach of an implied warranty of habitability against a subcontractor where there was no contractual relationship between the two. *Id.* ¶ 1. This holding overruled prior Illinois Appellate Court precedent that allowed a homebuyer to sue a subcontractor for a breach of the implied warranty of habitability when the builder-vendor was dissolved as an entity and is insolvent—when the builder-vendor was essentially bankrupt. *Id.* ¶ 25; *see Minton*, 116 Ill. App. 3d 852.

[1] The implied warranty of habitability has been a frequent topic in the *IDC Quarterly*. Anthony Longo and Michael Pisano authored the monograph on "The Implied Warranty of Habitability in Construction Defect Cases" in 2014. 24 *IDC Quarterly* 4. Donald Patrick Eckler and Jonathan Federman built on that monograph to explain recent decisions and developments in their 2018 monograph, The Saga Continues: The Further Development of Claims and Insurance Coverage in Construction Defect Cases, 28 *IDC Quarterly* 1.

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Development of the Implied Warranty of Habitability in Illinois

The implied warranty of habitability began to take root in American jurisprudence when *caveat emptor* and the doctrine of merger were believed to create unjust results. Anthony Longo, Michael Pisano, The Implied Warranty of Habitability in Construction Defect Cases, 24 *IDC Quarterly* 4, M-2 (2014). Combined, the two doctrines prevented a homebuyer from bringing a cause of action against a seller or builder for a defect in construction even if the defect in the home was not discoverable through a reasonable inspection.

The Illinois Supreme Court recognized the potential for unjust results when *caveat emptor* was applied to homebuying and established a cause of action for a breach of the implied warranty of habitability—especially because homebuying was becoming mass produced with little opportunity for purchasers to inspect the home during construction. *Petersen*, 76 Ill. 2d at 39. *Petersen* was a narrow holding, establishing that the warranty is "implied as a separate covenant between the builder-vendor and the vendee because of the unusual dependent relationship of the vendee to the vendor." *Id.* at 41. *Petersen* also made the implied warranty disclaimable. *Id.* at 43.

The Illinois Supreme Court next addressed the implied warranty in *Park v. Sohn*, when it held the warranty does not apply only to mass producers of new homes. 89 Ill. 2d 453 (1982). Three months later, the Supreme Court expanded the class of plaintiffs able to file suit to subsequent purchasers who discover latent defects which appear within a reasonable time after purchasing the home. *Redarowicz*, 92 Ill. 2d at 185. Next, the Supreme Court held that subsequent purchasers have a cause of action for damages resulting from latent defects caused in the construction of a significant structural addition to an existing residence. *VonHoldt v. Barba & Barba Constr., Inc.*, 175 Ill. 2d 426, 432 (1997).

Since its creation and its quick expansion, the Supreme Court has set about limiting the doctrine. For example, the Supreme Court declined to extend the doctrine to cover nonresidential units. *Board of Dirs. of Bloomfield Club Rec. Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419 (1999). It also declined to extend the doctrine to a subsequent purchaser when the first purchaser expressly waived the warranty. *Fattah v. Bim*, 2016 IL 119365, ¶ 35.

The *Minton* Rule

Throughout the years, the Illinois Appellate Court has struggled with the scope and extent of the doctrine, particularly in the area of who can be sued. Illinois law is clear that the builder or the developer—whoever made the sale—can be sued for breach of the implied warranty. *See Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581 (1st Dist. 1980). The appellate districts did not agree, though on if or when subcontractors could ever be liable for a breach of the implied warranty of habitability. *Compare Minton*, 116 Ill. App. 3d 852 (subcontractor can be liable when builder-vendor is dissolved as an entity, is insolvent, and the purchaser has no available recourse), *with Lehmann v. Arnold*, 137 Ill. App. 3d 412, 418 (4th Dist. 1985) ("We cannot concur in the view that plaintiffs must have a warranty action against someone other than the builder simply because the builder went bankrupt").

Generally, the rule in Illinois was that a subcontractor is not a proper defendant in an implied warranty of habitability action. *Wash. Court Condo Assoc. v. Wash. Golf Corp.*, 150 Ill. App. 3d 681, 690 (1st Dist. 1986). However, in *Minton*, the appellate court fashioned an exception to this general rule. In *Minton*, the court expanded the warranty of habitability to a subcontractor "where the innocent purchaser has no recourse against the builder-vendor and has sustained a loss due to the faulty and latent defect in their new home caused by the subcontractor." *Minton*, 110 Ill. App. 3d at 855. Under

this exception a purchaser was not allowed to proceed against a lower level contractor while it still had recourse against a higher level builder-vendor. *1324 W. Pratt Condo. Ass'n v. Platt Constr. Group*, 2012 IL App (1st) 111474, ¶ 38. However, courts interpreted this exception to allow an action for implied warranty of habitability against a lower tier contractor when the higher tier contractor had become insolvent. *Dearlove Cove Condos v. Kin Constr. Co., Inc.*, 180 Ill. App. 3d 437, 440 (1st Dist. 1989). Further, as long as the plaintiff's original action was timely filed, the statute of limitations as to a lower tier contractor was not triggered until the plaintiff learned of the lack of recourse due to the insolvency of the higher tier contractor. *Dearlove Cove Condos*, 180 Ill. App. 3d at 440. The result, of course, was a perpetuation of these lawsuits years after the construction had taken place.

Because of this disagreement on the extent of subcontractor liability, there are different opinions on when a statute of limitations defense is appropriate. *See Id.* Typically, the four-year limitation period begins to run when the plaintiff knew or reasonably should have known of the latent defect. 735 ILCS 5/13-214(a). When condominium associations are plaintiffs, the statute will not begin to run until a majority of the board of managers are elected—regardless of whether the association had knowledge of the claim prior to the election. 765 ILCS 605/18.2(f). But in *Dearlove*, the First District held a plaintiff could file an action against a subcontractor after the statute of limitations ran if the plaintiff timely filed the action against the general contractor, and the general contractor subsequently became insolvent. *Id.* at 440.

Sienna Court's Background and Procedural History

The Sienna Court Condominium Association governs a two-building, 111-residential-unit property in Evanston, Illinois. *Sienna Court*, 2018 IL 122011, ¶ 3. The condos were newly constructed, and were marketed and sold by a company called TR Sienna. *Id.* Shortly after constructing the buildings, TR Sienna and the general contractor were declared bankrupt in a federal bankruptcy proceeding. *Id.* ¶ 5. TR Sienna and the general contractor had insurance policies for the construction project—each providing coverage of $1 million per occurrence with $2 million aggregate limits. *Id.* There was also $308,000 potentially available to the condo association in a warranty escrow fund that TR Siena was required to establish under a City of Evanston ordinance. *Id.*

The plaintiff condominium association filed suit in 2013 on behalf of the individual unit owners alleging that the buildings contained latent defects that rendered both the individual units and common areas unfit for their intended use. *Id.* The condo association asserted claims for breach of an implied warranty of habitability against TR Sienna, the general contractor, the architect and engineering firms, material suppliers, and several subcontractors. *Id.* ¶ 4. The condo association was allowed to pursue its claims against TR Sienna and the general contractor to the extent of their available insurance. *Id.* ¶ 5; *see* 215 ILCS 5/388. The complaint alleged that the buildings were subject to an implied warranty of habitability extending from "each and every subcontractor" that the buildings would be suitable for habitation. *Sienna Court*, 2018 IL 122011, ¶ 4.

Several of the subcontractors and material suppliers filed a joint motion to dismiss the counts filed against them, asserting they were not subject to an implied warranty of habitability. *Id.* ¶ 6. The trial court denied the motion, largely relying on the then current precedent—*Minton*—that allowed homebuyers to sue subcontractors when the general contractor was legally insolvent. *Id.* ¶ 7.

The defendants then requested to certify questions for appeal under Illinois Supreme Court Rule 308. *Id.* The trial court granted the request and submitted four questions to the First District appellate court. *Id.* The questions all relied on the *Minton* decision, acknowledged that TR Siena and the general contractor were legally insolvent, and asked the

appellate court to clarify if the existence of the liability insurance policies and warranty fund prevented the plaintiff from claiming a breach of the implied warranty of habitability from the subcontractors. *Id.* The appellate court reasoned that legal insolvency of the builder-vendor, rather than an availability of recourse for plaintiff, determined whether a claim could proceed against a subcontractor. *Id.* ¶ 9. The appellate court held that the condo association's claims against the subcontractors could go forward. *Id.* The Illinois Supreme Court granted the subcontractors' petition for leave to appeal. *Id.* ¶ 10.

Sienna Court's Analysis

In its analysis, the Illinois Supreme Court declined to answer the same questions the appellate court did, and instead modified the questions to add a threshold inquiry: May a homebuyer assert a claim for breach of an implied warranty of habitability against a subcontractor who took part of the construction of the home but had no contractual relationship with the purchaser? *Id.* ¶ 13. The Court answered no—a homebuyer may not. *Id.* ¶ 30. The Court stressed that the origin of the implied warranty of habitability is based on the contract of sale—that contract law controls and not tort law. *Id.* ¶ 15.

The condo association raised an argument that "privity should not be a factor" in determining whether the claims against the subcontractors should go forward. *Id.* ¶ 19. It stylized its implied warranty claim against the subcontractors as "tort-like," and drew an analogy to products liability law where liability can attach to component suppliers. *Id.* The Court disagreed and reminded the condo association that it cannot recover in tort for solely economic losses. *See Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982). The Court went on to explain that the economic loss doctrine denies a tort remedy to a party whose complaint is rooted in disappointed contractual or commercial expectations—like here. *Sienna Court*, 2018 IL 122011, ¶ 21; *see also Collins v. Reynard*, 154 Ill. 2d 48, 54-55 (1992) (Miller, J., specially concurring). An action for economic loss requires the plaintiff to be in contractual privity with the defendant. *Sienna Court*, 2018 IL 122011, .21 ¶The Court held that the implied warranty of habitability cannot be characterized as a tort under *Moorman*. *Id.* ¶ 22.

The Court's *Moorman* discussion provides a nice transition into *Minton*. As mentioned previously, *Minton* was a 1983 appellate court case that held a homebuyer could sue a subcontractor for a breach of the implied warranty of habitability when the builder-vendor was dissolved as an entity and was insolvent. 116 Ill. App. 3d at 584. The court in *Minton* explained that the purpose of the implied warranty is to protect innocent purchasers; thus, when the innocent purchaser has no recourse to the builder-vendor and has sustained loss caused by the subcontractor, the warranty applies to the subcontractor. *Id.* at 585.

The Supreme Court overruled *Minton*. *Sienna Court*, 2018 IL 122022, ¶ 25. It found that *Minton* recognized a tort action against subcontractors without explaining or addressing how the economic loss doctrine would not apply. *Id.* The Supreme Court also commented on *Redarowicz*—the case that extended the implied warranty of habitability to include the second purchaser of a home. 92 Ill. 2d at 183. *Redarowicz* stated "[p]rivity of contract is not required" for a subsequent purchaser to be able to sue the buyer-vendor for a breach of the implied warranty of habitability. *Id*. The Court declined to overrule *Redarowicz* because the holding did not create a tort or tort-like cause of action for economic loss. *Sienna Court*, 2018 IL 122022, ¶ 27. The Court explained that the *Redarowicz* holding was rooted in a contract theory that the buyer-vendor is merely held to the same obligations that arose from its original contract with the first purchaser—and

the subsequent purchaser has an implied assignment of the first buyer's warranty rights. *Id.; see also Fattah v. Bim*, 2016 IL 119365, ¶ 34.

Justice Kilbride filed the lone dissenting opinion. He declined to follow the majority because he believed the policy considerations underlying the implied warranty of habitability support applying the warranty to subcontractors. *Sienna Court*, 2018 IL 122022, ¶ 43 (Kilbride, J., dissenting). He opined that the purchaser of a home has a reasonable expectation that subcontractors will perform their work competently, and the subcontractors should bear the repair costs if they created the latent defects. *Id*. ¶ 44.

Conclusion

Following *Sienna Court*, subcontractors can no longer be directly liable for a breach of the implied warranty of habitability. The Court's explanation of *Redarowicz*'s narrow holding helps limit that case's application to only scenarios where a subsequent purchaser buys the home within a reasonable time of the home's original creation and first purchase.

As for the appellate district split, the Illinois Supreme Court held that *Minton* was incorrectly decided because it did not consider a significant issue that would have been dispositive—the economic loss doctrine. The Court did not specifically overrule any other cases, but it stands to reason that the progeny of First District case law relying on *Minton* are no longer applicable. Holdings from *Dearlove*, 180 Ill. App. 3d 437, and the *Pratt* cases (*Pratt III*, 2013 IL App (1st) 130744) may no longer be good law.

This holding signals a shift back to the implied warranty of habitability originally recognized in *Petersen*. The Court appears to be stepping back from the judicially-created nuances that gave rise to two separate monographs within the past 5 years, and it is signaling to both litigants and lower courts that it is time to curtail this theory of recovery to a simple implied warranty based on a contract. The holding signals that clever deviations from theories of liability that are not rooted in contract law will not be supported. *See Sienna Court*, 2018 IL 122022 ¶ 30. Defense counsel for subcontractors in construction litigation should be prepared for some of these artful pleading methods going forward.

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