CORROSION BY CODIFICATION:
THE DEFICIENCIES IN THE STATUTORY VERSIONS OF THE IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION

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TABLE OF CONTENTS:

1. INTRODUCTION ................................... 104
2. DEFINITIONS: IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION AS COMPARED TO THE IMPLIED WARRANTY OF HABITABILITY ........................................ 105
3. STATES THAT HAVE CODIFIED THE IWWC ...... 108
4. TYPES OF CONSTRUCTION AND DEFECTS COVERED ........................................ 109
   A. Statutory IWWC: Defects Covered .......... 109
   B. Common Law IWWC: Defects Covered ....... 110
5. PRIVITY: ABILITY OF A REMOTE PURCHASER TO SU ........................ 112
   A. Statutory IWWC: Privity .................... 112
   B. Common Law IWWC: Privity .............. 112
6. STATUTES OF LIMITATIONS: EXPIRATION OF WARRANTY ................................ 115
   A. Statutory IWWC: Expiration of Warranty .... 115
   B. Common Law IWWC: Expiration of Warranty ... 116
7. EXCLUSION OF THE COMMON LAW IWWC ...... 118
8. WAIVER OR DISCLAIMER OF THE IWWC ........ 119
   A. Statutory IWWC: Waiver ................. 119
   B. Common Law IWWC: Waiver .............. 120
9. IMPLIED WARRANTIES IN RENOVATIONS OR REPAIR, OR LIMITATIONS TO NEW HOME CONSTRUCTION ..................................................... 123
   A. Statutory IWWC: Renovations ............ 123
   B. Common Law IWWC: Renovations .......... 123
10. ECONOMIC LOSS V. PERSONAL INJURY ........ 123

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1. INTRODUCTION

The common law implied warranty of workmanlike construction ("IWWC"), sometimes referred to as the implied warranty of workmanlike quality, has existed for centuries.1 Defined in greater detail below, it is important to understand that the IWWC balances the allocation of risk between two contracting parties and the remedies available are found in common law and codification. The purpose of this Article is to compare and contrast the protections afforded by both. Codification does not favor the unwitting consumer but rather eviscerates the very heart and spirit in which the IWWC developed.

From its inception, this warranty has served to protect the consuming public. Arising from our English legal ancestry of common law and dating back to 1806, an obligation to perform in a proper and sufficient manner emerged.2 Simplified, where a sophisticated builder sells to a buyer who is unable to control construction and is unable to assess latent problems before they arise, common law recognizes the IWWC as "an implicit term of a contract unless the contracting parties explicitly agree to vary it." In layman's terms, the IWWC stands for the proposition that should a builder fail to deliver a residence that conforms with community standards due to latent defects, the buyer has a legal remedy, as accepted and defined by a history of cases, and in some instances, by statute.

In one of the very first cases of its kind, a farmer-defendant defeated a carpenter-plaintiff's action against him by proving to the court that the carpenter had performed in a "very improper and insufficient manner."3 From there, the IWWC has twisted and turned into the somewhat ambivalent theory that it has become today. Confusion surrounding its applicability and its seeming similarities to other implied warranties has caused courts and scholars to debate whether the implied warranty is based on contract or tort, which has implications for statutes of limitations, the ability to waive or disclaim, and recov-

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ery for non-physical injuries. Although found to exist in all service contracts, the focus of this Article centers around home construction.

A handful of states have codified the IWWC as it applies to construction of new dwellings. These statutes fall far short of the protection afforded by the common law. The statutes fail to protect the homeowner victim of shoddy work with restrictive and confusing statutes of limitations and expirations, arbitrary exclusions from coverage, and the ability for the contractor to disclaim the warranty. The common law IWWC is, and in the states that now choose codification was, effective. In addition, the statutes have generally caused more problems than they have solved. This Article will compare the IWCC statutes in eight states, and compare and contrast these statutes to the common law protection. Suggestions for reform will be included at the conclusion of this Article.

2. DEFINITIONS: IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION AS COMPARED TO THE IMPLIED WARRANTY OF HABITABILITY

The implied warranty of workmanlike construction ("IWWC"), sometimes referred to as the implied warranty of workmanlike quality, focuses on the builder's conduct, requiring a minimum standard of care. The builder is required to "construct the home in the same manner as would a generally proficient builder engaged in similar work and performing under similar circumstances." This requirement has also been described as the "quality of work performed by one who has knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally proficient by those capable of judging such work." Even if the house is safe and fit for habitation, the builder may be liable under this implied warranty, for example, where a patio floor buckled as a result of improper soil compaction. The IWWC is "based on the ac-

5. See Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 354 (Tex. 1987) (finding an implied warranty of workmanlike performance in all contracts for the repair or modification of goods or property). One exception may be professional service contracts, which have been found not to contain an implied warranty of quality. See Stephen E. McConnico, Jennifer Knauth, & Robyn Bigelow, Unresolved Problems in Texas Legal Malpractice Law, 36 ST. MARY'S L.J. 989 (2005) (discussing the exclusion of an implied warranty of workmanlike performance in legal service contracts).
7. Centex Homes, 95 S.W.3d at 273.
tual and presumed knowledge of the seller, reliance on the seller's skill or judgment, and the ordinary expectations of the parties."\textsuperscript{10} Courts have reasoned that the purchaser of a new home has not had the opportunity to "observe how the building has withstood the passage of time," and therefore must rely on the seller/builder.\textsuperscript{11}

Many courts confuse the IWWC with the implied warranty of habitability ("IWH"), or enforce a hybrid of the two; however, the two implied warranties protect distinct interests and have distinct standards. The focus of the IWH is the quality of the structure, requiring that the structure be suitable as a home, safe and healthy for human habitation.\textsuperscript{12} Even if the builder exercises all due care, this IWH may be breached if the home is unsafe, for example a home constructed on a toxic waste site or on an underground spring that will cause flooding.\textsuperscript{13} Conversely, habitability may not be impaired when a defect is cosmetic, or involves ancillary space such as a patio; however, the IWWC may still be breached.\textsuperscript{14}

A Pennsylvania court found no breach of the IWH when warped and delaminated plywood sheathing in the roof caused the plaintiffs inconvenience, discomfort, and annoyance during the repair, but there were no allegations that the roof defects caused water to come into the house or that the home was a substantial threat to the plaintiffs' health or safety.\textsuperscript{15} Cracks in foundation walls were insufficient for a breach.\textsuperscript{16} Although earlier Illinois cases required plaintiffs to allege the home was unfit for human habitation, a later case in that state broadened the implied warranty, holding that a house that was capable of being inhabited did not satisfy the implied warranty where substantial defects included defective siding and an ill-fitting bay window.\textsuperscript{17} The later Illinois case referred to a requirement that the home be "reasonably fit for its intended use."\textsuperscript{18} Ohio courts have similarly defined the IWWC as "akin to a claim of breach of an implied warranty of fitness for a particular purpose,"\textsuperscript{19} which is a more appropriate analogy to the Implied Warranty of Habitability, not the Implied Warranty of Workmanlike Construction.

\textsuperscript{11} Pollard, 525 P.2d at 91.
\textsuperscript{13} Elderkin, 288 A.2d at 777.
\textsuperscript{14} See Aronsohn v. Mandara, 484 A.2d 675 (N.J. 1984).
\textsuperscript{17} Petersen v. Hubschman Constr. Co., 389 N.E.2d 1154, 1158 (Ill. 1979).
\textsuperscript{18} Petersen, 389 N.E.2d at 1160.
It is not unusual for a court to confuse the two implied warranties. The Tennessee Court of Appeals referred to an implied warranty of habitability, but described it as a representation that the construction was completed in a workmanlike manner, and cited as authority a case that discussed the IWWC.²⁰ North Carolina courts are similarly confused, combining the two implied warranties, referring to an implied warranty of habitability, which the court defined as construction “in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction.”²¹ A North Carolina case involved a garage that was partially blocked by steps, which would be more appropriately decided under the IWWC rather than the IWH.²² Another North Carolina court stated in its introduction that a jury found the defendants liable for breach of the IWWC; however later in the opinion the court stated that the plaintiff alleged a breach of the IWH.²³ The confusion of the two warranties may be one reason there are many more reported cases involving these implied warranties in North Carolina than in other states.²⁴

Some scholars also refer to an implied warranty of “workmanlike construction and habitability.”²⁵ A Colorado court similarly referred to an “implied warranty of habitability and fitness,” which it described as “defect due to improper construction, design, or preparation.”²⁶ The confusion of the two warranties causes difficulty because different types of defects are required for a breach, different standards are ap-

²² Lincoln, 601 S.E.2d at 242.
plied for a valid waiver or disclaimer of the warranty, and a codification of the IWWC may exclude a common law IWWC, but not the IWH. In states that have codified the IWWC, the confusion with the IWH is also problematic because some statutes do not specify solutions for these issues.

All jurisdictions are not consistent in their treatment of common law implied warranties. Washington does not recognize the implied warranty of workmanlike construction. 27 Missouri relies instead on implied warranties of merchantable quality and reasonable fitness, which are limited to the first purchaser of a new home from a builder. 28 A Missouri homeowners' association was denied recovery under these implied warranties against a builder for a defectively designed retaining wall on common property, because the association was not a first purchaser of a new home. 29 The author suggests that all jurisdictions should recognize the separate implied warranties of the IWH and the IWWC. Courts have implied these warranties for centuries with equitable results.

3. STATES THAT HAVE CODIFIED THE IWWC

Only a handful of states have codified the IWWC, including: Indiana, Louisiana, Maryland, Minnesota, Mississippi, New Jersey, New York, and Virginia. Each of these statutes applies only to residential dwellings and not commercial buildings. Most of these statutes cover newly constructed homes, and not remodeling, additions, or repair work, although some states provide a separate and similar warranty for remodeling. 30 Other states, including Maine, provide a statutory warranty of habitability and workmanlike construction in condominium units, but not other dwellings. 31 The most significant differences between the statutory IWWC and the common law versions include the following distinctions: types of construction and defects covered, privity requirement (can a successor in title who was not a party to the contract with the defendant contractor bring suit?), statutes of limitations, exclusion of other remedies (is the common law IWWC still available?), and the ability to waive or disclaim the warranty. Each of these issues will be addressed below.

29. Summer Chase, 146 S.W.3d at 415-16.
31. ME. REV. STAT. ANN. tit. 33, §§ 1604-113 (West 1999).
4. TYPES OF CONSTRUCTION AND DEFECTS COVERED

One detriment to homeowners in states with a statutory IWWC is that the types of defects and the types of construction covered are more limited than the types covered under the common law IWWC.

A. STATUTORY IWWC: DEFECTS COVERED

The New York statutory IWWC has been interpreted by the New York courts to apply only to the sale of a new home, and not to a contract to construct a new home on land already owned by the plaintiffs.\(^{32}\)

Minnesota's statutory IWWC expressly excludes "detached garages, driveways, walkways, patios, boundary walls, retaining walls not necessary for the structural stability of the dwelling, landscaping, fences, nonpermanent construction materials, off-site improvements, and all other similar items," limiting the statutory relief to new dwellings or remodeling of dwellings.\(^{33}\)

New Jersey's statute has been found to exclude coverage for a home that was rehabilitated after major fire damage, because the statute covers only new homes.\(^{34}\) The New Jersey courts have also interpreted the statute to exclude coverage for inadequate structural support in an unfinished space over a garage,\(^{35}\) kitchen countertop seams, weather stripping, floor board sealing, the size of a septic system, a master bath skylight that lacked insulation, the clearance between a basement floor and overhead girders, a sulphurous stench in the hot water supply, defects in the base for a garage floor, and a vibration in a dishwasher.\(^{36}\) Conversely, the New Jersey statute was found to provide coverage for inadequate heating and air conditioning, a chipped bathtub and missing access panel, omitted insulation in the crawl space under a house, cracks and splits in interior trim and cornice, a faulty concrete slab outside the front door,\(^{37}\) writings on the garage floor, a defective light in the shower, a loose kitchen cabinet door, a cracked master bedroom window, a depression in the ground before a drain pipe, and water leaking into a basement at the sill of

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the basement wall.\footnote{38} It is precisely this type of arbitrary inconsistency that prevents these statutes from providing an adequate remedy to homeowners.

Virginia’s statute is not specific as to the types of defects it covers, using broad language such as “free from structural defects,” and “constructed in a workmanlike manner, so as to pass without objection in the trade,” and expressly includes fixtures only if the seller is in the business of building or selling such homes.\footnote{39} The statute was held to cover construction of a well.\footnote{40} Maryland’s statute is similarly general in coverage, and was also interpreted to cover construction of a well and retaining wall.\footnote{41}

The Indiana statutory IWWC provides a warranty that a new home will be “free from defects caused by faulty workmanship or defective materials,”\footnote{42} but excludes from the definition of a new home the following items: detached garage, driveway, walkway, patio, boundary wall, retaining wall that is not necessary for new home’s structural stability, landscaping, fence, nonpermanent construction material, off-site improvement, appurtenant recreational facility, or “other similar item.”\footnote{43}

B. COMMON LAW IWWC: DEFECTS COVERED

Most jurisdictions find a common law IWWC in all service contracts, not limited to building construction, and therefore, defects in outbuildings and landscaping features may result in a breach of the common law IWWC.\footnote{44}

A caved-in basement wall causing the basement to be wet and damp was found to be a breach of the IWWC in Nebraska.\footnote{45} A complaint alleging that a cement floor in a horse barn did not properly drain stated a cause of action under the IWWC in a later Nebraska case.\footnote{46} In North Carolina, a basement prone to flooding was found to breach the IWWC,\footnote{47} and the implied warranty was found to apply to...
construction of a modular home, although a jury found no breach. A defective fireplace that caused a fire that severely damaged a home was found to be a breach in Delaware. Footings placed on top of the ground instead of underground, together with a list of 30 minor defects like non-functional electrical outlets and bad paint, were found to be a breach in Louisiana. Building a cement slab home on a natural “yazoo” clay base that expanded, causing wide cracks in the floors and walls, was a breach in Mississippi.

Faulty electrical wiring, including splicing without junction boxes in violation of the National Electrical Code, was found to state a cause of action under the IWWC in Wyoming. A Wyoming court found a breach of a common law IWWC when a well was drilled and cased but produced no water. An earlier Wyoming court found a breach of the IWWC when a defective sewage and water system was constructed in a trailer court. An Arizona court found a cause of action for breach of the IWWC when inch-wide cracks formed in the flooring, walls shifted, and ceilings began to bow; however, the court noted that proof of a defect was not sufficient, rather the plaintiff must prove a “defects in workmanship, supervision, or design as a responsibility of the individual defendant.” A Pennsylvania court found a breach of the IWWC when the private well that was the home’s only source of water was contaminated. In North Carolina, where courts refer to the IWH but apply the standards for the IWWC, breaches were found when an inferior type of artificial stucco was applied incorrectly, resulting in water intrusion, and when an air conditioner was defective.

A North Carolina court found a justiciable issue of fact or law when the landing and steps from the house into the garage were positioned so that one bay of the garage was not usable for parking a vehicle. An earlier North Carolina court had found a breach of the IWH

when the garage stairs required plaintiff to "pull to the back wall of
the garage to have enough room to open the door and had to 'squeeze' between the side of the car and the stairway to reach the kitchen."\(^{60}\)

No breach of the IWWC was found by a Connecticut court when the plaintiff's flooring complied with building codes, finding plaintiff's complaint that the floors were excessively "bouncy" to be subjective and not a breach.\(^{61}\) A California court denied recovery to a class of plaintiff new home buyers alleging defective concrete slabs that were more likely to crack because the court found the disclaimer of the IWWC was effective.\(^{62}\) Notwithstanding these denials, the common law IWWC is sufficiently broad to provide a remedy for most plaintiffs.

5. PRIVITY: ABILITY OF A REMOTE PURCHASER TO SUE

Each state that has enacted a statutory IWWC has allowed subsequent purchasers to sue builders with whom they were not in privity of contract. At common law, some jurisdictions would prohibit these actions.

A. STATUTORY IWWC: PRIVITY REQUIREMENT

The statutory IWWC in New Jersey, Indiana, Maryland, Mississippi, Minnesota, Virginia, and Louisiana do not require privity, extending the protection to successors in title before the expiration of the warranty.\(^{63}\)

B. COMMON LAW IWWC: PRIVITY REQUIREMENT

The common law IWWC extends to subsequent purchasers in most states, disregarding any requirement that the purchaser be a party to the contract with the builder. This warranty extension is logical, considering that the warranty is more akin to a tort action in negligence rather than based on any contractual right. Most courts agree that it would be inequitable to deny recovery to a subsequent purchaser when a construction defect was not discovered until after transfer of title, thereby providing a windfall to the negligent contractor.

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\(^{62}\) Hicks v. Superior Court, 8 Cal. Rptr. 3d 703 (Ca. Ct. App. 2004).

Recovery by a subsequent purchaser is limited to latent defects, which would not be discoverable by the subsequent purchaser upon a reasonable inspection, on the presumption that obvious defects would be accounted for in the purchase price.64 The type of inspection required by the subsequent purchaser is limited to a view of the premises by the average purchaser; expert inspection is not required.65

When the subsequent purchaser knew that the basement had flooding problems that the builder had attempted to repair, a North Carolina court found the subsequent purchaser was not entitled to damages after the attempted repair.66 Privity was not required by an Arizona Court when a homeowner who contracted with the builder sold his home to the plaintiff; however, the homeowner’s knowledge of a latent defect was imputed to the plaintiff for purposes of the statutory time limits, thus barring the plaintiff’s claim.67 Another Arizona case was similarly decided in favor of the builder, even though privity was not required, because thirteen years had passed since construction and the plaintiffs had made no reasonable inspection.68 A recent Arizona court found that subsequent purchasers of commercial, not residential, property could not bring an action for breach of the IWWC.69

A New Hampshire court found that a lack of privity did not preclude a remote purchaser from an action against a contractor who built a garage with a defective roof.70 Ohio, Rhode Island, and Colorado courts also agree that privity is not required for breach of the IWWC.71

Privity was required by a South Carolina court; however, that court referred to habitability, not implied warranty of workmanlike construction.72 Illinois, Kentucky, Alabama, Connecticut, and Missouri require privity.73 In deciding privity was required when the

plaintiff's loss was merely economic, the Missouri court considered "the policy concerns of exposing the defendant to an unlimited, indeterminate or excessive number of potential claimants and depriving parties control over their contracts." That court also was concerned with the "foreseeability of harm to the plaintiff" and the "moral blame attached to the defendant's conduct," among other factors, and decided that the economic loss of the plaintiff did not result in the liability of the defendant, even though a retaining wall was defectively designed. Many states that formerly required privity have abandoned this requirement in recent years.

A related privity issue is whether the homeowner contracted directly with the defendant, or was the defendant a subcontractor who contracted only with the contractor. A Texas court found that a homeowner did not have a cause of action against a subcontractor for breach of the IWWC; however, the court noted that the homeowner could sue the contractor for breach of the IWWC or bring an action against the subcontractor for negligence. These alternative actions did not help the homeowner, who had already settled his claim with the contractor and a jury had found the subcontractor was not negligent in pouring an unlevel foundation that resulted in significant cracks in the floor.

Another related privity issue is the ability of a guest or customer of the owner of the premises to bring suit against the builder for breach of the IWWC. A recent Michigan court found that a customer of a Burger King did not have an action against a builder for breach of IWWC when a defectively designed roof caused ice to accumulate on the walkway below; however, the court acknowledged that a claim of nuisance "would not have been futile."

The trend among courts, and the better reasoned result, is that privity should not be required for recovery for breach of the IWWC. Regardless of whether courts deem the implied warranty to emerge


75. Summer Chase, 146 S.W.3d at 417.


78. Codner, 40 S.W.3d at 674.

from contract or tort, the subsequent purchaser should have every right to recover where a latent defect was not discovered and sued upon before the transfer of title.

6. STATUTES OF LIMITATIONS: EXPIRATION OF WARRANTY

Another issue in the states with a statutory IWWC is the expiration of the warranty. The common law IWWC does not expire, but the statutes of limitations applicable to tort or contract actions apply, and generally begin to run when a latent defect is discovered.

A. STATUTORY IWWC: EXPIRATION OF WARRANTY

The states that have codified the IWWC have provided for a much shorter time period than the common law, generally providing for an expiration of the warranty one to ten years, depending on the type of defect, after the date of occupancy and regardless of the date of discovery. Connecticut has a one year time limit for its statutory IWWC, which refers to the date when the breach must arise, not when the action must be commenced. The Mississippi statute provides protection to homeowners for one year for defects due to noncompliance with building standards and 6 years for major structural defects.

In New Jersey, the warranty extends for one year from the date of occupation for “defects caused by faulty workmanship and defective materials due to noncompliance with the building standards . . . ;” two years for “faulty installation of plumbing, electrical, heating and cooling delivery systems,” and ten years for “major construction defects.” A New Jersey court held that the statute did not begin to run until occupation by a homeowner, rejecting the builder’s allegation that the warranty expired during the year the home was used as a model by the builder. Several New Jersey plaintiffs have been denied recovery because of these time limitations, in circumstances when they likely would have recovered under common law theories. A New Jersey court found lack of flashing on the deck of a townhouse was not a major structural defect, but only a construction defect, and therefore the claim was barred by the one year limit. Another plaintiff was denied recovery when the claim was filed 6 years after construction, because the condominium association made emergency repairs, at a

80. CONN. GEN. STAT. ANN. § 47-118 (e) (West 2004); Cashman v. Calvo, 493 A.2d 891 (Conn. 1985).
82. N.J. STAT. ANN. § 46:3B-3 (West 2003).
cost of $80,000, without first having the property inspected by a govern-
ing agency as required for major structural defects. The claim was
barred by the one year limit for faulty workmanship and defective
materials in the roof and balcony floors and the two year limit for
faulty installation of plumbing. 85

The Virginia statutory IWWC extends for a period of one year,
with an extension to five years for foundation problems, and the action
must be commenced within two years after the breach. 86

The Maryland statutory IWWC extends for a period of one year
from the date of delivery, completion, or occupancy, whichever occurs
first, with an extension to two years for structural defects. The action
must be commenced within two years after the expiration of the war-
 ranty or discovery of the breach, whichever occurs first. 87

The Indiana statutory IWWC expires two years after the date of
first occupancy for most defects, extended to four years for the roof
and ten years for major structural defects, defined as "actual damage
to the load bearing part of a new home." 88

Minnesota similarly requires the suit be brought within two years
after the plaintiff "discovers, or, with reasonable diligence, should
have discovered" the defect. 89 When homeowners discovered water
leaking through the walls and floor of their new home within six
months of their purchase, and the builder attempted to remedy the
defect for the following four years, the court found there was a genuine
issue of material fact as to whether the builder should be estopped
from asserting a statute of limitations defense because the plaintiffs
relied on his attempts to repair. 90 An interesting aspect of the Minne-
sota statute is that improvements, but not repairs, made to the home
trigger a new statute of limitations period. 91

The impact of these short statutes of limitations, or expirations of
coverage, is particularly onerous when the statute excludes remedies
under a common law IWWC.

B. COMMON LAW IWWC: EXPIRATION OF WARRANTY

Under the common law IWWC, the statute would begin to run on
the date of discovery of the defect and depending on whether the state

86. VA. CODE ANN. § 55-70.1 (E) (Michie 2003).
90. Rhee, 617 N.W.2d at 621.
interpreted the IWWC as contract or tort, the homeowner often had years following discovery to bring suit. Some courts have refused to provide an exact time limit, preferring to apply a reasonable time after discovery of the latent defect.\footnote{Terlinde v. Neely, 271 S.E.2d 768, 769 (S.C. 1980); Redarowicz v. Ohlendorf, 441 N.E.2d 324, 331 (Ill. 1982); Lempke v. Dagenais, 547 A.2d 290, 297 (N.H. 1988).} A Wyoming court used a reasonableness standard, finding no expiration of the warranty when more than two years had passed since construction was complete before the homeowner discovered faulty electrical wiring, stating "there is a point in time beyond which the implied warranty will have expired based on a standard of reasonableness."\footnote{Moxley v. Laramie Builders, Inc., 600 P.2d 733, 735 (Wyo. 1979).}

Arizona courts have had frequent opportunities to decide cases relating to the IWWC statute of limitations. In 1984, an Arizona court had applied a six year statute of limitations because the IWWC was deemed to arise in contract, however discovery was not at issue because the claim was brought within six years from the contract date.\footnote{Woodward v. Chirco Constr. Co., 687 P.2d 1269, 1271 (Ariz. 1984).} In 1989, an Arizona case was decided in favor of the builder because thirteen years had passed since construction, and the plaintiffs had made no reasonable inspection.\footnote{Sheibels v. Estes Homes, 778 P.2d 1299, 1302 (Ariz. Ct. App. 1989).} Two years later, an Arizona court found twelve years after construction was not an unreasonable time to discover faulty stucco application.\footnote{Hershey v. Rich Rosen Constr. Co., 817 P.2d 55, 61 (Ariz. Ct. App. 1991).} Most courts will consider that a reasonable time is required to discover a latent defect. In 2004, where a homeowner observed unevenness in the floors of his home, the Arizona court refused to impute knowledge of an underlying soil compaction problem, finding that this defect was not easily observable, and therefore latent.\footnote{Maycock v. Asilomar Dev., Inc, 88 P.3d 565, 569 (Ariz. Ct. App. 2004).}

A Rhode Island court found that subsequent purchasers were barred from suing a builder more than ten years after completion of construction.\footnote{Nichols v. R.R. Beaufort & Asocs., Inc., 727 A.2d 174, 177 (R.I. 1999).} Similarly, a Maine court found the condominium purchasers were barred by a six year statute of limitations when an electrical wiring defect caused a fire more than ten years after construction was completed.\footnote{Dunelawn Owners' Ass'n v. Gendreau, 750 A.2d 591, 596-97 (Me. 2000).} A Wisconsin court applied a six year statute of limitations to a homeowner's claim of negligence, finding that plaintiffs had a duty to exercise reasonable diligence to discover a leaky basement before the expiration of the period.\footnote{Williams v. Kaerek Builders, Inc., 568 N.W.2d 313, 317 (Wis. Ct. App. 1997).}
These cases illustrate the limitations courts have placed on a homeowner's ability to recover from builders for defects discovered years after the construction was completed. Homeowners are generally required to exercise reasonable diligence to discover defects and promptly bring an action, and courts have denied recovery for defects that were not latent. These limitations sufficiently protect builders from unlimited liability, and are more equitable than the complex expirations devised by the states that have codified the IWWC.

7. EXCLUSION OF THE COMMON LAW IWWC

Because the common law IWWC is much broader in scope than the statutory IWWC, it is not logical for the statutory IWWC to prohibit recovery under the common law IWWC for defects outside the scope of the statute. The common law IWWC arises in all types of service contracts, and therefore would encompass defects in ancillary structures and repair and renovation contracts that may not be covered by the statutory IWWC. Nonetheless, some courts have found the two warranties to be mutually exclusive. The New York statute has been deemed to negate any common law implied warranty.\(^\text{101}\) When plaintiffs failed to meet the statutory deadlines, the court found they had no cause of action under a common law IWWC.\(^\text{102}\)

In Connecticut, a common law IWWC may still exist in addition to the statutory warranty, as the statute provides that it "shall be in addition to any other warranties created or implied in law."\(^\text{103}\) Similarly, Minnesota's statute expressly provides that it is "in addition to all other warranties imposed by law or agreement."\(^\text{104}\)

The Virginia statute is silent as to any intent to exclude the common law implied warranties, and no cases discussing the issue were located by the author. In Maryland, there was no common law IWWC, and no implied warranties, until the legislature enacted its statutory IWWC in 1970; therefore exclusion was not an issue.\(^\text{105}\)

The common law IWWC generally does not exclude other causes of action, such as negligent design or construction.\(^\text{106}\) While the actions may overlap, a Wyoming court noted that "an implied warranty would embrace a wider range of causes and be less restrictive in

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\(^{103}\) \textit{CONN. GEN. STAT. ANN} § 47-120 (West 2004).

\(^{104}\) \textit{MINN. STAT. ANN.} § 327A.06 (West 2004).


proof." Once again, the common law provided adequate coverage and the attempts to codify the IWWC may have left many homeowners without a remedy, at least in states like New York where the statute is deemed to exclude the common law implied warranty.

8. WAIVER OR DISCLAIMER OF THE IWWC

One of the more important issues affecting all implied warranties is the ability to disclaim or waive the warranty. As with all other implied warranties, the common law IWWC may be disclaimed, but only if a court decided that the homeowner was aware of the rights they were giving up.

A. STATUTORY IWWC: WAIVER

Jurisdictions with a statutory IWWC have generally set forth a procedure within the statute for disclaimer. Minnesota's statutory IWWC may be waived only by full oral disclosure of the defect prior to the sale of the dwelling with a writing that explains the defect, states the "difference between the value of the dwelling without the defect and the value of the dwelling with the defect, as determined and attested to by an independent appraiser," explains the amount of the price reduction, and has the witnessed signature of the home buyer.\(^\text{108}\) Minnesota's statutory IWWC may be modified only if certain conditions are met: (1) in a writing, signed with consent by the homeowner, (2) printed in bold type of at least 10 point font, and (3) the writing provides a substitute warranty with "substantially the same protections" as afforded under the statute.\(^\text{109}\)

New York included the ability to disclaim the warranty as part of its statutory scheme, provided that a more limited warranty is contained in the agreement.\(^\text{110}\) A contrary statutory scheme was enacted in Washington, where a statute protecting residential condominium purchasers provides that a general disclaimer of implied warranties of quality is not effective to disclaim an implied warranty of workman-like manner.\(^\text{111}\) A trial court invalidated a more limited express warranty that addressed every item that would otherwise be covered by the implied warranty, but the appellate court found this was not a

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109. Id.
110. Fumarelli, 657 N.Y.S.2d at 62.
disclaimer and enforced the limited express warranty as a replacement for the implied warranties.\textsuperscript{112}

The Virginia statute provides for a disclaimer of the IWWC, provided the waiver is stated on the face of the agreement, is in capital letters of at least 2 points larger than the other words, and either specifies the warranty being waived or states that the home is sold "as is."\textsuperscript{113} When a builder attempted to exclude the warranty, with the proper size all-capital letters, but referred mistakenly to Section 55.70.01 of the Code of Virginia, instead of Section 55.70.1, the court found the waiver ineffective.\textsuperscript{114}

Contrary to the Virginia statute, the Maryland statute does not expressly provide for waivers, but a simple "as is" clause was deemed ineffective as a waiver of the IWWC when the warranty to be excluded was not set forth in detail.\textsuperscript{115} More limited express warranties were also not valid as a waiver of the IWWC.\textsuperscript{116}

The Indiana statutory IWWC may be disclaimed only if all of the following conditions are met: (1) the IWWC is "expressly provided for in the written contract," (2) the performance of the IWWC is backed by an insurance policy at least equal to the new home's purchase price, (3) the builder carries products liability insurance, and (4) the disclaimer is in at least 10 point font and the buyer signed a separate one page notice with language provided by the statute.\textsuperscript{117}

It is surprising that these jurisdictions have each allowed a disclaimer that defeats the legislative purpose of the statutory IWWC. In creating these statutes, legislators have acknowledged that buyers rely on the skill of the builder because the buyer lacks the opportunity to observe how the building has weathered over time. The concept of disclaimer is particularly problematic when the buyer effectively waives the IWWC and later sells the home to a subsequent purchaser who discovers a latent defect before expiration of the warranty. No cases were located by the author in which a waiver was imputed to a subsequent purchaser.

B. COMMON LAW IWWC: WAIVER

In most jurisdictions, the common law IWWC is easier to waive or disclaim than the IWH.\textsuperscript{118} The IWH may be disclaimed by the

\begin{footnotesize}
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\item \textsuperscript{112} Marina Cove, 34 P.3d at 876.
\item \textsuperscript{113} VA. CODE ANN. § 55-70.1 (C) (Michie 2003).
\item \textsuperscript{115} Starfish Condo. Ass'n v. Yorkridge Serv. Corp., 458 A.2d 805 (Md. 1983).
\item \textsuperscript{116} Andrulis v. Levin Constr. Corp., 628 A.2d 197, 202-03 (Md. 1993).
\item \textsuperscript{117} IND. CODE ANN. § 32-27-2-9 (Michie 2005).
\item \textsuperscript{118} Centex Homes v. Buecher, 95 S.W.3d 266 (Tex. 2002).
\end{itemize}
\end{footnotesize}
builder, or waived by the homeowner, "only to the extent that defects are adequately disclosed," and when the waiver is expressed in conspicuous language.\textsuperscript{119} For example, if a seller found a buyer willing to purchase a "fixer-upper" that had no working toilet, the home would likely not be deemed habitable, but the buyer could complete the sale if the buyer was aware of the problem. A waiver of the IWH will be strictly construed against the builder or seller.\textsuperscript{120}

A waiver of the IWWC requires an agreement that supersedes the gap-filling purpose of the implied warranty, expressly requiring a different standard of performance.\textsuperscript{121} For example, if a homeowner wanted to save money by painting the doors himself, he could state in the construction contract that the builder is not required to paint the doors, although the standard in the industry would be that the builder would do this work. A general merger clause stating that the written contract is complete and there are no other implied terms between the parties has been held ineffective by a Tennessee court as a disclaimer of the IWH.\textsuperscript{122} An Arkansas court held that an express one-year limited warranty on workmanship and materials did not waive the IWH or the IWWC, but held that these warranties may be waived by such language as "with faults" or "as is," so the homeowner would understand that he was waiving a warranty.\textsuperscript{123} An Ohio court disagreed, providing more protection to homeowners, finding that an "as is" clause was not a valid waiver of the IWWC.\textsuperscript{124} A Colorado court did not find a valid disclaimer when the builder refused the owner's request for express warranties and included language in the contract that the home was sold "in (its) present condition."\textsuperscript{125}

When a homeowner hired a contractor to repair a swimming pool that had been damaged by a fire, the court found no IWWC because the homeowner had refused the advice of the contractor.\textsuperscript{126} The contractor informed the homeowner that a beam needed to be replaced before the tile was installed or the tile would have an uneven appear-

\textsuperscript{119} Centex Homes, 95 S.W.3d at 274 (citing Crowder v. Vandendeale, 564 S.W.2d 879, 881 n.4 (Mo. 1978)).
\textsuperscript{121} Centex Homes, 95 S.W.2d at 274; Lenape Res. Corp. v. Tenn. Gas Pipeline Co., 925 S.W.2d 565, 570, 580 (Tex. 1996).
\textsuperscript{122} Wright, 1999 WL 1212166 at *6.
\textsuperscript{123} Bullington v. Palangio, 45 S.W.3d 834, 839 (Ark. 2001).
\textsuperscript{125} Sloat v. Matheny, 625 P.2d 1031, 1034 (Colo. 1981).
A recent Alabama court found a waiver of the IWWC to be effective when language in the written contract indicated that the builder warranted the home for latent defects for one year after construction, and this limited warranty was "given in lieu of any and all other warranties, either expressed or implied, including any implied warranty of merchantability, fitness for a particular purpose, habitability and workmanship." The limited warranty and disclaimer were in upper case letters and conspicuous. The builder applied a synthetic stucco finish that allowed moisture to seep into the house, causing damage. The homeowners brought suit five years later, after expiration of the limited warranty. The court granted summary judgment for the builder on the claims of the IWWC, finding a valid waiver but allowing the homeowners to proceed with a claim of negligent failure to warn by the builder.

A California court allowed a disclaimer of the IWWC, so long as it was expressed in "conspicuous and understandable language," without requiring a more limited express warranty or substitute standard of performance; however, the contract at issue did include a more limited express one year warranty for defects in materials and workmanship. In the 2004 California case, a state-wide class of new home purchasers alleged that an inferior material was used in concrete slabs to prevent cracks; however, the court found that the claims were precluded by the express disclaimer of the IWWC. The court analyzed the waiver by comparing it to a waiver of the implied warranty of merchantability in the Uniform Commercial Code Article 2, noting that this implied warranty may be disclaimed by "as is" language.

A North Carolina court found that the implied warranty of habitability, which in that state includes an implied warranty that the home is "constructed in a workmanlike manner," may only be waived by "clear, unambiguous language, reflecting the fact that the parties fully intended such result." The ambiguous combination of the IWH and the IWWC in North Carolina results in a waiver require-

127. DiMiceli, 110 S.W.3d at 173.
128. Id. at 173.
129. Turner v. Westhampton Court, L.L.C., 903 So. 2d 82, 86 ( Ala. 2004).
130. Turner, 903 So. 2d at 86.
131. Id. at 86.
132. Id.
133. Id. at 90, 94.
134. Hicks v. Superior Court, 8 Cal. Rptr. 3d 703, 705 (Cal. Ct. App. 2004).
135. Hicks, 8 Cal. Rptr. 3d at 705.
that is equally vague, with no requirement of specific language, a disclosure of defect, or a replacement limited warranty or standard of performance. This ambiguity leaves both parties at risk and leads to litigation, evidenced by the plethora of cases in North Carolina that involve these implied warranties, more than in other states.\textsuperscript{137}

9. IMPLIED WARRANTIES IN RENOVATIONS OR REPAIR, OR LIMITATIONS TO NEW HOME CONSTRUCTION

A. STATUTORY IWWC: RENOVATIONS V. NEW CONSTRUCTION

States that have codified the IWWC generally limit coverage to newly constructed homes, such as the Virginia statute.\textsuperscript{138} Indiana provides a similar statutory warranty to homeowners who contract for remodeling.\textsuperscript{139}

B. COMMON LAW IWWC: RENOVATIONS V. NEW CONSTRUCTION

Repair and remodeling contracts generally are held to include the common law IWWC because the common law IWWC is generally applied to all service contracts. An Ohio court held that a plaintiff whose claim for breach of the IWWC by a contractor who repaired an existing apartment building's roof must submit evidence of the cost of replacing the defective repair when the building was not rendered uninhabitable.\textsuperscript{140} When a homeowner hired a contractor to repair a swimming pool that had been damaged by a fire, the court found no IWWC because the homeowner had refused the advice of the contractor.\textsuperscript{141} However, there was no indication by the court that an IWWC could only apply to new home construction.

10. ECONOMIC LOSS V. PERSONAL INJURY

One aspect of the discussion of whether the IWWC arises in contract or tort involves whether a plaintiff who is not in privity, whose action appears to be based on tort, should be allowed to recover damages for economic loss, a more appropriate contract remedy. Very few cases alleging personal injury from breach of the IWWC were located


\textsuperscript{138} VA. CODE ANN. § 55-70.1 (A) and (B) (Michie 2003).

\textsuperscript{139} IND. CODE ANN. § 32-27-1-12 (Michie 2002).


by the author. An Ohio Court held that an action for breach of the IWWC arose in contract, not tort, and therefore damages for emotional distress caused by the contractor’s failure to perform were not recoverable. A later Ohio court found economic damages could be recovered for an action for breach of the IWWC, even though there was no privity of contract and the action was more akin to a tort action. A New Hampshire court agreed, allowing damages for economic loss with no privity of contract.

The distinction between contract and tort has become less relevant as courts have moved away from requirements of privity for breach of the IWWC, but may still be relevant where personal injury damages are alleged. An Arizona court refused to allow subsequent purchasers of commercial condominiums, who were precluded from bringing a breach of IWWC claim because of a lack of privity in a commercial contract, to recast their claim as one of negligence. The harm to the unit owners was purely economic, with no personal injury alleged, therefore the plaintiffs were not allowed to allege a tort action after their contractual IWWC claim was barred.

11. COVERAGE OF COMMERCIAL BUILDINGS AS OPPOSED TO RESIDENTIAL

In general, the common law IWWC applies to all service contracts, therefore the designation of a building as residential or commercial is not relevant. The states that have codified the IWWC have limited the statutory impact to residential dwellings.

A. STATUTORY IWWC: COMMERCIAL

The IWWC, as codified by each of the states mentioned above, applies only to dwellings, not to commercial buildings.

147. Hayden, 105 P.3d at 162.
148. See, e.g., MINN. STAT. ANN. § 327A.01 (3) (West 2004).
B. COMMON LAW IWWC: COMMERCIAL

Most courts that have addressed the issue have found common law IWWC protection is extended to commercial owners. A Michigan court found that a builder owed duties under the IWWC to the owner of a commercial building, but not to a customer of the business.\(^{149}\) An Ohio Court found a real estate developer had stated a cause of action for breach of the IWWC against a concrete subcontractor related to the construction of an Embassy Suites Hotel.\(^{150}\) Similarly, a California court found a cause of action for breach of the IWWC had been stated by the owner of an apartment complex when the roof leaked.\(^{151}\) An Arizona court found that the IWWC applied to commercial property, but only to the original parties to the contract, not to subsequent purchasers.\(^{152}\)

12. DEFENSES BY CONTRACTORS

An Idaho court permitted the defense of comparative negligence to an implied warranty of workmanlike construction claim because the implied warranty is cast in terms of negligence.\(^{153}\) When repair work was recommended by the builder but the homeowner refused, a Texas court found the homeowner was prevented from suing for implied warranty of workmanlike construction.\(^{154}\) A Texas court found that a homeowner did not have a cause of action against a subcontractor for breach of the IWWC because the homeowner had no contract with the subcontractor; however, the court noted that the homeowner could sue the contractor for breach of the IWWC or bring an action against the subcontractor for negligence.\(^{155}\)


13. DAMAGES

Courts have applied two methods of calculating damages in cases involving a breach of the IWWC: "(1) the difference between the value of the building as warranted or contracted for and its value as actually built, and (2) the cost of repairs required to bring the property into compliance with the warranty or contract."\(^{156}\) "The first method is used when a substantial part of the work must be redone in order to comply with the contract or warranty, resulting in economic waste, while the second method is generally applied when the defects can be corrected without substantial destruction of any part of the house."\(^{157}\) The determination of which method to use is a jury question.\(^{158}\) Because a replaced air conditioner would not require destruction of the house, a North Carolina court employed the second method with a jury awarding the cost of installing an appropriate air conditioning system at the time the house was constructed, and not the higher cost of such installation at the time of trial.\(^{159}\)

Homeowners were not entitled to rescind a contract because the court deemed it was substantially performed, even though the homeowners alleged a list of thirty-three defects including foundation footings that were placed on top of the ground instead of in the ground and other minor defects like bad paint and non-functional electrical outlets.\(^{160}\) The court required the homeowners to pay the purchase price because the building contract was substantially performed and the homeowners were living in the house, but the court allowed recovery for the costs of repairing the defects.\(^{161}\)

A contractor was not entitled to recover costs of litigation and attorney's fees when homeowners voluntarily dismissed their claims of breach of the IWWC because there was a justiciable issue of fact or law when the landing and steps from the house into the garage were positioned so that one bay of the garage was not usable for parking a vehicle.\(^{162}\)

A New Jersey court found that a homeowner had a duty to mitigate damages but affirmed a jury's award of $4,300, finding that the

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157. Warfield, 370 S.E.2d at 695.
158. Id. at 695.
161. Salard, 563 So. 2d at 1332.
homeowner had made reasonable attempts to mitigate damages by repeated calls to the builder and requests for the builder to remedy.\textsuperscript{163} The front door was defective, allowing rainwater to seep in, and the builder alleged replacement of the door would cost between $325 and $475.\textsuperscript{164} After three failed attempts to repair the door, the court found the homeowner was reasonable in his rejection of the builder's further offers to repair, allowing compensation for the homeowner's substitute arrangements to replace the door and repair the damage.\textsuperscript{165}

Once courts have acknowledged that a breach of the IWWC exists, the calculation of damages is easily solved by expert testimony of the costs of repair.

14. CONCLUSION

The common law IWWC has provided homeowners a remedy from defective and inadequate construction for centuries. The states that have attempted to codify the implied warranty have caused reduced protection for homeowners with restrictive and confusing statutes of limitations and expirations, arbitrary exclusions from coverage, and the ability of the contractor to disclaim the warranty, while increasing the burden on contractors who must comply with these complex statutory requirements. When comparing the sophistication of a professional builder to a new homeowner, the imbalance in technical understanding makes disclaimers and waivers particularly troubling. Latent defects, as demonstrated by the case law, are at times difficult to discover and devastating once unearthed. To fail to extend liability in these situations is unconscionable. Further, privity requirements are as disturbing as they are logically unsound. Defective work that has yet to be discovered is still defective, whether discovered by the first homeowner or the fifth. Definite periods for statutes of limitation serve more as statutes of repose and not only end liability, but also accountability for an entire industry in which a house is a unit or a number in a bank account, whereas to the unsophisticated buyer it is, or should have been, a home.

The author suggests that codification is not the correct solution. Instead, a more uniform adoption of the common law IWWC is the better solution in that it is a logical allocation of risk that favors neither industry nor consumer but rather sounds wholly in equity. With no requirement of privity, no ability to disclaim or waive, and

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\item \textsuperscript{164} Ingraham, 687 A.2d at 792.
\item \textsuperscript{165} Id. at 792.
\end{itemize}
application of the usual statute of limitations for contract actions to commence running on discovery of a latent defect, an industry is held accountable, a set standard of quality is ensured, and the individual owner may have peace of mind in the safety of their home.