



REAL PROPERTY

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What's old is now new: Application of the implied warranty of habitability to purchasers of three-year-old property—Editor's comment

By [Adam B. Whiteman](#)

As detailed in Richard Guerard's article in this edition, in the recent case of *Fattah v. Bim*, 2015 IL App (1st) 140171 (Ill. App., 2015), the First District permits a claim for breach of implied warranty of habitability by a home owner not in privity with the original builder more than three years after the home was first sold.

Fattah relies on the Illinois Supreme Court Cases of *Redarowicz v. Ohlendorf*, [92 Ill.2d 171](#) (1982) and *Peterson v. Hubschman Construction Co.*, [76 Ill. 2d 31](#) (1979), for the proposition that “the implied warranty of habitability is a creature of public policy and a judicial innovation that aims to protect innocent purchasers of *new* houses who subsequently discovered latent defects in their homes.” *Fattah* at pg. 10 (emphasis added).

I highlight the word “new” because I think it is crucial to the underlying issue of how far down the line the implied warranty should be applied. Thus, how does one define a “new” home? Is it by age? Is it by how long one has lived in it? In *Redarowicz*, the supreme court asserts that, “whether the house is new for the purposes of the issue of a warranty is a question of fact to be determined on a case-to-case basis” *Redarowicz*, [76 Ill. 2d 182](#) - 183.

In discussing that the implied warranty can apply to subsequent purchasers not in privity, the *Redarowicz* court explains that, “The compelling public policies underlying the implied warranty of habitability should not be frustrated because of the *short intervening ownership of the first purchaser*” *Redarowicz*, [76 Ill. 2d 183](#). (emphasis added).

Again, I emphasize the phrase “short intervening ownership of the first purchaser.” This phrase purports to define the underlying policy which is to protect purchasers of “new” homes. What is a new home? One that involves a “short” period of ownership.

In *Redarowicz*, the home in question was completed in early 1976 and sold to the plaintiff in April 1977 and the defect was detected shortly thereafter. Thus, just over a year. In *Fattah*, however, the first owner lived in the house for three years before selling it to the plaintiff. Thus, we now know that a home can be considered as “new” despite the fact of three years of intervening ownership.

The *Fattah* court focused its final question on “whether [the] defects manifested within a reasonable time after the purchase.” *Fattah* 2015 IL App (1st) 140171 at 19-20. *Fattah* cites the *Redarowicz* holding for this particular wording of the legal element. I believe this statement of the rule confounds the actual policy of the warranty which is to protect

innocent purchasers of “new” homes. By making the test one which seeks to determine if the defect manifested itself within a reasonable time after purchase, then it would seem that the question is no longer whether we are examining the purchase of a “new” home. Rather, it would seem that the clock gets re-set to zero for each subsequent purchaser who then gets to see if the defect manifests itself within a reasonable time from their purchase. This leads to an unfair and unending extension of the duration of the warranty.

Part of the problem of a “creature of public policy” created by “judicial innovation” is that such policies and innovations tend to lack strict and measurable guidelines. Words like “new” and phrases like “reasonable time after purchase” are not commercially feasible constructs.

In my view, the absence of strict and measurable guidelines with regard to the limitations period regarding an implied warranty of habitability brings insecurity and instability to those in the home construction business. A simple work-around would be that the builders will simply create limited liability companies for each individual home they build and simply dissolve that entity once it has been sold. This is an inconvenience for the homebuilder that will leave the putative protected class with no remedy.

Perhaps it is time for the legislature to codify the implied warranty of habitability in Illinois? ■

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