

Construction Law

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The First District Announces the Implied Warranty of Habitability Will Not be Expanded to Include Architects, Even in the Face of Builder-Developer Solvency Issues

An implied warranty of habitability arises out of a builder's sale of a newly constructed residence as the builder warrants, by implication, that the property is reasonably suitable for its intended purpose: habitation. *Bd. of Managers of Park Point at Wheeling Condo. Ass'n v. Park Point at Wheeling, LLC*, 2015 IL App (1st) 123452, ¶¶ 11-12. Liability for breach of this warranty applied, historically, only to builders and developers selling the fruits of their own labor: residential property. *Id.* However, liability for breach of the implied warranty of habitability has been expanded by the Illinois Appellate Court First District under certain circumstances to reach contractors that participated in the construction at issue, yet were not involved in the sale of the property. *Wheeling*, 2015 IL App (1st) 123452, ¶ 13; *also see Minton v. Richards Grp. of Chi.*, 116 Ill. App. 3d 852, 854-55 (1st Dist. 1983); *1324 W. Pratt Condo. Ass'n v. Platt Constr. Grp.*, 2012 IL App (1st) 111474, ¶ 39. The appropriateness of that expansion has been called into question by the Second and Fourth District Appellate Courts, as well as by legal scholars. *Lehmann v. Arnold*, 137 Ill. App. 3d 412, 418 (4th Dist. 1985); *Bernot v. Primus Corp.*, 278 Ill. App. 3d 751, 754-55 (2d Dist. 1996); *also see* Anthony J. Longo & Michael D. Pisano, *The IDC Monograph: The Implied Warranty of Habitability in Construction Defect Cases*, IDC Q., Vol 26, No. 4, at M-3 and M-6 (2014). Recently, the First District announced that liability for breach of the warranty of habitability will not be expanded further to reach architects and design professionals. *Wheeling*, 2015 IL App (1st) 123452, ¶ 31.

The Backdrop of *Wheeling*

In *Wheeling*, the First District reviewed the sufficiency of a condominium association's claims alleging a breach of the implied warranty of habitability by entities involved in the design, construction and sale of a residential condominium complex referenced as "Park Point." *Id.* ¶¶ 1-2. Plans for Park Point were finalized by the architect in 2000 and three condominium buildings were subsequently erected between 2001 and 2004. *Id.* ¶ 2. Shortly thereafter, air and water began leaking through the walls, windows and doors, damaging the interior of each of the buildings. *Id.* ¶ 4. Upon filing suit, the condominium association alleged that the infiltration was caused by a number of purported defects that did not become apparent until 2007, such as insufficient masonry walls, flashing, caps and dams. *Id.* Repairs needed to remedy the defects were estimated to exceed \$4 million. *Id.*

At the trial court level, the association's claim against Hirsch and Associates, LLC (Hirsch), the architecture firm that designed Park Point, was dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure for failure to state a claim. *Id.* ¶¶ 3-6. Specifically, it was found that Hirsch could not be susceptible to liability because Hirsch did not build or sell Park Point; rather, Hirsch solely designed the property. *Id.* ¶ 1.

The *Wheeling* Appeal and Decision

The association filed an interlocutory appeal seeking a finding that the dismissal of its claim against Hirsch was erroneous, urging the appellate court to expand the potential for liability for breach of the implied warranty of habitability to include architects. *Id.* ¶¶1, 23-24. In support of its argument, the association cited *Minton v. Richards Group of Chicago. Wheeling*, 2015 IL App (1st) 123452, ¶ 24. It argued that the reasoning set forth in the *Minton* decision with respect to the expansion of the implied warranty of habitability to the painting subcontractor defendant should similarly be applied to design professionals for public policy reason, claiming “no justification for immunizing architects from the reach of *Minton*” exists. *Id.* ¶ 24. Traditionally, the implied warranty of habitability doctrine has been applied because the costs to repair defective construction should be borne by the builder-seller that created the latent defects, as opposed to the home buyer. *Id.* ¶ 8. As articulated by the association, latent defects in a residential property can just as easily be caused by the failures by of architect as the failures of a builder, developer or contractor. *Id.* ¶ 24. The association further contended that the work of an architect is similar to the work of subcontractors, who have been found susceptible to liability for breach of the warranty of habitability. *Id.* Thus, the association advocated for an expansion of liability for breach of the warranty of implied habitability to architects generally, and to Hirsch in particular. *Id.*

The appellate court did not take the association’s bait to further expand the reach of the doctrine of the Implied Warranty of Habitability. Instead, it rejected the association’s arguments and affirmed the dismissal of the Breach of the Implied Warranty of Habitability claim asserted against Hirsch. *Id.* ¶¶25, 31. The court reasoned that in order to be liable for a breach of the implied warranty of habitability, an entity must actively participate in the construction of a residential property. *Id.* ¶ 22. The court noted that architects do not actually perform or coordinate construction work, nor do they provide equipment or labor for construction work. *Id.* ¶¶22, 29. Instead, they perform design services without warranting the accuracy of their plans and specifications and their duties are set forth in a services contract. *Id.* ¶¶15, 22. The court further noted that when it comes to design professionals, “courts have consistently declined to heighten their express contractual obligations by implying a warranty of habitability of construction.” *Id.* ¶ 22. The court further found that architects, unlike entities engaged in construction work, are not obligated to perform their professional services in a “workmanlike manner.” *Id.* ¶ 30. That determination was based primarily on the court’s determination that architects are “professionals” and the “workmanlike” standard is meant to apply only to individuals employed in manual labor, including builders, contractors, and craftsmen in the construction trades. *Id.* As articulated in *Wheeling*, architects are judged by the applicable standard of care; that is, liability attaches only “when the architect’s conduct falls below the standard of skill and care exercised by others engaged in the same profession, and in the same locality.” *Id.* ¶ 15.

Conclusion

In affirming dismissal of the association’s implied warranty claim against Hirsch, the *Wheeling* court consistently followed a number of cases rejecting breach of implied warranty of habitability claims directed against architects and other design professionals dating back to the 1898 Michigan Supreme Court decision of *Chapel v. Clark*, 117 Mich. 638 (1898). *Wheeling*, 2015 IL App (1st) 123452, ¶ 17. Illinois law therefore remains clear and consistent that the implied warranty of habitability will only be applied to those entities who engage in construction and not to those who prepare the plans, designs and specifications pursuant to which the construction is to be performed. *Id.* ¶ 22. Pursuant to *Wheeling*,



design professionals that do not actively participate in construction work may be reassured that they will not be subjected to the increasing expansion of the application of the implied warranty of habitability. Instead, Illinois law remains clear that the duties of an architect remain limited to those explicitly set forth in the applicable design services agreement.

About the Author

Lindsay Drecoll Brown is a senior associate in the Chicago office of *Cassiday Schade LLP*. She concentrates her practice in civil litigation defense, with an emphasis on construction law, professional liability and product liability. Ms. Brown received her J.D., *cum laude*, from Loyola University Chicago School of Law, and her undergraduate degree from Michigan State University, with high honors. She is a member of the Illinois Association of Defense Trial Counsel's Construction Law Committee.

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