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Minnesota Statutory Warranties on New Homes—An Examination and Proposal

I. INTRODUCTION

The doctrine of caveat emptor1 was for centuries the unquestioned rule governing all sales.2 Although discarded with respect to personal property sales,3 this ancient maxim has endured in real property transactions.4 As a result, purchasers of new homes have traditionally lacked a remedy against builders, except to the extent that builders may provide express warranties. In recent decades, however, courts in many states have extended the concept of implied warranties to new homes,5 rec-

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1. Caveat emptor has been defined as follows: "Let the purchaser beware, that is, let him examine the article he is buying, and act on his own judgment and at his own risk—a maxim implying a rule . . . that the purchaser buys at his own risk, except as to express warranties or those implied by law." WEBSTER'S NEW INTERNATIONAL DICTIONARY 428 (2d ed. 1934).

2. For an extensive analysis of the doctrine of caveat emptor, see Hamilton, The Ancient Maxim Caveat Emptor, 40 YALE L.J. 1133 (1931).

3. For an analysis of this transition, see Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L.REV. 791 (1966).


ognizing that the intrinsic inequities of the doctrine of caveat emptor are also manifest in real property.  

Recently, state legislatures have begun to follow the lead of the judiciary by providing statutory protections for purchasers of homes. In 1977, the Minnesota Legislature enacted a house-by-house warranty statute. This Note will not examine the origins or rationale of the implied warranty doctrine and the emergence of implied warranty concepts with respect to new housing have been more than adequately documented. See generally Bearman, Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule, 14 VAND. L. REV. 541 (1961); Bixby, Let the Seller Beware: Remedies for the Purchase of a Defective Home, 49 J. URB. L. 533 (1971); Dunham, Vendor's Obligation as to Fitness of Land for a Particular Purpose, 37 MINN. L. REV. 108 (1953); Dworkin, Consumer Protection and the Problems of Substandard New Houses, 28 CONV. (n.s.) 276 (1964); Harris, Builder's, Owner's and Landlord's Liability, 24 FED'N INS. COUNSEL Q. 44 (Winter 1974); Haskell, The Case for an Implied Warranty of Quality in Sales of Real Property, 53 GEO. L.J. 633 (1965); Jaeger, An Emerging Concept: Consumer Protection in Statutory Regulation, Products Liability and the Sale of New Homes, 11 VAL. U. L. REV. 335 (1977); McNamara, The Implied Warranty in New-House Construction Revisited, 3 REAL EST. L.J. 136 (1974); Roberts, The Unwary Home Buyer: The Housing Merchant Did It, 52 CORNELL L.Q. 835 (1970); Young & Harper, Quaere: Caveat Emptor or Caveat Venditor?, 24 ARK. L. REV. 245 (1970).

Moreover, it is likely that further proposals for such state legislation can be expected with increasing frequency. For example, the Washington and Oregon legislatures have both begun consideration of home warranty legislation. See Note, Washington's New Home Implied Warranty of Habitability—Explanation and Model Statute, 54 WASH. L. REV. 185, 217 n.159 (1978) (Washington bill) [hereinafter cited as Note, Washington's New Home
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ing warranties statute,8 which created implied warranties in
sales of new residential dwellings. The law provides initial and
subsequent purchasers of homes with a cause of action against
the builder if certain statutorily defined warranties are
breached. The statute has received little critical examination.9

This Note examines the nature and coverage of the Minne-
sota housing warranties statute. The shortcomings of the stat-
ute are demonstrated through comparison of the Minnesota act
with its closest counterparts,10 the New Jersey new home war-

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   §§ 327A.01-.07, 541.051 (1978)).

9. As of February 5, 1980, no action under the Minnesota new home war-
rants statute had been taken by the Minnesota Supreme Court.

10. The Minnesota and New Jersey statutes and HOW represent one of the
two major forms of statutorily implied warranties. They attempt to define in
some detail the scope of the warranty protection and extend that protection to
most aspects of the new home through a three-tiered system. The other form,
utilized by Maryland, Connecticut, and the Uniform Land Transaction Act,
adds a general warranty of materials and workmanship to a restatement of the
implied warranty of habitability. Maryland was the first state to enact a statute
of this type and the language it employed is typical:

   [I]n every sale, warranties are implied that . . . the improvement is:
   (1) Free from faulty materials;
   (2) Constructed according to sound engineering standards;
   (3) Constructed in a workmanlike manner; and
   (4) Fit for habitation.

   Md. Real Prop. Code Ann. § 10-203(a) (Supp. 1978). The Uniform Land Trans-

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ranties statute\textsuperscript{11} and a private scheme for new home protection, the National Association of Home Builders' Home Owners Warranty program (HOW).\textsuperscript{12} In response to the perceived inadequacies of the Minnesota warranty plan, this Note proposes a Model Statute.\textsuperscript{13} The Model Statute sets forth efficient warranty protections for new houses through a state-mandated, state-regulated program of privately managed new home warranty insurance.

II. DESCRIPTION AND INTERPRETATION OF THE MINNESOTA STATUTE

Although some form of judicially implied warranty on new homes has been established in many states,\textsuperscript{14} there is a paucity of Minnesota case law on such warranties. In \textit{Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator Co.},\textsuperscript{15} the Minnesota Supreme Court held that under certain circumstances a warranty of fitness-for-purpose would be implied in construction contracts.\textsuperscript{16} Although the court hinted that war-

action Act extends this coverage for a period of six years. \textit{See} \textit{Uniform Land Transaction Act} §§ 2309, 2-521(a)-(b). The Connecticut and Maryland warranties, however, are good for only one year. \textit{See} \textit{Conn. Gen. Stat. Ann.} § 47-118(e) (West 1978); \textit{Md. Real Prop. Code Ann.} § 10-204(b) (Supp. 1978). Maryland does allow two additional years in which to bring the suit. \textit{See id.} § 10-204(c). Maryland and Connecticut also exclude coverage of conditions that "a reasonably diligent purchaser" could have discovered at the time of purchase. \textit{See id.} § 10-203(b); \textit{Conn. Gen. Stat. Ann.} § 47-118(b) (West 1978). It is beyond the scope of this Note to comment extensively on these three relatively terse warranty provisions, other than to mention that their coverage is generally similar to that of the first group, although more vaguely defined and for a generally shorter period. \textit{See generally Note, Warranties in the Uniform Land Transaction Act of 1975—Progression or Retrogression for Pennsylvania?}, 49 \textit{Temple L.Q.} 162 (1975).

Louisiana employs the doctrine of redhibition to achieve results similar to those under the statutory home warranties in other states. Redhibition allows a buyer to void a sale or seek a reduction in price upon discovery of a defect in the item purchased. \textit{See} \textit{La. Civ. Code Ann.} art. 2520-2521, 2544 (West 1952). An actionable defect must be latent, unknown to the buyer, defective at the time of transfer, and such that the buyer would not have purchased the house had he known of the defect, or at least would not have purchased at that price. \textit{Bermes v. Facell}, 328 So. 2d 722, 725 (La. Ct. App. 1976). \textit{See also Haskell, supra note 5, at 645; Annot., 25 \textit{Al.R.3d} 383, 425-26 (1969).}


12. For a comprehensive discussion of HOW, see Note, \textit{The Home Owners Warranty Program, supra note 7}.

13. While the model statute follows the structure of the current Minnesota new home warranties statute, \textit{Minn. Stat.} §§ 327A.01-.07 (1978), it is designed to be suitable for adoption in any state.

14. \textit{See note 5 supra.}

15. 274 Minn. 17, 143 N.W.2d 622 (1966).

16. The requisite circumstances are:
ranties might also be implied in the purchase of new homes, the case itself extended such warranties only to construction contracts. Moreover, despite the court’s use of general language applicable to any “building,” the case involved a grain storage bin, and thus the implied warranty could arguably be limited to commercial buildings. By 1977, no cases involving claims of residential implied warranty had been appealed to the Minnesota Supreme Court. Given the absence of a clear judicial indication that purchasers of homes would be protected under Minnesota case law, it is therefore not surprising that, in 1977, the Minnesota Legislature passed a statute establishing

(1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract, and the owner (2) has no particular expertise in the kind of work contemplated, (3) furnishes no plans, design, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the experience and skill of the contractor, after making known to him the specific purposes for which the building is intended.

Id. at 24, 143 N.W.2d at 626.

17. See id. at 23, 143 N.W.2d at 626. In addition to noting the similarity between one who purchases a house and one who contracts for house construction, the court cites articles that call for the abandonment of caveat emptor in the real property field. See id. at 23 n.6, 143 N.W.2d at 626 n.6. Moreover, the court states, “In Minnesota we have consistently noted that the doctrine of implied warranty is to be liberally construed.” Id. at 23, 143 N.W.2d at 626.

18. See id.

19. One can only speculate about why there have been no reported cases involving claims of residential implied warranties in Minnesota. The quality of new home construction in Minnesota may conceivably be so outstanding that no defects result. Given the recent outcry against widespread shoddy construction, however, such an explanation seems highly doubtful. Speaking at the 1979 Convention of the National Association of Home Builders, Elizabeth Dole said, “For too many Americans, the dream home has turned into a nightmare . . . . As families move into their own little Garden of Eden, more and more are finding the apple full of worms. In fact, new home defects now rank among the top consumer problems in this country.” Dole Speech, supra note 7, at 9A, col. 1. One explanation for the lack of cases may be the high cost of litigation. A homeowner faced with a defect must perform a cost-benefit analysis that balances the cost of remedying the defect with the expected value of a lawsuit. When high court costs are added to the analysis, it seems unlikely that many cases will be litigated, let alone appealed. This explanation is supported by the fact that most of the cases establishing implied warranties were the result of unusually severe and costly defects. See, e.g., Cochran v. Keeton, 47 Ala. App. 194, 196-97, 252 So. 2d 307, 308-09 (1970), aff’d, 287 Ala. 439, 252 So. 2d 313 (1971) ($10,000 for fire damage caused by defective wiring); Wawak v. Stewart, 247 Ark. 1093, 1094, 449 S.W.2d 922, 923 (1970) ($1309 for deficient heating and air conditioning duct work); Carpenter v. Donohoe, 154 Colo. 78, 79, 388 P.2d 399, 400 (1964) ($9740.24 for structural damage); Crawley v. Terhune, 437 S.W.2d 743, 745 (Ky. 1969) ($6,000 for a wet basement).
new home warranties. The Minnesota statute provides that in a contract for the sale of a new residential dwelling, the vendor impliedly warrants to the vendee protection against certain construction defects. The scope of this protection is broadly defined by the statute. "Vendor" includes any person, firm, or corporation that constructs dwellings for the purpose of sale; "vendee" includes not only the initial purchaser of the dwelling, but also any subsequent purchasers. Contracts for sale and contracts for construction of a dwelling both trigger the warranty protections of the statute. Once triggered, the warranty is not re-

22. Id. § 327A.01(7). The definition of "vendor" only imposes liability on the builder. Intermediaries, such as real estate developers, are not required to warrant the house.
23. Id. § 327A.01(6). Section 327A.01, subdivision 4, defines the term "initial vendee" as a "person who first contracts to purchase a dwelling from a vendor for the purpose of habitation and not for resale in the ordinary course of trade." This definition aids in identifying the actions an initial purchaser must take to initiate the warranty period. See notes 25-26 infra.

A literal interpretation of the definitions of initial vendee and vendor presents a minor problem. If a vendor sells the dwelling to a "straw," no warranty is created because the "straw" has not contracted to purchase "for the purpose of habitation." The "straw" is thus not an "initial vendee," and because he is obviously not a subsequent purchaser, he would not be a "vendee" under the statutory definition. Since the "straw" does not "construct dwellings for the purpose of sale," he also does not qualify as a "vendor." Thus, no warranty is created when the "straw" eventually sells the dwelling to a bona fide purchaser. The net result is that no warranty accrues to the homeowner. Of course, an enlightened court may consider the "straw" an agent of the vendor, or may otherwise obviate the sham conveyance. Deleting the words "from a vendor" from the definition of "initial vendee" would remedy the problem. Some statutes deal expressly with this problem by making the sham transfer ineffective as to the warranty. See Conn. Gen. Stat. Ann. § 47-119 (West 1978); Md. Real Prop. Code Ann. § 10-205 (1979). Cf. Uniform Land Transactions Act § 2-309 (Commissioners' Comment No. 1) ("if the seller would be a person in the business if he were making the sale himself, he cannot avoid that result by selling through agents").
25. Minnesota Statutes section 327A.01, subdivision 8, defines the warranty date as "the date from and after which the statutory warranties provided in section 327A.02 shall be effective, and is the earliest of (a) The date of the initial vendee's first occupancy of the dwelling; or (b) The date on which the initial vendee takes legal or equitable title in the dwelling." The contingent condition in subparagraph (a) is clear; however, subparagraph (b) may lead to unintended results. For example, the homebuyer may arrange to purchase a partially completed dwelling on a contract for deed, and subsequently comple-
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stricted by the doctrine of privity; rather, it runs with the dwelling. The term "dwelling," which further establishes the scope of the statute, is also defined expansively. Although the definition excludes commercial structures, used dwellings, and property components beyond the basic structure of the house, it does include multi-family units, apartments, con-

tion of the dwelling is delayed for a year by a strike. Since the taking of equitable title triggers the warranty, the one-year protections of section 327A.02(1)(a) would expire before the house is completed. This problem could be alleviated by amending subparagraph (b) of § 327A.01(8) to read "if the initial vendee has taken legal or equitable title in the dwelling, the date when the completed structure is first made available for occupancy." See text accompanying note 152 infra.

26. Minn. Stat. § 327A.01(6) (1978). See text accompanying note 23 supra. In defining the party to whom the vendor warrants the dwelling, the statute uses the term "vendee" rather than "initial vendee." Minn. Stat. § 372A.02(1) (1978). The result is that the warranties run with the dwelling and not solely to the initial vendee. Such a result abandons the doctrine of privity, which required a contractual relationship between the buyer and seller if the seller was to be liable under an implied warranty theory. For a discussion of the privity doctrine, see Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 95, 207 A.2d 314, 328 (1965).

27. See Minn. Stat. § 327A.01(3) (1978).

28. Commercial structures are precluded by the phrase "constructed for the purpose of habitation." Id. In order to ensure warranty protection, a dwelling must not only be constructed for the purpose of habitation, but it must also be used for that purpose. Section 327A.03, subdivision 1, excludes warranty protection from any dwelling that is no longer used as a residence. Minn. Stat. § 327A.03(1) (1978).

29. Since statutory warranties run with the dwelling, see note 26 supra, a used home that is purchased within the statutory period will be accorded protection. Homes over ten years old or built before January 1, 1978, however, are not covered. See id. § 327A.02(c).

Traditionally, used homes were not protected under the common law. Recently, some commentators have called for implying warranties on all used homes. See, e.g., Bixby, supra note 6, at 562; Haskell, supra note 6, at 650-52. Haskell advocates emphasizing not the characteristics of the seller, but the buyer's expectation that a fair price will obtain goods reasonably fit for the purposes for which they are normally used. Id. at 649. In Casavant v. Campopiano, 114 R.I. 24, 27, 327 A.2d 831, 833 (1974), a house was occupied for a year by a tenant "to promote the sale by the builder-vendor." When the house was subsequently sold to a permanent occupant, the court considered the house to be new. The court intimated that it might imply warranties on used homes even in the absence of such unusual circumstances. Id. at 27, 327 A.2d at 833. See also Gable v. Silver, 258 So. 2d 11, 18 (Fla. Ct. App. 1972) ("We ponder, but do not decide, what result would occur if more remote purchasers were involved. We recognize that liability must have an end but question the creation of artificial limits of either time or remoteness to the original purchaser."). A less ambitious alternative to implied warranties is found in the City of Minneapolis "Truth in the Sale of Housing" ordinance, Minneapolis, Minn., Code § 248.10-20 (1978), which requires that prior to the sale of a used home, an evaluation made by a specialist must be disclosed to prospective purchasers.

30. Warranty coverage is withheld from "appurtenant recreational facili-
If a transaction is within the scope of the statute, the purchased dwelling is impliedly warranted in three ways. The most comprehensive level of protection afforded the new home buyer is the one-year warranty against defects "caused by faulty workmanship and defective materials due to noncompliance with building standards." Although the terms "faulty workmanship" and "defective materials" have been given precise meanings through their use in the case law, the term "building standards" is more ambiguous. "Building standards" could refer to the loose collection of standard procedures followed by similar builders in the locality, the nationwide trade codes, the state or local building codes or some combinations, 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.

The statute defines dwelling as a "new building...constructed for the purpose of habitation." The use of such general language, in conjunction with the omission of more restrictive definitional terms such as "house" or "single family dwelling," indicates that the drafters intended the statute to apply to the entire range of dwellings, including apartment buildings, multi-family structures, and condominiums. This is in keeping with a recent trend away from the construction of the traditional single-family home. In 1950, eighty-five percent of all housing starts were single-family homes. By 1971, that percentage dropped to fifty-six percent. Sumichrast, Coming Up—Accelerated Change in the Housing Market, 1972 REAL EST. REV. 52, 53. A recent National Association of Home Builders survey also showed a remarkable increase in the construction of townhouses and condominiums.

Several commentators who have proposed model statutes maintain that a longer period of comprehensive protection is preferable. For example, Professor Haskell suggests that a five-year warranty should apply. See Haskell, supra note 6, at 651-52. The authors of the Uniform Land Transactions Act recommend a six-year period for its warranty, while the Connecticut and Maryland statutes both provide one-year coverage. See note 10 supra. In general, it seems that one-year coverage is appropriate for types of defects likely to become apparent within that period, but that there should be longer coverage for defects that are more difficult to discover.

The language of this section could be made more precise by amending it to read: "free from defects caused by faulty workmanship or defective materials where the defects result from non-compliance with building standards" (emphasis not to be retained).

This is a negligence standard. See Mitchem v. Johnson, 7 Ohio St. 2d 66, 218 N.E.2d 594 (1965).

Nationwide trade codes, prepared by the various trade associations, list minimum acceptable specifications for a variety of construction tasks. There is a wide variety of general plumbing, mechanical, and electrical codes. See generally HOME OWNERS WARRANTY CORPORATION, APPROVED STANDARDS 1-2 (1979) (on file with the Minnesota Law Review).

A state building code has been promulgated in Minnesota pursuant to MINN. STAT. §§ 16.83-.865, .866(2), .867 (1978). MINN. STAT. § 16.868 (Supp. 1979).
tion of these three sets of standards. A reasonable interpretation of "building standards" would be a combination of state and local building codes and local industry standards.38

The second level of protection provided by the Minnesota statute is a two-year implied warranty against defects "caused by faulty installation of plumbing, electrical, heating, and cooling systems."39 The period of coverage for these systems was extended apparently because such systems are normally installed by specialists and are concealed within the walls of the structure.40 Not only does it generally take longer to discover a

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38. The legislature appears to have intentionally used a vague term. To give the term some content, it seems sensible to incorporate standards that are already well developed. To measure builder performance solely by local industry practices, however, is to apply nothing more than a statutory negligence standard. In fact, such a standard may even fall short of the negligence criterion of reasonableness, since builders in a particular locality may routinely perform some construction tasks in an unreasonable manner. In addition, inclusion of state and local building codes may not necessarily raise the standard above negligence. Violations of such codes might well have been actionable as negligence per se even without the statutory cause of action. The inclusion of building codes, however, does seem to raise the standard above reasonableness in at least some areas. Supplementation by building codes is necessarily limited because of the narrow range and minimal requirements of such codes. A standard of reasonableness, however, based on local practices and building codes, seems to be the best standard that can be fashioned from the present statutory language. Trade codes are clearly unsuitable for direct use as a standard because they vary greatly in stringency of requirements, and courts would have no fair method of choosing the codes to which builders must adhere. It seems clear that the best method of determining the proper meaning of "building standards" is to authorize the promulgation of definitional regulations. See text accompanying note 144 infra. Until such a proposal is adopted, homeowners who bring suit under the Minnesota act will encounter difficult problems of proof in establishing the fault of the homebuilder.

Building codes have been adopted by some courts as a partial standard for implied warranties of habitability even though such warranties ostensibly protect homeowners against only serious defects affecting the use of the building as a home. See Carpenter v. Donohoe, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964) ("There is an implied warranty that builder vendors have complied with the building code of the area in which the structure is located."); Goggin v. Fox Valley Constr. Corp., 48 Ill. App. 3d 103, 106, 365 N.E.2d 509, 511 (1977) ("in the context of a contract for the sale of a new home, . . . failure to comply with applicable building codes would constitute a breach of the implied warranty of habitability"). But see Polson v. Martin, 228 Md. 343, 180 A.2d 295 (1962).

39. MINN. STAT. § 327A.02(1)(b) (1978).

40. A four-year period for installation would be analogous to protection provided by the Uniform Commercial Code (U.C.C.) for installation of goods. See U.C.C. § 2-725. In O'Loughlin v. Minnesota Natural Gas Co., 253 N.W.2d 626 (Minn. 1977), decided prior to the effective date of the new home warranty statute, the Minnesota Supreme Court held that the faulty installation of a furnace
defect in a concealed system, but once the defect is discovered, repairs tend to be more expensive.\textsuperscript{41}

The third level of protection is the ten-year coverage of "major construction defects" which are defined as "actual damage to the load-bearing portion of the dwelling ... which vitally affects or is imminently likely to vitally affect the use of the dwelling for residential purposes."\textsuperscript{42} This definition involves a stringent two-pronged test. First, in order to be deemed a "major construction defect," damage that has an actual effect on the load-bearing ability of the structure must be found. Second, the damage must affect, or have the potential to affect, the use of the dwelling for residential purposes. This coverage is qualified by the exclusion of liability for "damage due to movement of the soil caused by flood, earthquake or other natural disaster."\textsuperscript{43} The ten-year period is unique since it is considerably longer than the periods provided in most other new home warranty statutes.\textsuperscript{44} One justification for such a protracted period of coverage is the severe loss that a homeowner would suffer from a major construction defect.\textsuperscript{45} In addition,
damage to load-bearing elements of the structure may take even longer to become apparent than defects in the plumbing, electrical, or other basic systems of the house. Such defects, however, are likely to be rare and builders will seldom be required to redeem their warranty.

The scope of coverage of the statutory warranties is limited by section 327A.03, which explicitly excludes certain items and situations. The proposition that the vendor should not be liable for events beyond his control is the rationale for many of the exclusions in the provision. These exclusions include, _inter alia:_ "loss or damage caused by defects in design, installation, or materials which the vendee supplied, installed, or had installed under his direction," "loss or damage from normal wear and tear," "loss or damage from dampness and condensation due to insufficient ventilation after occupancy,

46. _See_ text accompanying notes 40-41 _supra._
47. Jim Bergan, Legislative Chairman of the Minnesota Homebuilder Association, testified before the House Committee on Commerce and Economic Development on February 10, 1977, that to his knowledge there had been only one instance of a major construction defect in Minnesota in the previous ten years. This may indicate that few Minnesota homes are structurally impaired. An alternative interpretation, however, is that the definition of major construction defect is unduly stringent. Such a restrictive definition could potentially render a major portion of the statute ineffective. In fact, Virginia Knauer, former Special Assistant to the President for Consumer Affairs, warned against such interpretation, in the context of the HOW plan: "If this term [major construction defect] were defined so narrowly that it excluded some serious defects, the program would be reduced to a charade." Address by Virginia Knauer, National Association of Home Builders Annual Convention, in Houston, Texas (Jan. 22, 1974) (on file with the Minnesota Law Review).

48. The statute's coverage is also limited by the definitions of statutory terms. _See_ MINN. STAT. § 327A.01 (1978). For a discussion of those terms, see notes 22-31, 45 _supra_ and accompanying text.
49. _See also_ MINN. STAT. § 327A.03(g)-(j) (1978). These sections deal generally with improper maintenance or repair and improper landscaping or ground grading by parties other than the vendor.
50. _Id._ § 327A.03(b). This subsection seems poorly drafted. A preferable alternative would be: "Loss or damage where the defective design, installation, or materials were requested or supervised by the vendee, provided that the selection or supervision of the vendee is active and not a passive acquiescence in the judgment of the vendor." This version clarifies the distinction between acts of the vendor and vendee and is consistent with the rationale for this group of exceptions.
51. _Id._ § 327A.03(d). Homeowners do occasionally ask homebuilders to replace burnt-out light bulbs. _See_ Carter, _Legislature Report,_ 1978 NEW HOMES 16, 16 (Feb.-Mar.).
52. MINN. STAT. § 327A.03(f) (1978). A dangerous ambiguity is created by use of the unqualified phrase "insufficient ventilation after occupancy." If this were taken literally, a vendor who constructed a dwelling that _could not be_ properly ventilated would escape liability. This presumably unintended result
"[a]ccidental loss or damage usually described as acts of God . . . except when the loss or damage is caused by failure to comply with building standards," and "[l]oss or damage due to soil conditions where construction is done upon lands owned by the vendee and obtained by him from a source independent of the vendor." Most of the remaining exclusions are similarly justifiable. The builder is protected from stale claims by an exclusion for "[l]oss or damage not reported by the vendee to the vendor in writing within six months after the vendee discovers or should have discovered the loss or damage." Moreover, since the vendee should not be allowed to claim damages that he could have prevented, there is an exclusion for "[l]oss or damage which the vendee, whenever feasible, has not taken timely action to minimize." Non-coverage of "[l]oss or damage from normal shrinkage caused by the drying of the dwelling within could be remedied by adding the phrase, "except where the insufficient ventilation is caused by the vendor's failure to comply with building standards."

53. Id. § 327A.03(m). The examples given are "acts of God, including, but not limited to: fire, explosion, smoke, water escape, windstorm, hail or lightning, falling trees, aircraft and vehicles, flood, and earthquake." Id. See also id. § 327A.03(i) (mentioning "insect loss").

54. Id. § 327A.03(o). This provision appears to be drafted unsatisfactorily. By its terms, it makes liability contingent on who owns the land at the time construction begins. Presumably, the problem that the legislature intended to address was the situation in which a vendee selected unsuitable land and hired a contractor to build a house, which was later damaged by poor soil conditions. The statutory language, however, is overbroad. The exception should be deleted and these circumstances covered under the proposed revision of § 327A.03(b), which exempts the vendor from the effects of design choices made by the vendee. See note 50 supra. Alternatively, § 327A.03(o) could read: "Loss or damage due to soil conditions where the unsafe soil condition was known to the vendee, who directed the vendor to proceed with construction." This would eliminate land ownership as a criterion of liability.

55. Minn. Stat. § 327A.03(a) (1978). Although such a limitation may seem unnecessary because of the vendee's duty to mitigate and the vendor's unchaged position, this provision can be justified by the difficulty the vendor would otherwise have in proving the extent of the damage at the time of discovery by the vendee.

56. Id. § 327A.03(h). Because of a poor choice of language, this subsection implies that if the vendee does not take timely action to mitigate, he will lose all compensation for any loss or damage, not just the compensation for the marginal damage due to his own delay. A distinction between marginal and original damage should be drawn, making the vendor liable for the damage that occurred prior to accrual of the duty to mitigate. In addition, the statutory obligation to mitigate "whenever feasible," is arguably broader, and thus more stringent, than the usual contractual duty to make "reasonable" efforts to mitigate. See A. Corbin, Corbin on Contracts § 1039, at 241 (1964). Such an interpretation of "feasible" would hinder the statutory objective of placing the responsibility for homebuilder-caused defects on the homebuilder.
tolerances of building standards" appears meaningless since only deviations from building standards are subject to the statutory warranty. "Loss or damage from soil movement which is compensated by legislation or covered by insurance" is excluded to prevent double recovery by a vendee. The exclusion of "[l]andscaping or insect loss or damage" is simply an adjunct to the legislative decision to cover only the residence and not appurtenant facilities. The same rationale applies to the exclusion of "[l]oss or damage which occurs after the dwelling is no longer used primarily as a residence." Since the rationale of the statute is the need to protect residences, there is no reason to protect a dwelling after it ceases to be used as a residence. The final exclusion pertains to "[s]econdary loss or damage such as personal injury or property damage." These risks are excluded both because they transcend the residence-protection rationale and because the potential liability caused homebuilder opposition sufficient to obstruct the passage of the statute.

57. Minn. Stat. § 327A.03(e) (1978).
58. Id. § 327A.03(n). The vendor would not be expected to compensate where the legislature has seen fit to deal with the subject. Although the phrase "or covered by insurance" is acceptable under the present statute, it is deleted in this Note's proposed Model Statute. Since insurance plans are the thrust of the Model Statute, this innocuous phrase could potentially establish a "loop-hole" that would swallow up the entire statute.
59. See id. § 373A.03(i). See also notes 78-81 infra and accompanying text. The relationship between these two exclusions is unclear. If the reference to "insect loss" pertains to insect damage to the landscaping or shrubbery, it is redundant. If, however, it also includes damage to the residence, it cannot be explained, except as part of the legislative focus on coverage of the residence. Since the language is general, it must be assumed that the legislature meant to exclude all insect loss, even that occurring to the house. That decision is questionable in that such insect loss may occur as a result of errors by the homebuilder.

A better approach would be to delete this provision entirely. Landscaping has already been excluded from the definition of dwelling contained in section 327A.01(3). Insect loss would be better included as part of the section exempting the vendor from damage caused by acts of God, subject to that provision's exception "when the loss or damage is caused by failure to comply with building standards." See Minn. Stat. § 327A.03(m) (1978).
60. Id. § 327A.03(t). See note 28 supra.
61. See notes 79-81 infra and accompanying text.
63. See note 187 infra. Only one court has allowed recovery for personal injuries caused by a defective home. See Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) (mass producer of homes held liable under a strict liability or an implied warranty theory for failing to install a mixing valve that caused scalding water to burn a sixteen-month-old child).
If the vendee is within the ambit of the warranty protections, section 327A.05 grants him a judicial cause of action. Damages are limited to: "(a) [t]he amount necessary to remedy the defect or breach; or (b) [t]he difference between the value of the dwelling with the defect and the value of the dwelling without the defect." The statute provides no guidance on which alternative measure of damages should be applied in particular cases; presumably, the court has discretion to award either measure. Regardless of whether a vendee is within the ambit of the statute, however, he is still entitled, pursuant to section 327A.06, to other warranties imposed by law or agreement. Moreover, a vendee may recover damages greater than those allowed under section 327A.02 if he succeeds on a cause of action not based on chapter 327A.

Two sections of the statute allow partial or total avoidance of the warranty provisions. Under certain circumstances, the parties may agree to waive or modify the statutory warranties. Even though section 327A.04 initially states that "[a]ny agreement which purports to waive or modify the provisions of [this statute] shall be void," two exceptions are allowed. Subdivi-

64. Minn. Stat. § 327A.05 (1978).
65. Because section 327A.05 also permits a suit for specific performance, damages should ordinarily consist of the reduction in value caused by the defect. A vendee should not be permitted to obtain the amount that repair would cost (an amount which usually would be greater or equal to the decrease in value) when the vendor will perform the needed repair. He should only receive such an amount in situations in which the vendor is unwilling or unable to make proper repairs.
66. "The statutory warranties provided for in section 327A.02 shall be in addition to all other warranties imposed by law or agreement." Minn. Stat. § 327A.06 (1978). This provision prevents courts from interpreting the statutory warranties as a signal that the legislature intended to preempt further judicial action. Such an interpretation would stifle the development of common law remedies for ills inadequately dealt with in the statute. Given the rapid pace of change in this area of the law (in twenty-five years the courts have made the transition from caveat emptor to nearly unanimous acceptance of implied warranty principles), it is imperative to negate any notion of implied legislative preemption.
67. This is clear from the language of section 327A.06, which states: "The remedies provided in section 327A.05 shall not be construed as limiting the remedies in any action not predicated upon breach of the statutory warranties imposed by section 327A.02." Minn. Stat. § 327A.06 (1978).
68. Minn. Stat. § 327A.04(1) (1978) states:
   Except as provided in subdivisions 2 and 3 of this section, the provisions of sections 327A.01 to 327A.07 cannot be waived or modified by contract or otherwise. Any agreement which purports to waive or modify the provisions of sections 327A.01 to 327A.07, except as provided in subdivisions 2 and 3 of this section, shall be void.

The two sentences of this subdivision appear to be mere restatements of each other. It would seem practical to combine the sentences to state: "Any agree-
tion two of section 327A.04 allows modifications if certain detailed procedures are followed and if those modifications offer “substantially the same protections.” Subdivision three of section 327A.04 sets forth an extensive procedure for the waiver of warranty coverage of certain major construction defects. The procedure is designed to ensure that the vendee is fully

69. The procedures require that the waiver or modification be made “by a written instrument, printed in bold-face type of a minimum size of ten points, which is signed by the vendee and which sets forth in detail the warranty involved, the consent of the vendee, and the terms of the new agreement contained in the writing.” Id. § 327A.04(2).

The final sentence of subdivision two states that “[a]ny modification or exclusion agreed to by vendee and vendor pursuant to this subdivision shall not require the approval of the commissioner of administration pursuant to 327A.07.” Id. Unlike subdivision three, subdivision two does not require the recording of the substitute warranty. It is unclear whether the substitute warranties would be effective as to subsequent purchasers. See id. §§ 327A.01(6), .02(1)-(2). A subsequent vendee may believe that the warranties agreed to by the initial vendee are not, in fact, “substantially the same.” He may feel entitled to elect between the statutory protections and the express modification. In the interests of fairness to the builder and increased certainty, the bargained-for modifications should run with the land. Moreover, such modifications should be recorded, in order to put the subsequent vendees on notice. If the prospective purchaser is unhappy with the modifications, he has the option not to purchase. The requirement of recording should therefore be deleted from subdivision three and added to subdivision one: “Waivers under this section shall not be effective unless filed for recording with the county recorder or registrar of titles who shall file the waiver for record.”

70. The use of the phrase “substantially the same protections” generates needless uncertainty regarding the legality of substitute warranties. Courts will be forced to make post hoc determinations of the equivalence of the substitutes to the statutory protections.

This uncertainty could easily result in litigation. For example, vendee and vendor may agree that the vendee will waive warranty coverage of the central air conditioning system that was installed by the vendor. As a quid pro quo, vendor agrees to extend the two-year warranty of section 327A.02(1) (b) to two-and-one-half years. Unfortunately, within two years of the warranty date the air conditioning system breaks down as a result of faulty installation by the vendor. The vendee subsequently seeks to void the substitute warranty on the ground that the protections offered therein were not “substantially the same” as the statutory minimums. The possibilities for such litigation appear virtually endless. A better approach would be to allow waivers or modifications only if they enhance the statutory warranty protections. Thus, if the statutory warranties were set forth as an invariable minimum, vexatious litigation concerning equivalence would be avoided. An even better alternative would be to adopt the Model Statute proposed in this Note; all builders must subscribe to a state-approved warranty plan as a precondition to building, thereby eliminating the need for individually bargained substitute warranties and gaining cost reductions due to large volume. See also notes 76-77 infra and accompanying text.

aware of both the nature and extent of the defect prior to waiver. Only defects that are discovered prior to the sale of the dwelling are eligible for a subdivision three waiver.\(^7\) Prior to a waiver, a vendor must make “full oral disclosure of the specific defect.” The oral disclosure must then be authenticated by a document that details the specific defect that is being waived, the price reduction, the date construction was completed, and the legal description of the dwelling, and that verifies the consent of the vendee. Most importantly, the document must also include the opinion of an independent appraiser on the difference between the value of the house with and without the defect.\(^7\) Finally, subdivision three provides that a waiver will be ineffective unless it is filed.\(^7\) This procedure must be repeated for each defect sought to be waived.\(^7\)

The second means of circumventing the statute is the section 327A.07 provision for Commissioner-approved variations. The drafters of the statute attempted to provide some flexibility by allowing for replacement of the statutory provisions with a substitute plan that gives the same protections.\(^7\) The Commis-

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72. If such a defect is discovered subsequent to the sale, it must be remedied or the vendor will be liable for damages.

73. The real value of forced consultation with an appraiser is that as a fresh voice, the appraiser can counteract the potential “puffing” by the vendor.

74. This requirement minimizes the possibility that the initial vendee will capitalize on a subdivision three waiver. It is especially important with respect to major construction defects since the warranty period is lengthy and any defects are likely to be quite serious. Presumably a house with a documented major construction defect can be purchased at a considerable discount. If a waiver were not a matter of public record, the vendee might sell at a normal price an unwarranted, defective dwelling without revealing the warranty waiver.

75. One might wonder why waiver of such a crucial protection is allowed at all; by definition, the defect vitally affects or threatens to vitally affect the habitability of the dwelling. See Minn. Stat. § 327A.01(3) (1978). Without the availability of a waiver, however, it would be difficult, if not impossible, to offer substitute protections. A vendor would be forced to repair a house or forego a sale because, in order to realize the current market value (original value minus reduction due to defect), he would be required to offer the house at market value or above to cover his potential liability under the warranty. Potential vendees might well be reluctant to purchase a home under those conditions. Even if the arrangement is acceptable to both parties, there may be some uncertainty as to the eventual effects of the damage making precise evaluation difficult. In such cases, it is advisable to allow the parties to negotiate their own solution after full disclosure. This allowance for controlled risk-taking can also be justified by the need to minimize the waste of housing resources that would result if such houses were unmarketable.

76. Interview with Representative Michael Sieben, in Minneapolis, Minnesota (Nov. 13, 1978) [hereinafter cited as Sieben Interview]. Representative Sieben is the author of the Minnesota new home warranties statute, Act of May 5, 1977, ch. 65, 1977 Minn. Laws 107 (codified as Minn. Stat. §§ 327A.01-07, 541.05 (1978)). The basic premise behind the provision for commissioner-approved
sioner, however, apparently has the discretion to refuse to consider a plan, even if the plan appears to offer "substantially the same protections."77

It is useful, when examining the Act's provisions, to attempt to identify the Minnesota Legislature's objectives in determining the scope of the new home warranty statute. The courts that first abandoned the doctrine of caveat emptor generally substituted an implied warranty of habitability.78 More recently, the consumer protection movement has strongly urged that vendors be required to provide goods capable of satisfying the reasonable expectations of consumers. An examination of the Minnesota statute, however, indicates that the

variations is to free the vendor from individual negotiation on issues of waiver and modification. A vendor who wishes to allocate risk in a different manner than is prescribed by the statute can have his substitute warranty plan approved by the state. In that way, the vendor may then impose his substitute plan on all future vendees. Unfortunately, the legislature again used the phrase "substantially the same protections." Minn. Stat. § 327A.07 (1978). This concept is inherently vague and therefore tends to result in unnecessary litigation. See note 70 supra. However, since the decision is made prior to the implementation of the substitute program, and since a presumption of expertise would typically shield the administrator's decision from a probing judicial review, the phrase would foster less litigation than would § 327A.04(2). Nevertheless, although it might be desirable to allow individual vendors to develop substitute warranties that allocate risk in a manner more acceptable to them, it also seems desirable not to defeat the warranty provisions developed by the legislature. Therefore, a statutory limit on approval of substitute warranty plans to only those plans that exceed the statutory protections would be more consonant with the legislative purpose.

77. MINN. STAT. § 327A.07 (1978). Insofar as the section is intended to free the vendor from having to negotiate individual substitute warranties, as in § 327A.04(2), it has, at times, failed to achieve its purpose because of the discretion it affords the Commissioner. Section 327A.07 states that "[t]he commissioner of administration may approve . . . variations." Id. (emphasis supplied). At least one former Commissioner of Administration has used this discretion and has refused to consider any submitted substitute warranty programs, apparently because of inadequate funding and staff shortages. Telephone interview with Gerry Regan, Director of the Minnesota HOW program, in Minneapolis, Minnesota (Oct. 26, 1978). See also Letter from Richard L. Brubacher, Minnesota Commissioner of Administration, to Richard Martin, Attorney for Centex Corporation of Dallas, Texas (a national homebuilder) (Apr. 11, 1978) (on file with the Minnesota Law Review). There are two steps that, if taken, would further the purposes of the statute in this regard. First, the statute should provide for adequate funding to insure that its requirements can be fulfilled. Second, "shall" should replace "may"; the Commissioner then would, at the very least, be forced to issue an opinion as to the permissibility of individual proposed substitute warranties.

The legislature was pursuing a goal that lies between these two objectives. The statute transcends a habitability rationale in that it warrants against defects that do not affect the use of the home for habitation. On the other hand, the exclusion of items such as appurtenant facilities and secondary damage indicates that the legislature was unwilling to force homebuilders to reimburse consumers for all damage due to defective construction. The legislative motivation is best described as "residence protection": a desire to insulate homeowners from egregious construction defects.

III. COMPARATIVE ANALYSIS OF THE MINNESOTA NEW HOME WARRANTIES STATUTE

The Minnesota statute is a significant improvement in new home statutory warranties. An examination of the alternative approaches of the New Jersey New Home Warranties Act and the HOW program, however, illuminates weaknesses in the

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79. The distinction between the habitability and reasonable consumer expectation rationales is illustrated by the treatment of garages under the statute. Section 327A.01(3) specifically excludes detached garages from the statutory coverage; attached garages, however, would be included as part of the building constituting the dwelling. This interpretation conforms to the habitability rationale, since defects in a detached garage are not likely to affect one's ability to live in the house, while defects in an attached garage may affect the structure of the house and, hence, its habitability. The consumer expectation rationale would require coverage of both types of garages since a consumer would expect them to be fit for their intended purpose. The statutory scheme therefore encompasses the items covered under warranties of habitability, but stops short of adopting a consumer expectation rationale.

The Washington Supreme Court has articulated a good example of this distinction:

[T]he buckling and sinking of the front yard patio slabs [do not] affect the habitability of the house, and are not structural defects affecting habitability. . . . The law of implied warranty is not broad enough to make the builder-vendor of a house absolutely liable for all mishaps occurring within the boundaries of the improved real property.


Even if the Minnesota statute does not encompass the consumer expectation rationale, it clearly extends well beyond the scope of the habitability rationale. Defective fixtures within the house are covered by a one- or two-year warranty even if the flaw does not render the house uninhabitable. Thus, for example, cupboards that separate from the wall would probably be covered despite the fact that the house would be habitable without them.

80. See note 79 supra.
81. See id.
Minnesota Act. The existence of these flaws justifies the formulation of an improved statutory scheme that would ensure adequate residence protection to new home purchasers in Minnesota.

A. The New Jersey Approach

The warranty provisions of the New Jersey New Home Warranty and Builders’ Registration Act are quite similar to the protections afforded by the Minnesota statute. A one-year implied warranty exists for "defects caused by faulty workmanship and defective materials due to noncompliance with the building standards." In contrast to Minnesota’s ambiguous definition of "building standards," however, New Jersey restricts the scope to the "standards" that are approved by the Commissioner of the Department of Community Affairs. The Commissioner must promulgate "standards for construction and of quality for the structural elements and components of a new home with an indication, where appropriate, of what degree of noncompliance with such standards shall constitute a defect." The New Jersey statute also provides a two-year warranty against defects caused by faulty installation of plumbing, electrical, heating, and cooling delivery systems. The only difference from the two-year warranty in the Minnesota statute is that appliance coverage is limited to the length and scope of the warranty offered by the manufacturers. Finally, a ten-year warranty against major construction defects, similar to that of the Minnesota Act, is established.

Although the time periods of the warranties in the Minnesota and New Jersey statutes are identical, the method of promulgation of the warranty is substantially different. In the

83. Although the New Jersey statute is replete with ambiguities, this Note neither explores those ambiguities in depth, nor does it discuss minor definitional variations. Discussion of the New Jersey statute in this section is for the purpose of comparison with the Minnesota statute.
84. N.J. STAT. ANN. § 46:3B-3(b) (1) (West Supp. 1979).
85. "Commissioner" is defined as the Commissioner of the Department of Community Affairs. Id. § 46:3B-2(b).
86. Id. § 46:3B-3(a). Since it is difficult to anticipate every defect that could possibly occur, there are loopholes in this statutory provision.
87. Id. § 46:3B-3(b) (2).
88. Id.
89. Id. § 46:3B-3(b) (3).
Minnesota statute the definitions of the warranty protections are explicitly set forth. The New Jersey statute, on the other hand, authorizes the Commissioner to prescribe by rule or regulation the details of the actual new home warranty,90 and subsequently to modify the initial regulations. The New Jersey plan is thus the more flexible of the two plans.91

Other New Jersey provisions have no parallel in the Minnesota statute. For instance, the New Jersey statute establishes a new home warranty security fund—a pool of builder contributions set up to ensure that homeowners collect on meritorious claims when their builder is either unable to, or simply will not, remedy the defect.92 The fund is formed by assessing builders amounts “sufficient to cover anticipated claims, to provide a reasonable reserve and to cover the costs of administering the fund.”93 If the fund becomes inadequate, the Commissioner is mandated to replenish it by assessing additional amounts.94 Furthermore, builders responsible for a “significant” number of awards may be assessed surcharges.95 All builders are required to register with the state and, as a precondition to registration, they must participate in the new home warranty security fund or an approved substitute plan.96

A second difference is the provision for an informal complaint procedure in the New Jersey act.97 In following the procedure, the owner must first attempt to secure voluntary repair by the builder. If the builder fails to make satisfactory repairs within a reasonable time, the owner may then file a claim against the fund. The Commissioner is authorized to “investigate each claim to determine the validity thereof . . . and shall hold a hearing if requested by either party.” In addition, the claim is “reviewed through a conciliation or arbitration procedure by the department.” If the owner's claim is found to be meritorious, the builder is required to correct the defect. When a builder is unable or willfully refuses to correct the deficiency,

90. Id. § 46:3B-3(a).
91. Id.
92. Id. § 46:3B-7(a).
93. Id. § 46:3B-7(b). Management of the fund is the responsibility of the State Treasurer. Id.
94. Id. § 46:3B-7(d).
95. See id. Builders that are responsible for an “excessive” number of awards can be denied participation, which means that they cannot build. See note 99 infra and accompanying text.
96. N.J. STAT. ANN. 46:3B-5 (West Supp. 1979). For each home constructed without a certification of registration, the builder is subject to a fine of up to $2000. See id. § 46:3B-5, -12.
97. Id. § 46:3B-7(c).
the new home warranty security fund pays the homeowner.\textsuperscript{98} The Commissioner may then suspend or revoke the nonpaying builder's registration, thus preventing the builder from operating in the state. The Commissioner is not, however, authorized to sue the builder for the amount paid to the owner.\textsuperscript{99} Although the procedure provides the homeowner with a relatively informal and thus inexpensive means of asserting claims, the homeowner must be wary in selecting his remedies because, under the statute, "initiation of procedures to enforce a remedy shall constitute an election which shall bar the owner from all other remedies."\textsuperscript{100}

The New Jersey statute also differs from the Minnesota

\textsuperscript{98} Id. The amount of the award shall be sufficient to cover the reasonable costs necessary to correct any defect or defects covered under the warranty, but the total amount of awards from the fund for any new home shall not exceed the purchase price of the home in the first good faith sale thereof or the fair market value of the home on its completion date if there is no good faith sale.

\textit{Id.}

\textsuperscript{99} If the builder does not satisfy legitimate claims, the Commissioner may, after affording the builder an opportunity for a hearing, deny, suspend, or revoke any certificate of registration. Other transgressions that are subject to such a penalty include having

1. Willfully made a misstatement of a material fact in his application for registration or renewal;
2. Willfully committed fraud in the practice of his occupation;
3. Practiced his occupation in a grossly negligent manner;
4. Willfully violated any applicable building code to substantial degree;
5. Failed to continue his participation in the new home warranty security fund or an approved alternate new home warranty security program after proper notice from the commissioner in writing by certified mail; or
6. Violated any provision of this act or any rule or regulation adopted pursuant thereto, after proper notice from the commissioner in writing by certified mail.

\textit{Id.} at 46:3B-6(b).

\textsuperscript{100} Id. at 46:3B-9. The New Jersey homeowner thus must make a careful determination of the likelihood of success of each possible remedy. Other judicial courses of action include suits under theories of express warranty, implied warranty, see generally Note, The Home Owners Warranty Program, supra note 7, at 363-68, and manufacturers' warranty as defined by the Magnuson-Moss Warranty Act. 15 U.S.C. §§ 2301-2312 (1976).

Although under most circumstances it would be more beneficial to use the informal procedures set forth in the New Jersey statute, see notes 97-99 supra and accompanying text, the attractiveness of a judicial cause of action has recently been enhanced by New Jersey case law. In McDonald v. Mianecki, 79 N.J. 275, 398 A.2d 1283, 1294-95 (1979), the New Jersey Supreme Court held that the doctrine of implied warranty of habitability applied to all builder vendors and included the potability of the water supply.
statute in requiring the Commissioner to review and approve all alternative programs: "If the Commissioner finds that a new home warranty security program provides coverage and financial security at least equivalent to the new home warranty security fund, he shall approve the program."101 Applicants may also force the Commissioner to grant them a hearing on their application.102 The Commissioner may, however, revoke or suspend the approval of an alternate plan "if he finds the program no longer provides coverage and financial security equivalent to the new home warranty security fund."103

B. THE HOME OWNERS WARRANTY CORPORATION APPROACH

The Home Owners Warranty program (HOW) is a private new home warranty plan developed and operated by the National Association of Home Builders.104 The plan, patterned after the highly successful program of the National House-Building Council of Great Britain, has been widely praised.105 HOW was the model for both the Minnesota and New Jersey statutory warranties; all three plans include one-year coverage of defects due to builder noncompliance with building standards, two-year protection for installation of plumbing, electrical, heating, and cooling systems, and ten-year protection against major construction defects. Under HOW, the builder pays an initial insurance premium that guarantees his performance under the warranty for the full period.106 The builder provides the warranty for the first two years, and the insurer directly insures against major construction defects for an additional eight years.107

102. Id.
103. Id.
104. The program is administered through a national home owner’s warranty corporation and local home owner’s warranty councils. See Home Owners Warranty Council of Minnesota, Program Description 1 (1979) (on file with the Minnesota Law Review). The HOW program is extensively discussed in Note, The Home Owners Warranty Program, supra note 7.
105. Many groups have even replaced their own requirements with HOW provisions. Examples are the Veterans Administration, see Home Owners Warranty Corporation News Release 2 (Nov. 1978); the Federal Trade Commission, see id.; the Department of Housing and Urban Development, see id.; and savings and loan associations, see U.S. Savings and Loans find HOW beneficial to the lender, Savings and Loans News (Aug. 1978) (on file with the Minnesota Law Review).
106. HOME OWNERS WARRANTY CORP., LIMITED WARRANTY—HOME WARRANTY AGREEMENT 5 (1979) (on file with the Minnesota Law Review) [hereinafter cited as HOW WARRANTY AGREEMENT].
107. Id. at 5.
If a defect should arise, HOW provides an inexpensive mechanism for consumer complaints: a conciliation/arbitration procedure. The vendee first submits a "clear and specific written complaint" which the builder must receive no later than thirty days after the warranty on the defective item expires. If the vendor fails to respond or disputes his obligations under the agreement, the vendee may request an informal dispute settlement from the local HOW council. The council assigns a conciliator, who meets with the two parties in an attempt to reach a mutually satisfactory solution. If these efforts fail, the vendee may demand arbitration conducted by the American Arbitration Association or a similar organization. If the vendee decides to accept the arbitrator's decision, it is binding on the vendor; the vendor, however, may not bind the vendee. A vendee who refuses to accept the arbitrator's decision, and who remains unsatisfied, may then pursue any available legal remedies. If the vendor will not cooperate or will not perform as directed, the insurer may arrange for performance of the warranty obligations. When the insurer must satisfy the claim, the vendee's rights are subrogated to the insurance company.

C. CRITICAL ANALYSIS OF THE MINNESOTA APPROACH

Comparison of the Minnesota statute with the New Jersey statute and HOW reveals three major weaknesses in the Minnesota statute: the rigidity resulting from exclusively statutory definition of the warranty protections, the absence of an informal, inexpensive complaint-resolution process, and the lack of protection of homeowners from builder insolvency.

The first major flaw in the Minnesota statute is the inclusion of explicit warranties within the text of the statute; this creates unnecessary rigidity in a rapidly changing area of law. The New Jersey statute provides more flexibility by authorizing an administrative body to define the extent of the

108. Id. at 6.
109. Id. at 6-7.
110. Alteration of statutory warranty provisions currently requires the difficult, time-consuming, and expensive task of statutory amendment.
111. The rapid transformation of the common law is described in notes 1-6 supra and accompanying text.
warranty program through rulemaking.\textsuperscript{112} There are a number of advantages to this approach. Administrative agencies are generally better than legislative bodies at responding to changed circumstances and reflecting experience through incremental improvements.\textsuperscript{113} Furthermore, the changes would be promulgated by experts who are more qualified to weigh policy considerations and assess current developments in the field than are legislators.\textsuperscript{114} Another advantage of placing the warranty program under administrative control is the interpretive ability of the agency. A statutory warranty must be construed, and the judicial process of statutory construction is uncertain, time-consuming, expensive, and docket-straining.\textsuperscript{115} An administrative agency, on the other hand, need not wait for litigation. As questions are raised, either formally or informally, the agency can issue rules and interpretations, or offer examples to clarify the scope of warranty protections.\textsuperscript{116} Minnesota already provides for some administrative interaction

\textsuperscript{112} See N.J. STAT. ANN. \S 46:3B-3 (West Supp. 1979). See notes 90-91 supra and accompanying text.

\textsuperscript{113} Although the Minnesota statute expressly negates any intent of statutory preemption of the new home warranty field, see MINN. STAT. \S 327A.06 (1978); notes 66-67 supra and accompanying text, courts may nevertheless be reluctant to act when the legislature has spoken so recently. To compensate for this reluctance, an agency should have the task of ensuring that the statute remains current.

\textsuperscript{114} For a discussion of the attributes of administrative agencies, see K. Davis, \textit{Administrative Law Text} 11-15 (1972).


The rulemaking process prescribed by the Minnesota Administrative Procedure Act (MAPA) is unnecessarily complicated, cumbersome, costly, and time-consuming. It scatters authority and responsibility and discourages rulemaking, without which there can be no effective and efficient administration of state government. . . .

Unlike the Federal Administrative Procedure Act (FAPA), MAPA does not distinguish between informal or notice-and-comment rulemaking and formal or on-the-record rulemaking . . . . In my judgment, the existing rulemaking provisions of MAPA should be scrapped.
with the statutory warranties by allowing the Commissioner of Administration to approve substitute warranty plans, but such interaction has not occurred, because the language of the statute is precatory.\footnote{117} Merger of the Commissioner's power to approve alternative programs with the power to interpret the statute and promulgate rules would secure all the advantages of prospective rulemaking.\footnote{118} There are, however, disadvantages inherent in a statute that merely instructs the Commissioner to promulgate a warranty plan. The agency might fail to formulate an adequate plan\footnote{119} or reach beyond the sphere intended by the legislature. An intermediate position in which the legislature provides the basic statutory protection and the administrative body is given the power to interpret and supplement those protections is preferable. In the context of the Minnesota statute, this intermediate approach would allow the warranties of section 327A.02 to provide minimal statutory protections, with the exclusions of section 327A.03 preventing the agency from straying from the statutory purpose. Within this framework, the agency would be free to modify and interpret the warranty protections.\footnote{120}

The second major drawback of the Minnesota statute is that relief for the homeowner lies solely in actual or threatened litigation—an expensive and time-consuming process.\footnote{121} Given the choice between a thousand-dollar repair cost and an uncertain amount of attorney's fees, the vendee might well decide to abandon his legitimate warranty claim and pay for the repair himself, even if he is certain that he will win. Any chance of failure will make the vendee even less likely to pursue his claim. As a result, vendors may routinely begin to ignore meritorious claims, since vendees, absent substantial monetary loss, will rarely find it worthwhile to bring suit. The opportunity to pursue an action in small claims court may alleviate the problem to some extent in Minnesota,\footnote{122} but recovery on many

\begin{footnotes}
\footnotetext{117} See Minn. Stat. § 327A.07 (1978); note 77 supra and accompanying text.
\footnotetext{118} See note 116 supra.
\footnotetext{119} See note 117 supra and accompanying text.
\footnotetext{120} The agency would, of course, also be subject to judicial supervision and legislative control.
\footnotetext{121} The prohibitive cost of litigation may account for the absence of common law new home warranties in Minnesota. See note 19 supra.
\footnotetext{122} The governing body of any city may, by resolution, establish a concilia-}

\end{footnotes}
claims will be at the discretion of the vendor rather than forced by the protections of the statutory warranties.

The informal settlement procedure of the New Jersey statute, adopted from HOW, provides a remedy superior to the judicial recourse available under the Minnesota statute. The conciliation/arbitration procedure set forth in the New Jersey statute\textsuperscript{123} reflects the belief that often all that is required is the inclusion of an impartial third party, even one whose efforts are merely advisory, to break stalemates between builders and owners. Arbitration usually provides the advantages of speed,\textsuperscript{124} economy, expertise, privacy, informality, convenience, and fairness.\textsuperscript{125} Moreover, the arbitration procedure is enhanced by the strong incentive for builder compliance in the HOW program. If a builder fails to comply with the self-policing standards, he is denied further participation in the program.\textsuperscript{126} Similarly, if a New Jersey builder constructs an

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"excessive" number of defective homes, he will be dropped from the fund and will therefore be unable to build in the state.127

Although both the New Jersey and HOW plans share the benefits of informal settlement procedures, the HOW scheme has additional advantages that are absent from the New Jersey plan. One example is the HOW plan's economical use of private mediators, in contrast to the New Jersey plan's use of state-supplied conciliators, arbitrators, and other personnel. Another disadvantage of the New Jersey plan is that it permits either party to request a formal adversarial hearing.128 The use of the statutory process is also more expensive, since such a hearing would probably require the services of an attorney.129 A final benefit of the HOW plan is that it makes the arbitrator's decision binding on the vendor but not on the vendee.130 Thus, if a vendee believes that he is being "railroaded" by conciliators or arbitrators who favor builders, he may still resort to judicial remedies. The more flexible plans, those of HOW and Minnesota, permit the vendee to pursue common law rights concurrently with statutory protections.131 In New Jersey, however, vendees and vendors are equally bound by administrative decisions.132 This approach is unnecessarily rigid; homeowners should be able to take advantage of any rights the law provides them.

The final major drawback of the Minnesota statute is that it fails to protect homeowners from subsequent insolvency of

127. See note 95 supra.

128. Note, however, that not all the attributes of a trial are necessary at the hearing. See In re Public Hearings of Commuter Operating Agency 1975-1976, 142 N.J. Super. 136, 361 A.2d 30 (1978). The mere fact that the statutory provision imposes a duty on the agency to receive and consider evidence in a hearing does not of itself signify that the hearing must resemble a trial. Id. at 151, 361 A.2d at 38. Nevertheless, "an opportunity . . . to respond, appear and present evidence and argument on all issues involved" must be afforded to all parties. N.J. STAT. ANN. § 52:14B:9(c) (West Supp. 1979).

129. Since arbitration is a less formal procedure, the vendee may well be capable of arguing his case without legal counsel. Due to the concomitant cost saving, he is more likely to pursue this remedy.

130. See text accompanying note 109 supra.


builders. The warranties in all three plans initially run from the vendor to the vendee; if the vendor is reputable and solvent, there will be no difficulty. If, however, the vendor is unscrupulous or insolvent, vendees with meritorious claims may be without effective remedies. The HOW plan avoids this problem by requiring participating builders to insure their performance under the warranty before selling the dwelling. Once that premium is paid, the dwelling is protected regardless of the solvency or scruples of the builder. The benefits of this scheme are made even more attractive by the requirement that builders reregister with HOW every year. Any builder that compiles an unsatisfactory complaint record is removed from the program. The removal of high-risk vendors maintains the cost of the insurance program at a reasonable level. The HOW plan, however, does have a critical weakness: since vendor participation is voluntary, significant numbers of homebuyers may be left without effective protection. The solution to this problem is some form of statutory compulsory participation. Such a requirement would raise the question whether the state should mandate private warranty insurance coverage or should

133. Many homebuilders constructed quality homes and offered express warranties before the era of statutory warranties. Some builders will routinely repair defects to protect their reputation and maintain good will. For example, Centex Home Corp. of Dallas, Texas, a national homebuilder, offered the following protections: a thorough inspection on the closing date, a return visit one year later to rectify defects, periodic service should a defect arise, and a fairly comprehensive warranty. Interview with Richard Martin, Attorney for Centex Home Corp. of Dallas, Texas, in St. Paul, Minnesota (Oct. 13, 1978) (Centex Warranty on file with the Minnesota Law Review).

In the past, housing construction was predominantly done by small builders in localized markets. National builders, however, are becoming more common. Many of these national homebuilders are eager to satisfy homeowners because they anticipate repeat purchasers in a mobile society. Interview with Richard Martin, supra.

134. A significant problem is that unscrupulous "fly-by-night" builders often erect superficially attractive houses that are structurally unsound. Homes sometimes are built by a collapsible corporation which ceases to exist upon completion of the last home in the project. This scheme is relatively easy to effect in states that permit incorporation for a limited period; the vendor can merely set the date of expiration a few days beyond the expected completion date of the last house. See, e.g., MODEL BUSINESS CORPORATION ACT § 54(b) (1969); MINN. STAT. § 301.04(2) (1978). In addition to unscrupulous builders, there are other builders who either go bankrupt or simply leave the home construction business.

135. See text accompanying note 106 supra; Note, The Home Owners Warranty Program, supra note 7, at 360 n.18.

136. See Note, The Home Owners Warranty Program, supra note 7, at 377 n.103.

137. See id. at 373-74.

138. But see id. at 373.
itself enter the warranty insurance business. New Jersey has chosen to do both. The New Jersey statute mandates that no builder may engage in the business of constructing new homes unless he is registered with the State. As a precondition to registration, the builder must submit proof of participation in the state new home warranty security fund or an approved private alternative.

The administrative costs of privately operated builder insurance plans will most likely be lower than those of state plans. The private sector profit motive should encourage managerial efficiency; governmental regulatory programs, on the other hand, tend to become cumbersome and inefficient. In addition, if similar insurance plans were operated in several states, a private, multi-state insurer could achieve greater economies of scale than could a state-sponsored insurer limited to one state.

The best solution, therefore, is a statutory mandate that builders obtain state-approved, private warranty insurance as a requisite to home construction. In this way, all the benefits of the HOW program are realized without the state immersing itself in the actual mechanics of claim settlement. Such a statute must establish minimum standards for the private programs and a minimal administrative framework.

IV. THE MODEL STATUTE

Since the current Minnesota new home warranties statute is inadequate, this Note offers a Model Statute, drafted in the form of a comprehensive new Minnesota statute. The Model

140. Id.
141. See generally Note, The Home Owners Warranty Program, supra note 7, at 370-74. Indeed, a comparison of the fees charged by HOW and the New Jersey state plan supports this prediction. HOW charges a fee of 0.2% of the purchase price, one-half of which is the insurance premium and one-half of which covers administrative costs of the program. See id. at 362. New Jersey's estimated costs, by contrast, are 0.5% of the purchase price. See HOW builders exempt from N.J. law save $$, HOW Builder (Oct. 30, 1978) (newsletter of the Home Owners Warranty Corporation) (on file with the Minnesota Law Review).
142. See Note, The Home Owners Warranty Program, supra note 7, at 372.
143. The Model Statute follows the structure of the current Minnesota law. Minor grammatical and technical changes are either made without mention or briefly noted in footnotes. Significant changes are discussed in a brief textual analysis following the model. Occasionally, a meritorious provision is omitted despite favorable mention in prior discussion. Such omissions reflect an ap-
Statute, designed to be acceptable to builders as well as consumers, may also prove useful in states other than Minnesota, given the similar inadequacies of the other programs and the general lack of statutory protection of home purchasers.

A. **TEXT OF THE MODEL STATUTE**

**Section I—Definitions**

As used in this chapter:

Subdivision 1. "Building standards" means the structural, mechanical, electrical, and quality standards of both the state and local building codes, Minnesota Statutes sections 16.83 to 16.867, and of the home building industry for the geographic area in which the dwelling is situated.¹⁴⁴

Subd. 2. "Commissioner" means the Commissioner of Administration.

Subd. 3. "Dwelling" means a new building¹⁴⁵ (including, but not limited to, apartment buildings, cooperative housing, condominiums, multi-family units, single family units, and townhouses),¹⁴⁶ not previously occupied and constructed for use as a residence.¹⁴⁷ "Dwelling" includes appurtenant recreational facilities, detached garages, driveways, walkways, patios, boundary walls, retaining walls, and all other similar items associated with a residence, but does not include mobile homes covered by sections 327.51 to 327.67 of Minnesota Statutes.¹⁴⁸

Subd. 4. "Dwelling warranty plan" means any warranty or insurance plan submitted for the Commissioner's approval.¹⁴⁹

Subd. 5. "Initial vendee" means a person who contracts to purchase a dwelling for use as a residence and not for resale in the ordinary course of trade.

Subd. 6. "Major construction defect" means actual damage to the load-bearing portion of the dwelling (including damage due to subsidence, praisal of the political feasibility of enacting a statute containing such a provision.

¹⁴⁴. See notes 33-38 supra and accompanying text.

¹⁴⁵. Used dwellings are not protected by the statute. See note 29 supra.

¹⁴⁶. Although these examples are already included in the definition "constructed for use as a residence," they are inserted to resolve potential ambiguity. The "including, but not limited to," clause emphasizes that the types of housing are exemplary and not exhaustive. See note 31 supra.

¹⁴⁷. Given that the rationale behind the Minnesota statute can be categorized as "residence protection" and that "habitability" means suitability for living in, all references to habitation have been altered to conform to the "residence protection" rationale. See notes 28, 78-81 supra and accompanying text.

¹⁴⁸. These items are included in the Model Statute to promote a reasonable consumer expectation rationale. See notes 78-81 supra and accompanying text. If, however, the statute is only intended to protect habitability, the exclusion of appurtenant facilities would enhance political feasibility. Since mobile homes are "constructed for use as a residence" they could arguably be included in the statutory definition. In Minnesota, however, they should be explicitly excluded since they are regulated elsewhere.

¹⁴⁹. "Dwelling warranty plan" is a new concept introduced by the Model Statute and therefore requires definition.

¹⁵⁰. Pursuant to the analysis of note 23 supra, the phrase "from a vendor" has been deleted in order to prevent sham conveyances.
expansion, or lateral movement of the soil) which affects its load-bearing function or which vitally affects or is imminently likely to vitally affect use of the dwelling as a residence.\textsuperscript{151}

Subd. 7. "Vendee" means any purchaser of a dwelling and includes the initial vendee and subsequent purchasers.

Subd. 8. "Vendor" means any person, firm, or corporation that constructs dwellings for the purpose of sale, including dwellings on land owned by vendees.

Subd. 9. "Required warranty" means the warranty prescribed by the Commissioner pursuant to section two, subdivision one of this chapter.

Subd. 10. "Warranty date" is the earlier of:

(a) The date of the initial vendee's first occupancy of the dwelling; or

(b) The date when the completed structure was first made available for occupancy,\textsuperscript{152} if the initial vendee has taken legal or equitable title in the dwelling.

\textbf{Section 2—Warranty Provision}

Subdivision 1. The Commissioner is hereby authorized and directed to prescribe by rule or regulation a required warranty. Such warranty shall, at a minimum, provide that in every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor warrants to the vendee that:

(a) During the one-year period from and after the warranty date, the dwelling shall be free from defects caused by faulty workmanship or defective materials where the defects result from noncompliance with building standards; and

(b) During the four-year period from and after the warranty date, the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems;\textsuperscript{153} and

(c) During the ten-year period from and after the warranty date, the dwelling shall be free from major construction defects.

Subd. 2. The warranties required or approved under this chapter shall survive the passing of legal or equitable title in the dwelling.

Subd. 3. The liability of the vendor under this chapter shall not extend\textsuperscript{154} to the following:

(a) Loss or damage not reported by the vendee to the vendor in writing within six months after the vendee discovers or should have

\textsuperscript{151} The last sentence of Minnesota Statutes section 327A.01(5) states: "'Major construction defect' does not include damage due to movement of the soil caused by flood, earthquake or other natural disaster." \textsc{Minn. Stat.} § 327A.01(5) (1978). It has been deleted since the exclusion is covered in section two, subdivision one of the Model Statute.

\textsuperscript{152} The modification will ensure that the warranty protections correspond more closely to the date of actual use of the dwelling. \textit{See} note 25 \textit{supra}.

\textsuperscript{153} This period is extended to four years because of judicial extension of the four-year U.C.C. warranty to home fixtures. \textit{See} O'Laughlin \textit{v. Minnesota Natural Gas}, 253 N.W.2d 826 (Minn. 1977), and cases cited in note 40 \textit{supra}.

\textsuperscript{154} The language "shall not extend" denies the Commissioner authority to alter these exclusions. They may only be altered by statutory amendment.
discovered the loss or damage;\textsuperscript{155}

(b) Loss or damage where the defective design, installation, or materials were requested or supervised by the vendee, provided that the selection or supervision of the vendee is active and not a passive acquiescence in the judgment of the vendor;\textsuperscript{156}

(c) Secondary loss or damage such as personal injury or property damage;\textsuperscript{157}

(d) Loss or damage from normal wear and tear;

(e) Loss or damage from dampness or condensation when loss or damage is due to insufficient ventilation after occupation, except where the insufficient ventilation is caused by the vendor's failure to comply with building standards;\textsuperscript{158}

(f) Loss or damage from the negligence of, improper maintenance by, or alteration of the dwelling by parties other than the vendor;

(g) Loss or damage from changes in grading of the ground around the dwelling by parties other than the vendor;

(h) Loss or damage to the landscaping;\textsuperscript{159}

(i) Loss or damage due to failure to maintain the dwelling in good repair;

(j) Loss or damage due to a vendee's unreasonable failure to minimize;\textsuperscript{160}

(k) Loss or damage which occurs after the dwelling is no longer used as a residence;\textsuperscript{161}

(l) Accidental loss or damage usually described as resulting from acts of God (including, but not limited to, fire, explosion, smoke, water escape, windstorm, hail, lightning, or earthquake), except when the loss or damage is caused by failure to comply with building standards;

(m) Loss or damage from soil movement which is compensated by legislation;\textsuperscript{162}

Section 3—Powers of the Commissioner; Approval of Dwelling Warranty Plans

Subdivision 1. The Commissioner may, pursuant to Minnesota Statutes sections 15.0411 to 15.052,\textsuperscript{163} promulgate additional warranty protections to supplement those mandated by section two, subdivision one.

\textsuperscript{155} See note 55 supra.
\textsuperscript{156} See note 50 supra.
\textsuperscript{157} This concession appears necessary to ensure the political feasibility of the statute. The original version of the Minnesota bill for statutory warranties on new housing, which included personal injury liability, was unsuccessful at the committee stage. Sieben Interview, supra note 76. If the statute is intended to protect consumer expectations, however, there should be no such exclusion.
\textsuperscript{158} See note 52 supra.
\textsuperscript{159} Cf. note 59 supra (suggesting that the landscaping exception could be omitted if appurtenant facilities are excluded from the definition of dwelling).
\textsuperscript{160} A reasonable person test is preferable to an undefined "feasibility" standard. See note 56 supra.
\textsuperscript{161} See note 28 supra.
\textsuperscript{162} See note 58 supra.
\textsuperscript{163} Ideally, the Commissioner should be allowed to promulgate these additional warranty protections pursuant to an informal "notice and comment" procedure. In Minnesota, however, the Minnesota Administrative Procedure Act...
of this chapter. The Commissioner shall not extend warranty protection to loss or damage excluded by section two, subdivision three of this chapter.

Subd. 2. The Commissioner, pursuant to Minnesota Statutes section 16.85, may amend the state building code.

Subd. 3. The Commissioner is hereby authorized to review and approve proposed dwelling warranty plans after a hearing pursuant to Minnesota Statutes section 15.0418.\textsuperscript{164} The Commissioner shall approve any proposed dwelling warranty plan that satisfies the following criteria:\textsuperscript{165}

(a) The proposed dwelling warranty plan shall provide warranty protections that meet or exceed the protections specified in section two of this chapter as supplemented by any additional warranty protections promulgated by the Commissioner pursuant to section three, subdivision one of this chapter.

(b) The proposed dwelling warranty plan shall provide an informal complaint procedure and a procedure for conciliation and arbitration of disputes, and shall provide that arbitration decisions are binding only upon the vendor and the insurer under the dwelling warranty plan. In addition, the vendee shall have a cause of action against the vendor or the insurer under the dwelling warranty plan for damages arising out of the breach, or, if damages are inadequate, for specific performance. Damages are limited to (a) the amount necessary to remedy the defect or breach; or (b) the difference between the value of the dwelling with the defect and the value of the dwelling without the defect.

(c) The proposed dwelling warranty plan shall provide for the creation of a fund sufficient to pay claims reasonably to be anticipated under the plan.

Subd. 4. The Commissioner shall, pursuant to Minnesota Statutes section 15.0412, revoke or suspend, at any time, the approval of a dwelling warranty plan, if he finds that the plan no longer satisfies the criteria stated in section three, subdivision three of this chapter.

Subd. 5. The Commissioner shall, pursuant to Minnesota Statutes section 15.0412, promulgate such rules and regulations as are necessary to carry out the provisions of this chapter.

Section 4—Regulation of Vendors

Subdivision 1. All vendors must register with the Commissioner before engaging in the business of new home construction. As a precondition to registration, the vendor must offer proof of participation in an approved dwelling warranty plan.

Subd. 2. Any vendor who fails to register, or who contracts to sell or
sells a dwelling not covered by a dwelling warranty plan, shall be sub-
ject to a fine not to exceed $2,000 for each offense. The Commissioner
shall enforce this section in accordance with Minnesota Statutes sec-
tion 574.35.

Section 5—Waiver and Variations

Subdivision 1. Except as provided in subdivision two of this section,
the provisions of this chapter cannot be waived or modified by contract
or otherwise and any agreement which purports to do so shall be void.
Subd. 2. If a major construction defect is discovered prior to the sale
of a dwelling, the warranty requirements of section two of this chapter
may be waived, after full oral disclosure of the specific defect, by an in-
strument that sets forth in detail: the specific defect; the difference be-
tween the value of the dwelling without the defect and the value of the
dwelling with the defect (as determined and attested to by an in-
dependent appraiser, contractor, insurance adjuster, engineer, or any
other similarly knowledgeable person selected by the vendee); the
price reduction; the date construction was completed; the legal descrip-
tion of the dwelling; the consent of the vendee to the waiver; and the
signatures of the vendee, the vendor, and two witnesses. Waivers
under this subdivision shall not be effective unless filed for recording
with the county recorder or registrar of titles, who shall file the waiver
for record.166

Section 6—Remedies

The initiation of procedures to enforce a remedy shall not constitute an
election of remedies so as to bar the vendee from any other remedy.

Section 7—Other Warranties

Subdivision 1. The warranties provided in this chapter shall be in ad-
dition to all other warranties imposed by law or agreement.
Subd. 2. The remedies provided for in this chapter shall not be con-
strued as limiting any other remedies.
Subd. 3. Section 541.051 shall not apply to actions based on breach of
the warranties provided for in this chapter.

B. EXPLANATION OF THE MODEL STATUTE

Section one of the Model Statute, although similar to the
current Minnesota statute, significantly expands the meanings
of several terms used in both statutes. First, "building stan-
dard" has been altered to expressly incorporate the state building
codes and the "standard procedures" of similar builders in
the industry. Although the modification would merely codify
the meaning that can be inferred from the Minnesota statute, it

166. The waiver provision of Minnesota Statutes section 327A.04, subdivi-
sion two, is not applicable to the Model Statute. Since all vendors must obtain
state-approved dwelling warranty plans, the need for modification at the con-
tract level is moot. See notes 69-70 supra and accompanying text. However, the
need for the waiver of the inadvertent major construction defect is not so obvi-
ated. See notes 71-75 supra and accompanying text.
would ensure that the standard could not be weakened. In similar fashion, the definition of the types of "dwellings" included in the statute's protection would, for the most part, simply codify the definition implied in the current statute. A significant expansion in the meaning of "dwelling" under the model statute, however, is the inclusion of appurtenant facilities within the statutory warranties. The expansion beyond the current "residence protection" rationale would ensure that a homeowner's recovery will not depend on the placement of the garage, and that the builder will not have an incentive to construct shoddy appurtenant facilities.

A major change in the Model Statute is the expansion, in section two, of the term "warranty"; new home warranties would no longer be exclusively defined in the statute. Under section three, the Commissioner would have the power, after a hearing, to expand the scope of warranty protections as well as the power to approve new home warranty plans. The Commissioner could not, however, limit the minimum protections of section two, subdivision one, which parallel the warranties in the current Minnesota statute. These essential protections include a one-year period covering defects caused by faulty workmanship or defective materials, both of which must result from noncompliance with the building standards. The duration of the warranty covering faulty installation of plumbing, electrical, heating, and cooling systems would be extended under the Model Statute from two to four years in order to conform to the Uniform Commercial Code. The ten-year period of coverage for major construction defects is unchanged. In order to ensure fair and equitable treatment to builders under the statute, the maximum extent of the Commissioner's authority is established by the exclusions in section two, subdivision three. In addition, all proposed dwelling warranty plans must be approved if they meet the standards set forth in section three, subdivision three.

One of the required elements of proposed dwelling warranty plans under the Model Statute is an informal conciliation and arbitration procedure, the outcome of which is binding on the vendor and the insurer under the warranty plan, but not on the vendee. The availability of informal proceedings will

167. See notes 78-81 supra and accompanying text.
168. See note 40 supra.
strengthen the protections of the statute by providing a low-cost method of enforcement. The procedure is binding on the vendor to secure his participation. By extending liability to the dwelling warranty plan, the statute protects the homeowner regardless of the builder's financial status. The arbitration decision is not made binding on the vendee because the statute is intended as a supplement to his other remedies.

To ensure continued compliance with the statutory requirements, section three, subdivision four, of the Model Statute gives the Commissioner the authority to suspend the approval of any dwelling warranty plan if he finds that the plan no longer satisfies the criteria set forth in section three, subdivision three. Once a plan has been revoked, the builders who are members of that plan will be unable to build because, under section four, all vendors, prior to construction of dwellings, must register with the Commissioner and offer proof of participation in an approved dwelling warranty plan. The dwelling warranty plans ensure protection even to victims of "fly-by-night" builders. The incentive for builders to register and comply with the statute is increased by the threat of being dropped from a warranty plan. If dropped from a plan, a builder must decide whether to pay "high risk" premiums or to refrain from building. The long-term result is that less reputable builders are removed from the housing market, while at all times dwellings built by them are accorded full warranty protections.

Section five provides for only one method of waiving the warranty protections of the Model Statute. A waiver is allowed in the unusual case in which a major construction defect is discovered prior to the sale of the dwelling and extensive procedural safeguards are followed. Sections six and seven reinforce the notion that the chapter is supplemental to, and not in derogation of preexisting warranties and remedies.

V. CONCLUSION

Twenty years ago, courts began to recognize implied warranties on new homes. The focus of that movement has recently shifted to several state legislatures that have taken the initiative in providing adequate protection to new home purchasers. Minnesota has recently joined that movement by the enactment of a new home warranties statute. Although that statute provides significant coverage, analysis of the Minnesota statute in light of the New Jersey new home warranties statute
and the National Association of Home Builders' Home Owners Warranty program suggests areas that need improvement. The optimal plan involves a combination of state regulation and private industry initiative. On the one hand, the state should set minimal requirements and outside liability limits on the private plans, guarantee that the private plans are adequate, and ensure builder participation in the plans. On the other hand, private industry should provide the operational aspect of the warranty plan. If this plan were followed, the result would be a union of private and public sectors that would create an efficient, practical, and effective new home warranty, fair to the homeowner, yet fair to the homebuilder. State legislatures should recognize the advantages of legislation such as proposed in this Note, and act to confer its benefits on the purchasers of new homes in their states.